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1946

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING COMMITTEE ON BANKING AND COMMERCE

to whom was referred the Bill A-5, intituled:
"An Act respecting Bankruptcy."

No. 1

WEDNESDAY, MAY 22, 1946

CHAIRMAN

The Honourable Elie Beauregard, K.C.

WITNESS:

Mr. W. J. Reilley, K.C., Superintendent, Bankruptcy Act Administration, Department of Secretary of State.

OTTAWA
EDMOND CLOUTIER
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
1946

ORDER OF REFERENCE

EXTRACT from the Minutes of Proceedings of the Senate for 13th May, 1946.

Pursuant to the Order of the Day, the Honourable Senator Robertson moved that the Bill (A-5), intituled: "An Act respecting Bankruptcy", be now read a second time.

After debate, and—

The question being put on the said motion.

It was resolved in the affirmative.

Ordered, That the said Bill be referred to the Standing Committee on Banking and Commerce.

L. C. MOYER,
Clerk of the Senate.

STANDING COMMITTEE ON BANKING AND COMMERCE

The Honourable ELIE BEAUREGARD, K.C., *Chairman*

The Honourable Senators

Aseltine	Euler	Marcotte
Aylesworth, Sir Allen	Fallis	McGuire
Ballantyne	Farris	McRae
Beaubien (Montarville)	Foster	Michener
Beauregard	Gershaw	Molloy
Buchanan	Gouin	Moraud
Burchill	Haig	Murdock
Campbell	Hardy	Nicol
Copp	Hayden	Paterson
Crerar	Howard	Quinn
Daigle	Hugessen	Raymond
David	Jones	Riley
Dessureault	Kinley	Robertson
Donnelly	Lambert	Sinclair
Duff	Leger	White
DuTremblay	MacDonald (Cardigan)	Wilson—(48).

MINUTES OF PROCEEDINGS

THURSDAY, 16th May, 1946.

Pursuant to adjournment and notice the Standing Committee on Banking and Commerce met this day at 11.30 a.m.

Present: The Honourable Senator Beauregard, Chairman; The Honourable Senators Ballantyne, Buchanan, Campbell, Copp, Crerar, Dessureault, Donnelly, Euler, Fallis, Farris, Foster, Gershaw, Haig, Hugessen, Lambert, Léger, Macdonald (*Cardigan*), McGuire, McRae, Molloy, Moraud, Murdock, Paterson, Robertson, Sinclair, White and Wilson—28.

Bill A.5—"An Act respecting Bankruptcy", was read and considered.

Mr. W. J. Reilley, K.C., Superintendent, Bankruptcy Act Administration, Department of Secretary of State, was heard in explanation of certain features of the Bill.

Further consideration of the Bill was postponed.

At 12.55 p.m., the Committee adjourned to the call of the Chairman.

ATTEST.

R. LAROSE
Clerk of the Committee.

WEDNESDAY, 22nd May, 1946.

Pursuant to adjournment and notice the Standing Committee on Banking and Commerce met this day at 11 a.m.

Present: The Honourable Senator Farris, Acting Chairman; The Honourable Senators Aseltine, Ballantyne, Buchanan, Copp, Crerar, Daigle, Dessureault, Duff, DuTremblay, Foster, Gouin, Haig, Hayden, Kinley, Lambert, Léger, Macdonald (*Cardigan*), McGuire, Molloy, Moraud, Paterson, Robertson and Sinclair.—25.

In attendance: The Official Reporters of the Senate.

Mr. J. F. MacNeill, Law Clerk and Parliamentary Counsel of the Senate.

The Honourable Senator Farris was appointed Acting Chairman, and took the Chair.

Bill A-5—"An Act respecting Bankruptcy", was again considered.

Mr. W. J. Reilley, K.C., Superintendent, Bankruptcy Act Administration, Department of Secretary of State, was again heard.

On Motion of the Honourable Senator Moraud, seconded by the Honourable Senator Aseltine, it was,—

RESOLVED, to report to the Senate recommending:—That the Committee be authorized to print 1,000 copies in English and 400 copies in French of its day to day proceedings on the Bill A-5, intituled: "An Act respecting Bankruptcy," and that Rule 100 be suspended in relation to the said printing.

At 1 p.m., the Committee adjourned until Tuesday, 28th instant, at 10.30 a.m.

ATTEST.

R. LAROSE,
Clerk of the Committee.

MINUTES OF EVIDENCE

THE SENATE,

OTTAWA, Wednesday, May 22, 1946.

The Standing Committee on Banking and Commerce to whom was referred Bill A-5, an Act respecting Bankruptcy, met this day at 11 a.m.

Hon. Mr. FARRIS (Acting Chairman) in the Chair.

The Acting CHAIRMAN: Mr. Reilley, the last time you were here you dealt with the question of decentralization, and we will secure that from you in more detail later. Do you recall what further headings you dealt with?

Mr. W. J. REILLEY, K.C. (Superintendent of the Bankruptcy Act Administration): I mentioned the intended changes in regard to compositions.

The Acting CHAIRMAN: Part II of the bill.

Mr. REILLEY: Yes, beginning with section 11.

The Acting CHAIRMAN: This is so important, gentlemen, that I think we had better start all over again.

Hon. Mr. HAIG: All right.

Hon. Mr. MORAUD: I suppose you will have a certain number of copies of this report printed?

The Acting CHAIRMAN: Perhaps you would make a motion.

Hon. Mr. MORAUD: I would make a motion that a thousand copies of the proceedings be printed in English and four hundred copies in French.

The Acting CHAIRMAN: Are you agreeable, gentlemen?

Some Hon. MEMBERS: Carried.

The Acting CHAIRMAN: Part II, Mr. Reilley begins at page 13 and runs to page 24. It deals with composition, extension or scheme of arrangement. You might state to us what are the existing factors as to compositions and then give us the essential changes.

Hon. Mr. ASELTINE: Would this be similar to the provisions of the Farmers Creditors' Arrangement Act?

Mr. REILLEY: In some respects.

Hon. Mr. ASELTINE: That is the objection that most of us have to the proposed changes.

Mr. REILLEY: The present law is that a proposal for composition can only be made after bankruptcy occurs. Originally when the Act was passed in 1919 a composition could be offered before bankruptcy by any man in financial embarrassment. He could get his creditors together, and if the proposal was approved it went to the court, and then it became binding on all the creditors. That was eliminated in 1923 by reason of the fact that there was so much dishonesty connected with these proposals, with no method of checking up or appraisal to find out whether they were fair or not. So after that time if a man wanted to make a proposal to his creditors he had first to go into bankruptcy. I think all of you know that bankruptcy of itself almost inherently depreciates the possibility of a proposal going through. At once bankruptcy depreciates a man's assets by a very considerable percentage, and consequently when it gets to that stage the possibility of making a proposal and getting it through is much less, and also his own chances of carrying the proposal through have been very much affected.

The Acting CHAIRMAN: What are the changes you propose should be made?

Mr. REILLEY: The change I propose is merely to permit any person under the Act to make a proposal with his creditors before bankruptcy.

Hon. Mr. MORAUD: That is to restore the 1919 conditions.

Mr. REILLEY: Yes. The trouble with the original Act of 1919 was that there was no way of checking on the debtor. If he could conceal or cheat his creditors, there was no way of getting at whether or not he was doing so. Where you have a body of creditors acting together like that no one of them just wants to take the necessary steps to delve into the situation sufficiently to find out what the facts are.

Hon. Mr. EULER: How do you propose to guard against that now?

Mr. REILLEY: By the fact that the proposal has to be made to a licenced trustee, who will be required to make an appraisal and investigation of the debtor's affairs and report to the creditors at the meeting.

Hon. Mr. MORAUD: You have not that safeguard now.

Mr. REILLEY: I think it is about the only safeguard you can find. I do not know of any other one that could be inserted. In those days of course trustees were a very different type of men from the trustees of to-day, who, generally speaking, I think are pretty honourable men.

The Acting CHAIRMAN: You explained to us at the last meeting that in 1932 two changes were made in the Act. One was to provide for a superintendent in the set-up. That is yourself.

Mr. REILLEY: Yes.

The Acting CHAIRMAN: And the second was, you were given power to licence trustees annually.

Mr. REILLEY: Yes.

The Acting CHAIRMAN: You have power to revoke or refuse licences.

Mr. REILLEY: Yes.

Hon. Mr. HAIG: And the trustees are bonded.

Mr. REILLEY: Yes, they are bonded.

The Acting CHAIRMAN: You have had an experience of thirteen or fourteen years in building up an organization of licensed trustees.

Mr. REILLEY: Yes.

Hon. Mr. ASELTINE: Are these trustees usually trust companies?

Mr. REILLEY: Well, all of the trust companies have licences, but the majority of them have very few bankruptcy cases. Most of the bankruptcy cases are handled by private trustees.

Hon. Mr. MORAUD: I understood you to say at the last meeting that trustees might be influenced by the debtor. After all, the debtor goes to the trustee first, the creditors come afterwards; so the trustee is the debtor's man instead of the creditors'. Are you not afraid that in a case of a composition like this the trustee might work more for the debtor than for the creditors?

Mr. REILLEY: Well, that was the opinion held in regard to trustees generally, that they always acted for the debtor. But I think most trustees today are pretty well aware of the fact that if they lend themselves to any shady scheme, and I find any inkling of it, they know just about where they stand.

Hon. Mr. EULER: What greater protection have the creditors if the debtor has to go through bankruptcy proceedings than they will have if this trustee is empowered to go and ascertain all the assets?

Mr. REILLEY: None whatever.

Hon. Mr. HAIG: Yes. Under bankruptcy you can examine the debtor under oath.

Mr. REILLEY: He can be examined under oath at the meeting of creditors if you want it. I have just forgotten whether I have that in or not, but you could put that in.

Hon. Mr. EULER: So that protection would be as great under your proposal as in bankruptcy?

Mr. REILLEY: Yes.

Hon. Mr. HAIG: In bankruptcy if creditors think the debtor has assets which he has not disclosed they can have him examined under oath.

The Acting CHAIRMAN: Once the debtor submits himself to the trustee under the new section the same procedure would follow.

Hon. Mr. HAIG: It was not so in 1919.

Mr. REILLEY: I answer that question by this section that I have put in the bill.

The Acting CHAIRMAN: Which is it?

Mr. REILLEY: Section 13:

> "If the creditors by a ten per cent vote of those voting in person or by proxy at the meeting"—

I have put that down to 10 per cent, which is a sufficiently low percentage to give them the right to a further investigation.

Hon. Mr. HAIG: 10 per cent in value or in number?

Mr. REILLEY: Any creditor by proxy or in person may vote.

The Acting CHAIRMAN: It is number, not value.

Mr. REILLEY: Yes, number, not value. This is the new section 13.

> (1) If the creditors by a ten per cent vote of those voting in person or by proxy 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 such further appraisal and investigation of the affairs and property of the debtor to be made as may be deemed advisable in which case the information thereby obtained shall be incorporated in a report and placed before the adjourned meeting or may be read in court on the application for approval of the proposal.
>
> (*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 as elsewhere provided in this Act. 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.
>
> (2) The court if not satisfied with the report or the testimony of the debtor or such other person may direct that such further investigation be made as it may deem advisable or that the debtor or such other person attend before the court for further examination.

Hon. Mr. EULER: I am not a lawyer, but after all this is only common sense. You say the creditors would have the same protection by the appointment of a trustee as they would have if the debtor went into bankruptcy?

Mr. REILLEY: I think so.

Hon. Mr. EULER: They would not labour under any of the defects of bankruptcy?

Mr. REILLEY: That is the idea.

Hon. Mr. ASELTINE: But the trustee has no power to examine the debtor under oath prior to the meeting of creditors.

Mr. REILLEY: No, he has no power to examine under oath. I have there given him the duty of making an appraisal. He is expected to do that reasonably well.

Hon. Mr. MORAUD: We should give more power to the court, so as not to leave the position entirely in the hands of the trustee.

Mr. REILLEY: My opinion is that they should go first to the court for leave to file a proposal, but I wanted to get away from too many technicalities and too much formality. I thought that with the system of trustees we have to-day they could be relied on generally to give pretty fair protection to the creditors. As I said before, as long as the trustee is just not living up to the requirements, he has to answer to me at the end of the year, and some have found that a pretty hard testing.

Hon. Mr. MORAUD: I have in mind a case of dishonesty. If a man comes to me for advice. I as a lawyer am inclined to help him out; and the trustee is in about the same position. The debtor goes to him for advice and says, "I am in a bad fix. What can I do about it?" The trustee, of course, is inclined to help him out. Sometimes helping the debtor out would not be in the best interests of the creditors. So I am wondering whether it would not be better for the trustee and everybody else concerned if in all cases the registrar or the court were given authority as to final approval of any proposal.

Mr. REILLEY: Every proposal, even if approved by the creditors, has to go before the court for approval, and every creditor has a right to appear there.

Hon. Mr. HAIG: Mr. Reilley, we have had this whole procedure in proceedings in my province under the Farmers Creditors' Arrangement Act. The registrar is always on the side of the debtor, and you have great difficulty in getting him even to admit that the assets are worth more. In Saskatchewan he started on the theory that the debtor was right 100 per cent and the creditors were wrong 100 per cent, and he valued the farm at about a quarter or a half or a third of what it was worth, and you could not get away from that. That is what we are scared about in regard to these provisions.

Mr. REILLEY: I do not know, senator, that any law could be set up to remedy bias on the part of the court, and if a registrar or anybody else—

Hon. Mr. HAIG: That is the tendency under the Farmer Creditors' Arrangement Act. I am only one, but I shall not let this bill go through and have perpetrated on the creditors of this country what the Farmers Creditors' Arrangement Act has perpetrated on the creditors of Manitoba and Saskatchewan. Your system is the same.

Mr. REILLEY: No.

Hon. Mr. MCGUIRE: There is the superintendent over the trustee here; there is not over the registrar in the other case.

Mr. REILLEY: There is one of your answers. There is no intervening authority under the Farmers Creditors' Arrangement Act to see that the duties to be performed under the Act are performed properly.

Hon. Mr. ASELTINE: Would not the trustee under these proceedings be in the same position as the official receiver under the Farmers Creditors' Arrangement Act?

Mr. REILLEY: No.

Hon. Mr. ASELTINE: As Senator Haig has stated, the Official Receiver is 99 per cent of the time on the side of the farmer debtor.

Mr. REILLEY: Yes, I know. I have not any comments to make on the Farmers Creditors' Arrangement Act. I was opposed to it very violently when it went through, and I am still.

Hon. Mr. ASELTINE: But you are incorporating a great deal of the same procedure in this bill.

Mr. REILLEY: My idea of this, gentlemen, is that bankruptcy in itself is destructive.

Hon. Mr. HAIG: We agree with you there.

Mr. REILLEY: This is the only procedure that I have ever heard of whereby you can proceed in this way. In England the procedure is this: a receiving order is made—it is not an adjudication of bankruptcy, but just an interim order—and after that is made the Official Receiver makes an investigation of the debtor's affairs and examines him; then it comes to the creditors' meeting, and at that meeting he is asked, Are you willing or ready to make a proposal to your creditors. There is not any bankruptcy yet. There is an order, to be sure, saying he has committed an act of bankruptcy, but everybody has who gets into that position. At the meeting of creditors if no composition is proposed, they go back to the court and get an adjudication of bankruptcy—what they call an adjudication order. So there are two orders, and then the intervening period when the debtor is given an opportunity to make a composition.

Hon. Mr. ASELTINE: Under this bill who prepares the proposal, the trustee?

Mr. REILLEY: It would be prepared by the debtor, I suppose.

The ACTING CHAIRMAN: Is there any particular reason why the condition Senator Haig mentioned would be applicable to farmers, but might not be generally applicable to ordinary business?

Hon. Mr. HAIG: What I am afraid of is this. No one creditor wants to make a row, because he thinks the debtor may get on his feet again and may be a good outlet for business. I am not afraid of the 75 or 85 or even 99 per cent of people who are honest; it is the dishonest debtor I am worried about beating his creditors. You do think that in 1919 it was rampant?

Mr. REILLEY: Yes.

Hon. Mr. HAIG: I know about that, for we had a big practice in bankruptcy proceedings at that time.

Mr. REILLEY: All I can say is it was rampant between 1919 and 1923. The changes after that did not remedy the situation very much until 1932. Before that period, you know, dishonesty was very rampant, but from 1932 on you have not heard very much about dishonesty in bankruptcy.

Hon. Mr. HAIG: I admit that.

Mr. REILLEY: Whether the superintendent's control is entirely responsible for that I am not going to say; I leave it to the public to judge. That control has effected a very considerable remedy of the situation.

Hon. Mr. HAIG: Of course, your 10 per cent vote is a very fine provision; that gives the kickers a pretty good show.

Hon. Mr. MCGUIRE: The whole purpose of the Farmers Creditors' Arrangement Act was to provide a new deal for the debtor, and the creditors knew right from the beginning that their interests were going to be sacrificed to a great extent at least.

Mr. REILLEY: Yes.

Hon. Mr. MCGUIRE: That Act was only intended to be temporary. Why Senator Haig's province and the other western provinces want to hang on to it is their own business.

Hon. Mr. HAIG: We do not want it.

The ACTING CHAIRMAN: Your legislature asked for it back.

Hon. Mr. McGUIRE: The whole object of the Farmers Creditors' Arrangement Act was entirely different from the Bankruptcy Act.

Mr. REILLEY: Entirely.

Hon. Mr. McGUIRE: I think the proposed arrangement in this bill sounds very good. The debtor must get some consideration; the creditors are not the only ones to be taken into account.

Hon. Mr. EULER: The composition arrangement under this bill is a protection to the creditors themselves by reason of the fact that the trustee can make the same investigation as can be made under bankruptcy proceedings. I do not see why we should not give the debtor an opportunity to escape bankruptcy and so save depreciation of his assets, so long as the creditors are justly protected.

Hon. Mr. MORAUD: This is altogether in favour of the debtor.

Mr. REILLEY: I would not go that far, senator. I have had a lot of experience doing nothing but bankruptcy work for twenty-four years, and after all the majority of people are honest.

Hon. Mr. MORAUD: There is no doubt of that.

Mr. REILLEY: Many debtors may get into financial embarrassment and want to make an honourable proposal for the benefit of themselves and their creditors as well.

Hon. Mr. EULER: Though the debtor may be dishonest, the trustee is supposed to be honest and he protects the creditors.

Mr. REILLEY: In section 11 I have put it this way:—

> (2) Proceedings for a proposal by a debtor shall be commenced before bankruptcy as filing with a licensed trustee, and after bankruptcy by filing with the trustee of the estate,
>
> (*a*) a copy of the proposal in writing embodying the terms of the proposed composition, extension or scheme of arrangement, and setting out the particulars of any securities or sureties proposed, signed by the debtor and the proposed sureties, if any;
>
> (*b*) a statement, verified by affidavit, showing the cause of the debtor's financial difficulties, the reason for the proposal, and the grounds of the debtor's belief that the proposal is fair and reasonable and can be carried out.

Hon. Mr. HAIG: The debtor had to do the same thing under the Farmers Creditors' Arrangement Act. The difficulty is the valuation of the assets. Under your proposal the debtor says he owns a store in the village and a farm out in the country. He has so much stock on the farm and so much goods in the store, and he puts his valuation on those. The question arises right there, whether his valuation is proper. Who checks that valuation?

Mr. REILLEY: The trustee.

Hon. Mr. EULER: Has not the trustee power to go in and examine the debtor under oath?

Hon. Mr. ASELTINE: Only the creditors can decide whether there shall be an examination.

Mr. REILLY: Subsection 4 of section 11 deals with the duties of the trustees:—

> (4) The trustee shall make or cause to be made 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 and the cause of the debtor's financial difficulties or insolvency, and report the result thereof to the meeting of the creditors. A copy of the report shall as soon as completed be mailed to the Superintendent.

Hon. Mr. ASELTINE: Then if a meeting takes place 10 per cent of the creditors may require the debtor himself to be examined.

Mr. REILLEY: Or ask for a further investigation.

Hon. Mr. HAIG: What percentage of the creditors have to approve of the compromise?

Mr. REILLEY: Seventy-five per cent.

Hon. Mr. HAIG: In value and number both?

Mr. REILLEY: No. "A majority in number of all the creditors, or of any class thereof, with proven claims of $25 or over, and holding three-quarters in amount of all such proven claims of creditors or class of creditors, as the case may be, in so far as the proposal affects any such class, present in person or by proxy, resolve to accept the proposal as made"—a majority of 75 per cent.

Hon. Mr. HAIG: In my experience I would get 75 per cent in amount because some of the bigger creditors would be only too anxious to carry on the business, and the little creditors would get squeezed to death. I would say it should be 75 per cent in amount and 75 per cent in number—both.

Mr. REILLEY: Well, this is the provision found I think in virtually every Act of Bankruptcy. I do not think you will find as high a percentage as you have suggested.

Hon. Mr. MORAUD: Number and value ought to be fair enough.

Hon. Mr. HAIG: Value does not help you much; it is the number.

Mr. REILLEY: The proposal has to be accepted by a majority of the creditors. After all, the majority rules.

Hon. Mr. ASELTINE: The bulk Sales Act of each province provides for a similar percentage in number and amount as suggested by Senator Haig. It works out very well.

Mr. REILLEY: This is a majority of all the creditors holding 75 per cent of all the claims.

Hon. Mr. MORAUD: I think it is fair enough.

Hon. Mr. HAIG: It is what gives you the trouble.

The ACTING CHAIRMAN: But you have to get a majority in number and also 75 per cent in value. That is pretty drastic.

Hon. Mr. HAIG: If you made it 75 per cent in number and 50 per cent in value this would be all right.

The ACTING CHAIRMAN: Then you might get a few of the small fellows bought off at 100 per cent. I suggest that we do not spend too much time on the details. We want to get the general picture.

Hon. Mr. HAIG: Certainly.

Hon. Mr. KINLEY: Is there anything on preferred creditors?

Mr. REILLEY: That is dealt with further on in the bill when we come to distribution.

The ACTING CHAIRMAN: This composition question is also dealt with at page 23. What are the changes in that respect?

Mr. REILLEY: In the case of a corporation, where a proposal has been before the creditors and has not been approved, the corporation can apply to the court to appoint a committee.

The ACTING CHAIRMAN: What section is that?

Mr. REILLEY: Section 23 at page 21. The Committee will investigate the affairs of the corporation, hear representations from any persons and it will then try to formulate a proposal and that proposal is submitted to the creditors or shareholders as the case may be, for their approval.

The ACTING CHAIRMAN: That committee is not necessarily composed of creditors?

Mr. REILLEY: Not necessarily. It is presumed to be an independent committee.

Hon. Mr. HAIG: Who appoints them?

Mr. REILLEY: The court.

Hon. Mr. MORAUD: Suggested by the corporation or by whom?

Mr. REILLEY: I have not said by whom. I have left it to the court to appoint a committee that it feels would be qualified to act in such a case.

The ACTING CHAIRMAN: The court, I take it, could in its discretion ask all interested parties to make suggestions?

Hon Mr. MORAUD: The court might accept representations from the corporation?

Mr. REILLEY: I do not think the court would pay too much attention to that—I do not think a judge in Montreal would. He would be very much inclined to say: "Is this man independent in the matter?" I think that is the attitude most judges would take.

Hon. Mr. ASELTINE: Then the committee may formulate a proposal?

Mr. REILLEY: And that goes back to all the creditors again.

Hon. Mr. HAIG: And if they reject it?

Mr. REILLEY: Then the corporation can apply to the court itself to formulate a proposal. Then if the court, after hearing the report of the committee and the representations of all interested parties, is of the opinion that it is in the public interest by reason of the nature of the services rendered or the business carried on that a proposal should be formulated, it can proceed to do so and put it into effect.

Hon. Mr. MORAUD: Don't you think that procedure is rather vague?

Mr. REILLEY: There has first been a meeting of creditors to consider the proposal put forward. That is the first stage. The second stage is that they can apply to the court for a committee.

Hon. Mr. MORAUD: The corporation does.

Mr. REILLEY: The corporation. Then if that scheme fails, if nothing comes from it, they can apply to the court if it is in the public interest, because there are many corporations, as you know, which, while they are private corporations are actually operating in the public interest.

Hon. Mr. EULER: By what percentage of the creditors can the committee's report be rejected, 75 per cent?

Mr. REILLEY: The same percentage. You have a substantial majority in order to bind the rest of the creditors or shareholders, as the case may be. It is an important section. I may say, gentlemen, that I have adopted the idea largely from the corporate organization proposals of the United States Bankruptcy Act, which extended the provisions for dealing with reorganizations.

The ACTING CHAIRMAN: I think, Mr. Reilley, the most contentious part of your whole proposal is subsection 10 of section 23. You ought to go into that fully with this committee.

Mr. REILLEY: I do not know, Mr. Chairman, that there is much more that I can add to that. That is just a scheme. As I say, every person who is interested has an opportunity to come before the court and be heard. That is expressly stated.

The ACTING CHAIRMAN: Let me read the last six lines of subsection 10:—

> The court may by order formulate a proposal of composition modifying or altering the rights of creditors or shareholders or any class of them

and providing for the issuance of such new securities or shares or other evidence of title or interest therein as may be necessary to carry out the terms and formalities of the proposal.

That is where the teeth are in this bill. The teeth may work both ways. That, I take it, Mr. Reilley, means that the rights of secured creditors, bondholders and debentureholders, may be affected.

Mr. REILLEY: Yes.

Hon. Mr. HAIG: That is going pretty far.

Mr. REILLEY: It is and it is not. You have to consider the fairness of the court in protecting all the interests as far as it can be equitably done.

Hon. Mr. HAIG: Let me illustrate, Mr. Reilley. Here is what happened under the Farmers Creditors' Arrangement Act, which contains a similar provision. A farmer, the owner of a half section of land, had mortgaged it to some company, he owed money to the bank and to the storekeeper, and he was in default with his municipal taxes. Now, as everybody knows, taxes are a first charge. The Judge satisfied the taxes or part of them. Then he set aside the mortgage and gave the bank and the merchant, who were unsecured creditors, rights in the estate. That destroyed the mortgage security. When the first mortgage on a half section worth $5,000 is as high as $8,000 there may be some justification for cutting that down to $5,000, but I can never see any justification for cutting it down to $3,000 and letting the bank and the other unsecured creditors jump in. You are doing virtually the same thing here.

Hon. Mr. MORAUD: I am very much against leaving everything to the discretion of the judge. One man can say to the bondholders: "Now, you will get only so much, and you shareholders, who should not get anything, you will divide the assets with the bondholders." I do not think we should leave that to the discretion of one man.

Mr. REILLEY: Subsection 10 of section 23 can of course be separated from the rest of the section. I admit it was put in there as a last resource. I felt that was the tendency and that there should be some final resource to get at a settlement of certain very difficult, intricate and involved matters. But, I repeat, subsection 10 is not a necessary part of the section.

Hon. Mr. ASELTINE: Is that copied from the United States Act?

Mr. REILLEY: No, it is purely a device of my own mind.

Hon. Mr. MORAUD: Don't you think the experience we have had under the Farmers Creditors' Arrangement Act has been very unsatisfactory? As you know, some of the judges ignored the Act in trying to be equitable.

Mr. REILLEY: I don't like to comment on the operation of another Act of Parliament because—

Hon. Mr. MCGUIRE: The Farmers Creditors' Arrangement Act was intended to be an Act of confiscation, and that is what it was.

Hon. Mr. MORAUD: This is exactly the same thing.

Hon. Mr. MCGUIRE: No. This is to make the best arrangement for both the debtor and the creditors.

Hon. Mr. MORAUD: It is confiscation of the rights of the bondholders.

Hon. Mr. MCGUIRE: Confiscation is the spirit of the Farmers Creditors' Arrangement Act. That is why under it you can take an $8,000 mortgage and cut it down to $3,000. That was never intended in the Bankruptcy Act.

Hon. Mr. EULER: It can be done under this provision.

Hon. Mr. MCGUIRE: No. What is more, can you think of any better man to rely on for the exercise of discretion than a judge with his experience and ability?

Hon. Mr. MORAUD: No; but I prefer to rely on law rather than discretion.

Hon. Mr. HAIG: I don't think Senator McGuire has had the experience of some or us western fellows with the operation of the Farmers Creditors' Arrangement Act.

Hon. Mr. MCGUIRE: No. You people out there must like it or you would not want to keep it.

Hon. Mr. HAIG: There are more debtors than creditors—

Hon. Mr. MCGUIRE: All over.

Hon. Mr. HAIG: —so it is easy to decide on the side of the debtor.

Hon. Mr. KINLEY: And the creditor is an absentee.

Hon. Mr. HAIG: Let me give an illustration. I had a second mortgage of $1,000 on a piece of land at Marquette. The first mortgage was for the full value of the property. I lacked experience at that time or I would not have taken the second mortgage. The judge threw $1,000 off the mortgage and said I was to get $75 on my mortgage. So I got my $75 at the expense of the first mortgagee.

Mr. REILLEY: You must not forget, senator, that the preamble to the Farmers Creditors' Arrangement Act was very different altogether from the preamble to the Bankruptcy Act. The object and purpose of that Act was to keep men on the farm.

Hon. Mr. MCGUIRE: Right.

Mr. REILLEY: That was the first object.

Hon. Mr. ASELTINE: Is not the object of the Bankruptcy Act to keep men in business? The same thing.

Mr. REILLEY: They went at it in a different way.

Hon. Mr. KINLEY: Is not the object to protect creditors?

Mr. REILLEY: Yes.

The ACTING CHAIRMAN: That should be the general object of the Act. I think, Mr. Reilley, we had better read the provision in this section.

> —if in its opinion it is desirable and expedient in the interest of the corporation, the creditors and the shareholders or in the public interest by reason of the nature of the services rendered or the business carried on—

That widens the usual purposes of the Bankruptcy Act.

Hon. Mr. MORAUD: And discretion is left to the court. One man can decide whether it is expedient, and so on.

The ACTING CHAIRMAN: I think, Mr. Reilley, you intimated to us that you do not think subsection 10 an essential part of your scheme.

Mr. REILLEY: Oh, no.

The ACTING CHAIRMAN: It will work without that in?

Mr. REILLEY: It would work without that in if Parliament sees fit to delete that.

The ACTING CHAIRMAN: What would you think about the advisability of going a little slowly, trying the general scheme without that subsection, and if it was working well you could incorporate that a little later.

Mr. REILLEY: Well, that is an idea.

Hon. Mr. KINLEY: What is it in for?

Mr. REILLEY: My idea was to make the scheme complete.

Hon. Mr. EULER: You are really making it possible for one man, the judge, to set aside preferred rights, say, of bondholders to the advantage of other creditors: is not that so?

Mr. REILLEY: You can I suppose put it that way if you like, but I am assuming that the courts are going to deal fairly and equitably with all concerned.

Hon. Mr. EULER: But it is all left to the judgment of one man.

Mr. REILLEY: All rights depend on the judgment of one man in the last analysis.

Hon. Mr. GOUIN: You are leaving everything to the absolute discretion of the judge as to the rights of the creditors, and in the exercise of that discretion he could set aside certain civil rights.

The ACTING CHAIRMAN: Have you considered the effect this would have on future large borrowings on securities?

Mr. REILLEY: I have, and my candid opinion would be that it would not affect borrowers in any way whatsoever, because the cases where this section would be applied would not be one in ten thousand.

Hon. Mr. EULER: Then why put it in?

Mr. REILLEY: As I say, I put it in to make the scheme complete.

The ACTING CHAIRMAN: I suppose you feel that if there is this ultimate power in the court it might make creditors a little more reasonable in coming to a voluntary composition—voluntary with a gun at their head?

Mr. REILLEY: It might help.

Hon. Mr. HAIG: It positively would help. There is no question about what would happen.

Mr. REILLEY: After all, you have first an investigation by a committee who have examined and investigated the situation and passed their opinion on it.

Hon. Mr. MORAUD: But the judge could do away with that opinion, take other evidence and decide that the bondholders had no claim whatever, or that they were not in a better position than ordinary shareholders.

Hon. Mr. EULER: I can well imagine, Mr. Chairman, that it might have the same effect as the Farmers Creditors' Arrangement Act had in Ontario. That Act worked to the detriment of the farmer himself, because no man would put his money in a farm mortgage if it could be partly wiped out. Who would want to buy a bond if it were in the power of a judge later on to say, "Your bond is not worth anything?"

Hon. Mr. HAIG: The only money lent on farm mortgages in Manitoba is by the Farm Loans Board. The private companies are not lending at all.

Mr. REILLEY: The Farmers Creditors' Arrangement Act is not in operation in Ontario and Quebec.

Hon. Mr. HAIG: But it scared them; they have had experience.

Hon. Mr. EULER: That is why it was wiped out here. Only Manitoba wanted the Act again. We defeated the bill by an amendment providing for the right of appeal to a judge. Next year the government came back with a similar bill embodying our amendment.

Hon. Mr. HAIG: But it is not worked the same now as it was before.

The ACTING CHAIRMAN: Let us stick to his bill, gentlemen.

Mr. REILLEY: Before I go any further, gentlemen, I want to say this. These are my suggestions. I am not married to any or all of them, and I do not care what the committee does in regard to them.

The ACTING CHAIRMAN: But you stand up to them. We want to hear your considered opinion.

Mr. REILLEY: Certainly. But I am not going to be hurt or feel badly because the committee say, "We don't think this provision is good." I want the committee to understand that so far as I am concerned.

The ACTING CHAIRMAN: On the other hand, the committee want you to give your opinion and all the reasons for it without any qualification whatever, because we have to form our opinion on that basis.

Mr. REILLEY: Is there anything more we need say about this?

The ACTING CHAIRMAN: Do you want to say anything more?

Mr. REILLEY: No.

The ACTING CHAIRMAN: What is the next question?

Mr. REILLEY: The next question discussed was decentralization.

The ACTING CHAIRMAN: We are going to leave that for a memorandum from you. (See memo. at end of proceedings.) There is nothing complicated about that. You could dictate that later. What is the next important heading?

Mr. REILLEY: In principle the next change I am suggesting is that an application for discharge of a debtor should come up automatically before the courts within a certain time after his bankruptcy.

Hon. Mr. MORAUD: Discharge of the debtor, not of the trustee?

Mr. REILLEY: Yes. In the last twenty-five years I don't suppose that 20 per cent of all those who have gone bankrupt have ever applied for their discharge. There are two reasons for that. In many cases they do not know the situation, and that is accentuated by the fact that the highest courts have held that future assets—which include earnings—may be taken possession of in order to try to pay off the creditors. The result is that in many of these cases the debtor, if he gets a job and is earning more than a bare living, is faced with this proposition, that the trustee can step in and claim through the court a certain amount of his earnings. The debtor then is never in the position of being able to apply for his discharge. While it has often been regarded as important that the creditors should obtain an equitable distribution of the debtor's assets, yet the fundamental principle of bankruptcy is that we have to give the honest unfortunate debtor an opportunity to rehabilitate himself.

Hon. Mr. HAIG: Hear, hear.

Mr. REILLEY: He cannot do that if he is perpetually in bankruptcy.

Hon. Mr. HAIG: That is right.

Mr. REILLEY: My idea is that within a certain period, six months after his bankruptcy, his application for discharge should come up before the courts.

Hon. Mr. COPP: Within a certain time?

Mr. REILLEY: Within a certain time. There are two reasons for that. The first is that the debtor and the creditors are then interested in the bankruptcy, particularly the creditors. Notices of applications for discharge are coming into my office of debtors who went bankrupt twenty years ago. Where is there a creditor to-day to receive notice of that or anything else? Under this provision the matter will be dealt with when the creditors are interested in the debtor's affairs, and they will be alive to the situation and know something about it. Otherwise if the bankruptcy goes on for a few years the creditors just write the debt off their books and count it a dead loss, and never bother about it any more. In the second place, if the application for discharge comes up early the case will be dealt with more properly on its merits. If the debtor has been unfortunate, why, the court will deal with the application on its merits, the interested creditors will be able to make representations, and if they think the debtor can do something better, or that his application should be suspended, the court will deal with it as it sees fit.

Hon. Mr. KINLEY: Are there any necessary preliminary qualifications for discharge, must the debtor pay so much of a percentage of his debts, before he goes to the court?

Mr. REILLEY: No, none at all.

Hon. Mr. KINLEY: There used to be.

Mr. REILLEY: No. The court can discharge a debtor who has not paid anything.

Hon. Mr. MORAUD: You don't make it easy for the debtor if he has to apply within six months, for the creditors will not be very keen on his getting a discharge. But a few years later the creditors—

Mr. REILLEY: Have cooled off.

Hon. Mr. MORAUD: —and then it is easier to get a discharge. If you force a debtor to apply for discharge while the creditors are still sore, there is not a chance that he will get it.

Mr. REILLEY: It is not forced on him.

Hon. Mr. LEGER: By section 146 the fact that the debtor has assigned or become bankrupt is taken as notice to the creditors that he will within six months apply for his discharge. Then there is a duty cast upon the trustee to bring the matter up before the court, unless the debtor has waived that himself.

Hon. Mr. MORAUD: It is not the obligation but the privilege of the debtor.

Hon. Mr. LEGER: Yes. I read that with a great deal of interest. The principle is very good.

Hon. Mr. HAIG: Is six months too short?

Mr. REILLEY: I do not think so. In the ordinary case six months gives the trustee a reasonable opportunity to know where he is going to finish up or how the estate is going to end up. At the same time, it is not so long that the creditors have lost interest in the matter. That was one of my reasons for this. I wanted the application for discharge to come up before the creditors had lost interest, because I know lots of discharges are going through today, though my records show that the debtors had committed fraud, just because no creditors have showed up to contest the applications.

Hon. Mr. EULER: Do creditors ever lose interest in what is going on with respect to their debtors?

Hon. Mr. COPP: Take this case, Mr. Reilley. The debtor assigned, went through the bankruptcy court, his property was all sold at public auction, the trustee carried on and paid out dividends on the assets so realized, but the debtor never got his discharge. That bankruptcy, we will say, happened fifteen years ago. Now, assuming that the debtor gets on his feet again, makes some money and accumulates an estate, can the creditors come in and demand additional dividends or does the statute of limitations apply?

Mr. REILLEY: The creditors can also come in again and repossess anything that the debtor has now got. But here is something that I consider almost ludicrous in the Act today. A case recently came before me in which a second bankruptcy occurred. The bankrupt had gone into business again and failed. It is not at all uncommon for a man to go into bankruptcy two or three times. But as the Act now stands, the creditors in the first bankruptcy are entitled to take all the assets now found before the creditors in the second bankruptcy get a cent.

Hon. Mr. COPP: Irrespective of the statute of limitations?

Mr. REILLEY: In case he never had a discharge.

Hon. Mr. COPP: I had such a case come before me and I was very much interested in what might happen.

The ACTING CHAIRMAN: That should be rectified even though there was no discharge.

Mr. REILLEY: Yes. I have a provision here for bringing it into line with the English Act dealing with a second bankruptcy, so all creditors come into the

picture. In the case I have referred to those old creditors who had washed the thing out of their books ten years ago now find themselves in the position of collecting whatever is in the hands of the trustee of the second bankruptcy.

Hon. Mr. COPP: My client came to me for advice. Now, after fifteen years, he wants to apply to be released.

Hon. Mr. HAIG: He can get his discharge.

Hon. Mr. COPP: I advised him that he had better leave sleeping dogs lie. The creditors had not said anything. Now on his application for discharge they might find he had in the meantime accumulated some means and make a further claim on him.

Mr. REILLEY: That probably might be good advice from his angle. There is nothing to prevent his creditors stepping in at any moment and taking every dollar he has got.

Hon. Mr. COPP: That is what I was afraid of.

Mr. REILLEY: He is working under that hazard all the time.

The ACTING CHAIRMAN: I think that is all we need on that point; the details we will consider later. Anything else?

Mr. REILLEY: I am suggesting that in certain respects the functions of the superintendent be broadened to be more in line with the English Act.

The ACTING CHAIRMAN: In what way?

Mr. REILLEY: Particularly in regard to the winding up of the estate. When our statute was passed there was no superintendent to act in the same capacity as the Board of Trade in England acts through the Inspector General of Bankruptcy. Consequently in our legislation the matter of dealing with discharge of the trustee was placed before the court, whereas under the British legislation it is dealt with by the Inspector General of Bankruptcy. It has to do with checking up on the statements of the trustee, and so on. I am suggesting that it should be done in that way here, that instead of going to the court for his release the trustee should come to me, and my branch would deal with it and send out notices to the creditors. Any creditor objecting would have the opportunity to apply to the court against the trustee's discharge.

One reason for my suggestion is this. In order to follow through the administration of an estate we have to check through the trustee's final statement and do everything that has to be done by the court in order to know whether the trustee has finished his job. It is only a duplication of my work for the purpose of going to the court anyway. For a long time the courts in one province always put its approval in this form: Seeing the superintendent has approved the statement, we hereby approve it. That is the way it went through. Then another change I propose will be found towards the end of the bill. It starts with section 196, and is headed Summary Administration.

Hon. Mr. LEGER: That has to do with small estates not worth the attention of the court. I have read the sections under that heading and see nothing objectionable in them.

Hon. Mr. HAIG: What is the limit?

Hon. Mr. LEGER: The limit is $500.

Hon. Mr. HAIG: Oh, let it go.

Mr. REILLEY: Small estates would be dealt with summarily. The registrar of the court would act as the trustee and turn the limited assets over to the sherriff to realize and hand the returns back for distribution among the creditors. That would be the end of it. A great many debtors cannot find the means to go through bankruptcy because they cannot get a trustee to handle their estate. The trustee is allowed a minimum fee of $100, as provided for in the Act fifteen years ago, and with the expenses it costs any debtor, no matter how poor a wage-

earner he may be, at least $150. Under this scheme it ought not to cost him more than $25.

Hon. Mr. HAIG: May I tell you, Mr. Reilley, that about 1931 the Manitoba Legislature passed a somewhat similar amendment. It enables a poor man to apply to the county court, and there his application is disposed of summarily and at small expense. I presume this is somewhat the same provision?

Mr. REILLEY: I had not heard of that.

Hon. Mr. HAIG: It is in the 1930 or 1931 statutes of that province.

The ACTING CHAIRMAN: Gentlemen, I suggest that we have pretty well covered the essentials. Mr. Reilley will always be available if we require his attendance again.

Hon. Mr. HAIG: Yes.

Mr. Reilley then withdrew.

MEMORANDUM by MR. REILLEY

The new Bankruptcy Act embodies certain changes in principle and procedure. One of the most important changes in principle is that relating to decentralization of the Courts. Under Section 152 of the Bankruptcy Act heretofore the Superior Courts throughout the various provinces were vested with jurisdiction in bankruptcy matters. Under Section 157 it was left to the Chief Justices of each of such Courts "to appoint and assign such registrars, clerks and other officers in bankruptcy as is deemed necessary or expedient for the transaction or disposal of matters in respect of which power or jurisdiction is given by this Act and may prescribe or limit the territorial jurisdiction of any such registrar, clerk or any other officers". The powers thereby conferred have been exercised by the various Chief Justices in a very different manner. In some provinces the registrars, clerks or prothonotaries of the ordinary Civil Courts were appointed registrars in bankruptcy within their respective territorial jurisdictions. In other provinces the Chief Justice saw fit to appoint only one or a lesser number of such registrars, clerks or prothonotaries as registrars in bankruptcy with the result that all court proceedings had to be begun where the office of such registrar was located. The object of restricting such appointments obviously was to endeavour to have more uniformity in bankruptcy court proceedings.

From my observations of the operations of the Act during the last thirteen years since the office of the Superintendent of Bankruptcy was established it would appear that it is desirable that bankruptcy courts be established on a basis more convenient to the public at large and that there is now no valid reason why bankruptcy matters could not be heard and disposed of in the same manner as the business of the ordinary Civil Courts is carried on. Judicial precedents have settled many of the uncertainties and ambiguities that arose naturally on the introduction of the Bankruptcy Act in 1920 and it is believed that is would be in the best interest of the bankruptcy administration that the facilities of all the Superior Courts throughout the Country be made available in bankruptcy matters. The Criminal Code, the Winding Up Act and other federal legislation are so administered within such Courts and there is no suggestion that it should be otherwise. It would seem not to be unreasonable that bankruptcy matters be dealt with in the same way. The intended change is that the registrars, clerks or prothonotaries within their respective judicial districts should hereafter be registrars in bankruptcy for all the purposes of the Bankruptcy Act.

1946

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING COMMITTEE ON BANKING AND COMMERCE

to whom was referred the Bill A-5, intituled:
"An Act respecting Bankruptcy."

No. 2

TUESDAY, MAY 28, 1946

CHAIRMAN

The Honourable Elie Beauregard, K.C.

WITNESS:

The Honourable Mr. Justice Boyer, Superior Court of Quebec.

OTTAWA
EDMOND CLOUTIER
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
1946

ORDER OF REFERENCE

EXTRACT from the Minutes of Proceedings of the Senate for 13th May, 1946.

Pursuant to the Order of the Day, the Honourable Senator Robertson moved that the Bill (A-5), intituled: "An Act respecting Bankruptcy", be now read a second time.

After debate, and—

The question being put on the said motion.

It was resolved in the affirmative.

Ordered, That the said Bill be referred to the Standing Committee on Banking and Commerce.

L. C. MOYER,
Clerk of the Senate.

STANDING COMMITTEE ON BANKING AND COMMERCE

The Honourable ELIE BEAUREGARD, K.C., *Chairman*

The Honourable Senators

Aseltine	Euler	Marcotte
Aylesworth, Sir Allen	Fallis	McGuire
Ballantyne	Farris	McRae
Beaubien (Montarville)	Foster	Michener
Beauregard	Gershaw	Molloy
Buchanan	Gouin	Moraud
Burchill	Haig	Murdock
Campbell	Hardy	Nicol
Copp	Hayden	Paterson
Crerar	Howard	Quinn
Daigle	Hugessen	Raymond
David	Jones	Riley
Dessureault	Kinley	Robertson
Donnelly	Lambert	Sinclair
Duff	Leger	White
DuTremblay	MacDonald (Cardigan)	Wilson—(48).

MINUTES OF PROCEEDINGS

TUESDAY, 28th May, 1946.

Pursuant to adjournment and notice the Standing Committee on Banking and Commerce met this day at 10.30 a.m.

Present: The Honourable Senators: Buchanan, Burchill, Copp, Crerar, Dessureault, Euler, Fallis, Foster, Haig, Hardy, Hugessen, Jones, Kinley, Leger, MacDonald (Cardigan), Marcotte, McGuire, McRae, Molloy, Murdock, Paterson, Robertson, Wilson.—23.

In the absence of the Chairman, the Honourable Senator Hugessen was elected Acting Chairman.

Bill A-5,—"An Act respecting Bankruptcy", was again considered.

In attendance: Mr. J. F. MacNeill, Law Clerk and Parliamentary Counsel of the Senate.

The Official Reporters of the Senate.

Mr. W. J. Reilley, K.C., Supt. of Bankruptcy.

The Honourable Mr. Justice Boyer, Superior Court of Quebec, Montreal, P.Q., was heard and suggested certain amendments to the Bill.

At 1.00 o'clock p.m., the Committee adjourned to the rising of the Senate this day.

At 4.15 p.m., the Committee resumed.

The hearing of Mr. Justice Boyer was continued.

At 4.35 p.m., Mr. Justice Boyer retired.

Further consideration of the Bill was postponed.

At 4.50 p.m., the Committee adjourned to the call of the Chairman.

ATTEST.

A. H. HINDS,
Chief Clerk of the Committees.

65100—1½

MINUTES OF EVIDENCE

THE SENATE,

OTTAWA, TUESDAY, May 28, 1946

The Standing Committee on Banking and Commerce to whom was referred Bill A5, an Act respecting Bankruptcy, met this day at 11.45 a.m.

Hon. Mr. HUGESSEN (Acting Chairman) in the Chair.

The ACTING CHAIRMAN: Gentlemen, we have with us Mr. Justice Louis Boyer. If it meets with the convenience of His Lordship and members of the committee may I suggest that His Lordship give us a statement now and we can reserve our questions until we re-assemble after the house rises this afternoon.

Mr. JUSTICE BOYER: Gentlemen, you have me here, and I feel you want to ask me some questions. If you have any quesitons on special points I should be glad to be helpful in clearing them up. Otherwise I will make a few suggestions.

The ACTING CHAIRMAN: You will remember, Your Lordship, that we are not the expert you are, and that we are looking for guidance.

Hon. Mr. COPP: I think His Lordship might give us any objections he has to sections then we could study them.

Mr. JUSTICE BOYER: In the first place, I find that this act supersedes the Winding Up Act and the Companies Creditors Arrangement Act; it would necessarily abrogate the Winding Up Act and the Companies Creditors Arrangement Act. Of course the Winding Up Act could be preserved for the winding up of insolvent companies. There is a saving clause in the present Bankruptcy Act to the effect that permission should be had under the Winding Up Act. I do not see why there should be two acts. I am strongly in favour of the Bankruptcy Act providing only one act, and disposing of the Winding Up Act and the Companies Creditors Arrangement Act.

This act provides that a compromise may be offered before bankruptcy proceedings. It was contemplated by the Companies Creditors Arrangement Act. On that point it is just a question of disposing of the other statutes. As far as section 27 (5) of the bill is concerned it says the bankrupt should not sell any property at all; there is nothing said about exempted property. In the province of Quebec certain articles are exempted from seizure and are not to be turned over to the trustees. This section provides no exception at all.

The ACTING CHAIRMAN: That is subsection 5 of section 27?

Mr. JUSTICE BOYER: That is right. In our province once the trustee had been discharged any creditor could take action against the bankrupt. I understand the jurisprudence of the other provinces is the other way. But it often happens that the bankrupt does not ask for his discharge, and he contracts more debts, and since those debts are not provable under the Bankruptcy Act, the new creditors are left without any remedy at all.

Hon. Mr. HAIG: We understand that.

Mr. JUSTICE BOYER: So it is up to you if you want to clarify this point.

The ACTING CHAIRMAN: Which section?

Mr. JUSTICE BOYER: Section 26. There is the question of the right of the seizing creditor. Under the proposed law the seizing creditor is only privileged after the trustee. In my experience it happens very very often that the debtor, as soon as the seizure is taken against him, makes abandonment, a trustee is appointed, and very often he never realizes enough to pay the seizing creditor.

So the seizing creditor, who has been putting the assets of the debtor into the hands of the court in order to preserve them, is practically without a right. Whether you want to let it go at that or change it is up to you.

The ACTING CHAIRMAN: What would be your suggestion there?

Mr. JUSTICE BOYER: That is section 27, subsections 1, 2, 6, compared with section 28, subsections 3 and 4. As to the discharge of the trustee, there is a provision that his report has got to be approved first by the superintendent. I entirely approve of it, but I see no disposition in the law to let anyone aggrieved by the superintendent to appeal to anyone.

Mr. REILLEY: Yes, that is correct.

Mr. JUSTICE BOYER: Section 39, subsection 5. Section 82, subsection 2.

Section 46 allows the trustee to apply to the judge for directions. I do not approve of this clause at all. But the point is this, the trustee in the first place and the lawyers run up pretty big bills, but they do not want to take responsibility, so they come back to the judge. But this direction is not binding on anyone, so the question can come up again to the judge. If it is a question of management of the estate there might be an application to the Superintendent of Bankruptcy for directions, but I do not believe these directions by the judge should be there. That is section 46.

The next point is the minimum fee to the trustee of $100. There are a number of cases to my knowledge where no assets at all were available, so this minimum of $100 to a trustee seems to me to be too high. That is section 90, subsection 2.

Section 93, subsection 4. This is a provision about publishing everything in the *Canada Gazette*. The costs of bankruptcy are too heavy according to the general opinion. Why saddle the estate with the cost of advertising in the *Canada Gazette*, which no one reads? Of course, if you want to preserve that as a means of emolument to the government, I suppose that is all right. But so far as I am concerned, I am certain no creditors read the *Canada Gazette*.

Hon. Mr. HAIG: Nor anybody else.

Hon. Mr. FOSTER: What would you do with it?

Mr. JUSTICE BOYER: Section 126, paragraph (*d*). That is for the privilege of the employees of the company. It limits the claim to $500. To my mind it is not clear whether the $500 applies to all employees or to anyone in particular. I think that should be made quite clear.

The ACTING CHAIRMAN: You mean the $500 might apply to one employee only?

Mr. JUSTICE BOYER: Or to all employees. I do not know whether it means that the $500 is for all employees or for any one in particular. That should be cleared up.

Section 160 raises the question of procedure. My idea is that the bankruptcy court should be more of a business court. That is why for my part, although I may not be more qualified than anyone else, I had a lot of difficulties at first in this regard. There was a disposition on the part of the lawyers to make the rules of procedure apply, and they would go on in the same way and carry my decision to the court of appeal. The case came before me a second time, and I gave judgment in the same way, with further reasons, and finally the court of appeal approved my judgment. I think the procedure should be made clear.

There is another feature too. Under the civil code procedure in the province of Quebec you may make any number of exceptions and contestations. You may know how the election of our mayor was contested. He was elected several years ago, he is still in office, and there is no decision yet on the exception to his election. The reason for the delay is the making of exception after exception

and the appealing on every exception. Some clever lawyers may suspend a case for two or three years.

I would suggest this amendment:—

> All proceedings by or against the trustee, creditors, bankrupt, shareholders, contributors and any third party shall be summary and by way of petition.
>
> No written contestation or stated case shall take place without the consent of the court.
>
> All grounds of contestation shall be heard at one and the same time and disposed of by the court by one judgment, unless the court decides to hear and decide them separately.

I think that would simplify matters.

Authority of the courts. Section 164, subsection 2, subsections 6 and 7, section 167, subsections 5 and 6. The powers of the registrar to my mind are not defined at all, and I have yet to find out what his powers are. I will tell you why. One article in the old law and in this law says a judge can sit in chambers at any time on any proceeding. Another article says a registrar has jurisdiction in all matters that can be heard in chambers. So it is referred to one or the other. I think that should be clarified.

Section 171, subsection 7. I do not know whether these costs should not be wiped out. If a man wants to make an assignment a receiver can give him all the directions possible. Usually when an assignment is made the blank is generally filled up by the trustee to be appointed, and he is the one who puts down the name of the lawyer who gets the fee. So I do not think the fees on the assignment should be allowed.

The ACTING CHAIRMAN: Which section?

Mr. JUSTICE BOYER: Section 171, 7(*c*).

The ACTING CHAIRMAN: Costs of assignment?

Mr. JUSTICE BOYER: Yes. There are several grounds of appeal, and finally there is a disposition. An appeal may be taken with the permission either of a judge of the Superior Court or a judge of the Court of Appeal. Personally, I do not like the idea of having to sit on my own judgment and decide whether the party should go to appeal or not. I think it would be safer to leave it to the court of appeal, which would have a clear mind about the matter.

The security on appeal is fixed at $100. There may be an appeal involving thousands of dollars, even millions, and the guarantee of costs would be only $100. It is true there is a disposition on the part of the Court of Appeal to increase the security, but I think this minimum should be increased.

Hon. Mr. HAIG: It should be under your suggestion that all questions should be settled in one appeal.

Mr. JUSTICE BOYER: That cannot always be the case.

Hon. Mr. HAIG: No.

Mr. JUSTICE BOYER: But on any appeal any creditor dissatisfied can appeal, and all he has to do is to put up $100. Then the matter may stand over for three or four months, and if the long vacation intervenes the delay may extend over six or eight months.

I think a difference should be made clearly between fees on court proceedings and fees for assistance of the trustees. There is a limit in the law as to the costs, but it is not clear which costs. It is all right to limit them, but on the other hand there are cases like the Stadacona Mines Company, where there have been any number of petitions contesting certain claims and notes, each of them involving amounts from $10,000 to $20,000. Naturally no lawyer would carry on the contestation if there is a limit of 10 per cent of the assets of the

corporation, as finally the assets may not even be $10,000. As to the fees for instructions to the trustee, I am perfectly in accord with the limit put down, because I find the fees are generally exaggerated.

As to the disbursements, the fees to be paid on procedure, I do not like the provision as it stands, for this reason: there is no distinction made according to the amount involved in the bankruptcy. On a petition in bankruptcy the fee is the same whether the assets are nil or amount to $1,000,000. The costs going to the Crown, the registrar and to the lawyer are not classified at all. I think that should be remedied.

I may say that I have not had time to consider the bill very closely, especially not to compare it with the Act, but so far what I have stated have struck me as the points that should be brought to your attention. If there are any other points you would like me to clear up I shall be glad to do so.

Hon. Mr. KINLEY: Would you care to discuss section 143, on page 91 of the bill?

Mr. JUSTICE BOYER: What about it, sir?

Hon. Mr. KINLEY: I am not a lawyer, but I have been reading the discussions in the House of Commons about the liberty of the subject under Magna Carta, and I should like to quote the report at page 1376 of the Commons Hansard.

Mr. JUSTICE BOYER: There is no change there, you know.

Hon. Mr. KINLEY: I know. I just want to show what the Minister of Justice said on this thing, when answering critics who had criticized the espionage law. Let me read the report:

> Mr. ST. LAURENT: Then entering another field let us look at the Brankruptcy Act. Sections 127 to 138 provide that if a man becomes bankrupt and his creditors are disappointed at his allowing something to happen that was not intended to happen he can be examined under oath and asked to explain how and why some of his creditors are to be exposed to the loss of some dollars. Section 138 of the Bankruptcy Act provides:
>
> > Any person liable to be examined under the provisions of the ten last preceding sections shall be bound to answer all questions relating to the business or property of the debtor, and as to the causes of his insolvency and the disposition of his assets, and shall not be excused from answering any question on the ground that the answer may tend to criminate the person so examined.
>
> Mr. SMITH (*Calgary West*): What statute is that?
>
> Mr. ST. LAURENT: The Bankruptcy Act, section 138.
>
> Mr. DIEFENBAKER: Is not the person who is being examined there entitled to the protection of the Canada Evidence Act?
>
> Mr. ST. LAURENT: Apparently not.
>
> Mr. DIEFENBAKER: Against the use of the evidence?
>
> Mr. ST. LAURENT: I am not stating it as my opinion that he would not be treated in the same way, but Parliament went to the length of saying that he would not be excused from answering questions about the reasons for his insolvency because he might thereby incriminate himself.
>
> Mr. FLEMING: Will the Minister not tell the committee that these examinations are carried on before a court officer and that the bankrupt always has the benefit of counsel.
>
> Mr. ST. LAURENT: If it is a benefit, I assume counsel may be present. But the position is that the debtor is called upon to explain why it is this situation of his which was not supposed to happen and which his creditors did not expect to happen, and which may cause his creditors to lose some one or more dollars did come about. It is not only the Canadian

Parliament that has made this provision because the Bankruptcy Act of 1914, chapter 59 of the statutes of the Parliament of the United Kingdom of that year, provides in section 15 for a similar situation there.

Now, section 143 of this bill says:—

> Any person being examined hereunder shall be bound to answer all questions relating to the business or property of the bankrupt, and as to the causes of his insolvency and the disposition of his assets, and shall not be excused from answering any question on the ground that the answer may tend to criminate the person so examined or to establish his liability in any civil action, and all or any of the questions and answers upon any examination under this Act may be given in evidence against the person so examined on any charge of an offence agaist this Act and in any civil action or proceeding brought by, or on behalf of, the trustee or of any creditor or creditors entitled to take such action or proceedings.

This comes to my mind, Mr. Chairman, because of my business experience and also my experience in parliamentary life. Take the Compensation Act and other legislation, those who are to administer it want some kind of blanket control that restricts the liberty of the subject. The principle seems to be that you are presumed to be guilty until you have proved your innocence—something entirely contrary to our traditions. We were talking about the Mounted Police this morning. I have the greatest respect for the Mounted Police, but in my experience what those men would do in remote sections of the country, in the days of rum-running, hardly looked like justice. What is the use of talking about the liberty of the subject and the Magna Carta if we require a man to incriminate himself?

Hon. Mr. HAIG: This has got nothing to do with liberty of the subject.

Hon. Mr. KINLEY: Under this law a man can be called upon to give evidence to incriminate himself.

Hon. Mr. HAIG: Why not, if a man has been carrying on a crooked business? Suppose I am a merchant and have stolen goods and turn them over to somebody. The trustee gets after me, and when he has me under examination, he asks, "What did you do with those assets?" I must admit what I did with them. The person who does a crooked thing like that is the only one who can tell about it.

Hon. Mr. KINLEY: Anyone who is brought into court on a charge may be proved guilty by the evidence, but you cannot make a man prove himself guilty.

Hon. Mr. HAIG: Under the bankruptcy law of any country there is no way to get the kind of evidence I am referring to except out of the man himself. That has always been the law.

Mr. JUSTICE BOYER: Yes.

Hon. Mr. KINLEY: In Great Britain and other countries where financial interests were strong the law was always very arbitrary. To make a man prove himself guilty is contrary to the principles of justice. Even if a man is a murderer you have got to prove him guilty, but under this law, which deals with a money matter, he is required to prove himself guilty.

Hon. Mr. HAIG: It seems to me we are discussing a question of policy now, and I do not think his Lordship would care to comment upon that.

The CHAIRMAN: I suggest, Senator Kinley, that this is a matter of public policy, and we can hardly ask his Lordship to deal with that.

Hon. Mr. KINLEY: He is an expert witness, and I wanted him to give us the benefit of his knowledge on this feature of the law.

Mr. JUSTICE BOYER: It is the old law. I did not consider it especially, but I find it is very good law. It is very hard to get the truth out of a

bankrupt sometimes, and but for the provision that he cannot claim any privilege you would never get at the facts. If the debtor is honest he will answer all right, and if he is a crook I do not think he deserves any mercy.

Hon. Mr. KINLEY: He is not a crook till he is proved to be one. This law seeks to get the proof out of his own mouth.

Mr. JUSTICE BOYER: That may be, but there may be a prima facie case against him.

There is another matter. I understand that subsection 10 of section 23 has been a subject of some discussion. That subsection allows the judge, when the parties cannot agree on a compromise, to impose one on the parties. That is a pretty radical departure from the old law. There is one suggestion I would make, namely, that if you allow that subsection to stand it should be restricted to public utility companies. In that case the public is interested. On the other hand, if the public has rights, it must also have some obligations, and if you cut down the rights of creditors and shareholders there might be a question of increasing the rates to be paid by the public.

I believe that decentralization is another point that came up.

Hon. Mr. HAIG: Yes.

Mr. JUSTICE BOYER: So far in Quebec only two registars have been appointed, one in Quebec and one in Montreal. Decentralization might entail considerable delay. A judge sits in the rural districts only three or four times a year.

Hon. Mr. HAIG: It is the same in Manitoba.

Mr. JUSTICE BOYER: Again, in the act there is a provision for appointing a judge especially to handle bankruptcy matters. Well, if one judge is appointed especially to handle bankruptcy matters he cannot be attending to them all around the province, especially in the province of Quebec, where we are short of judges already. In commercial matters, at least, if the debtor is from Montreal, practically all the creditors will be in Montreal, with perhaps a few in the rural districts. And if the debtor is in Quebec, you will find practically all the creditors there. So as the matter stands now, it is satisfactory.

Hon. Mr. HAIG: Mr. Chairman, I would suggest that the committee adjourn.

The committee adjourned at 1 p.m., to resume when the Senate rises.

The committee resumed at 4 p.m.

Hon. Mr. HUGESSEN, Acting Chairman.

The ACTING CHAIRMAN: Does the committee wish to continue asking questions of Mr. Justice Boyer?

Hon. Mr. KINLEY: Perhaps Mr. Justice Boyer could tell us how the Companies' Creditors Arrangement Act and the Bankruptcy Act are related.

The ACTING CHAIRMAN: I was going to ask his Lordship to give us his views on whether it is a good thing to abolish the Companies' Creditors Arrangement Act and the Winding-up Act in so far as it relates to insolvent companies, and to have the provisions in regard to bankruptcy placed in one statute. That is really the effect of this legislation.

Mr. JUSTICE BOYER: I see no objection to having the provisions incorporated in one statute. Originally when the Bankruptcy Act was first passed you could ask for a compromise without going through bankruptcy, but that provision was abolished later on. It is of course for you to say, but I would suggest that the Winding-up Act remain as a law for winding up companies that are not insolvent and which come within the jurisdiction of the federal parliament, that is companies incorporated by federal statutes and doing business in more than one province.

I want to correct a statement I made this morning, Mr. Chairman. I stated there should be an appeal from any decision of the Superintendent of

Bankruptcy. After reading more of the bill I find there is provision for an appeal, in section 91, subsection 8.

One thing I forgot is the provision that the trustee may carry on the business of the bankrupt. That is section 47, subsection 1, paragraph (*b*). I find the provision is somewhat abused, and I would suggest that a limited period be stated for the carrying on of business by a trustee, except by leave of the court.

Hon. Mr. FOSTER: Then he could apply for an extension?

Mr. JUSTICE BOYER: Yes.

Hon. Mr. FOSTER: And give his reasons?

Mr. JUSTICE BOYER: Yes. I will give you an example. A company in Montreal has been under the Bankruptcy Act for eight, if not ten, years. The trustees have been carrying on the business all that time, and not only the business of that company, but they went into the manufacturing of hardwood flooring, they opened a coal and wood yard and so on; and during that time there has never been a dividend paid.

Hon. Mr. FOSTER: Whom are they working for?

Mr. JUSTICE BOYER: Creditors who are supplying materials are often appointed as inspectors and they want to keep the business going. The trustees can always get credit from the bank, and the creditors have no objection to the business being carried on, because they know they are secure. The assets may not be sufficient to pay the debts in full, but they are sufficient to pay for whatever is sold by the inspectors.

Hon. Mr. EULER: The Abitibi Company was in the receiver's hands for ten years.

The Deputy CHAIRMAN: Longer than that, I think.

Mr. JUSTICE BOYER: Section 123 deals with restricted creditors. Nowadays a large number of commercial ventures are made in the guise of companies: that is, one man incorporates a company and he is really the sole owner. There have to be three persons interested in a company before a charter can be obtained, but the real owner gets a couple of members of his family or employees to join him. If the company is running into difficulty, the man who has the main interest advances money to the concern, which is practically his own, and when there is a bankruptcy you find he is the largest creditor.

When there is a bankruptcy you find he is the largest creditor. I think his claim should be restricted and put in the same class as the others. There may be a question of deciding what is the actual situation. It is not always a one-man company, but it may be controlled by one man with more than two or three shares.

Hon. Mr. HAIG: A family corporation.

Mr. JUSTICE BOYER: Yes. It might be worded to mention relatives, employees and others associated with the principal shareholders.

Hon. Mr. KINLEY: Who can be preferred creditors under the Bankruptcy Act?

Mr. JUSTICE BOYER: There is a list of them. I am glad to say that has been clarified in the bill. Formerly there was a lot of litigation as to what the purpose would be between federal and provincial governments, municipalities, and so on. Now the law provides clearly for the whole thing.

Hon. Mr. KINLEY: How about the banks?

Mr. JUSTICE BOYER: They stand like everyone else.

Hon. Mr. KINLEY: They are usually preferred.

Mr. JUSTICE BOYER: The banks have their liens under the Bank Act. But so far as their lien is concerned, they are in the same position as the other parties

if they knew the bankrupt was insolvent at the time they took the lien. I have had a number of transactions where banks were concerned.

Hon. Mr. KINLEY: I am just asking for information. Let us suppose we are the creditors of the concern in bankruptcy, and you four gentlemen up there have big preferred claims and want to carry on the business, and the rest of us have smaller claims which are not preferred. What voting power have they? Do they vote by the size of their accounts, and thus control the situation?

The ASSISTANT CHAIRMAN: Which Act are you referring to, senator?

Hon. Mr. KINLEY: I am referring to either the Bankruptcy Act or the Creditors' Arrangement Act. Suppose we are all creditors here trying to decide what is best to be done. The four up there have all preferred claims, big claims, and the rest of us have unpreferred claims. We might want to wind up the business, and they might want to carry it on. What power have they over us?

Mr. JUSTICE BOYER: As far as the voting is concerned, the preference credtors are generally what you call secured creditors, and as secured creditors they can vote. Suppose one man is a creditor for $10,000, and he estimates his security at $5,000. Then he is a creditor for $5,000 and he can vote accordingly.

The ACTING CHAIRMAN: Is the voting according to the amount of the claims or the number of the creditors?

Mr. JUSTICE BOYER: I forget now.

Hon. Mr. HAIG: As the claims increase you do not get as many voting as for the smaller creditors. For instance, if I have a claim for $1,000 and you have one for $5,000, you have not five times as many votes as I have; you probably have three times as many.

Mr. REILLEY: You would have three votes, he would have about six.

Hon. Mr. KINLEY: That is the safeguard there.

Hon. Mr. HAIG: Yes. There is another position which I think the judge would know of.

The ACTING CHAIRMAN: Preferred creditors.

Hon. Mr. HAIG: Yes. Not only can a preferred creditor value his securities as the judge said, but he can add 10 per cent to his security and if the trustee takes over the claim he must take it over at that value.

Mr. REILLEY: I do not think so.

Hon. Mr. HAIG: He cannot take over my claim without paying me the extra value.

Mr. REILLEY: No. I do not think that has ever been in the Act in that way. No creditor who files a claim as a secured creditor can do that. You can offer him his dollars, and he has got to take them.

Hon. Mr. HAIG: No.

Hon. Mr. FOSTER: You said there was a provision in this bill that the bankrupt can put a proposition before his creditors before making an assignment.

Mr. JUSTICE BOYER: Yes.

Hon. Mr. FOSTER: Under the Act he cannot do that.

Mr. JUSTICE BOYER: He had to go into insolvency, which meant a lot of costs before making an assignment.

Hon. Mr. FOSTER: This gives him a better chance.

Mr. JUSTICE BOYER: Yes.

The Acting CHAIRMAN: You favour that amendment?

Mr. JUSTICE BOYER: Yes, I do.

The ACTING CHAIRMAN: You don't think it is open to abuse as it was apparently in old days?

Mr. JUSTICE BOYER: There are provisions in the bill which might prevent fraud. Of course you cannot always prevent it.

Hon. Mr. FOSTER: Is there any provision in this bill with regard to the residence of the trustee?

Hon. Mr. HAIG: You had better ask Mr. Reilley that question.

Hon. Mr. FOSTER: In our province this has been our experience. A man in business in New Brunswick would assign to a man in Montreal. There would be quite a number of creditors in Montreal and they would come down and a non-resident man would be appointed trustee. So you had a man in Montreal in control of a business in New Brunswick. This absentee management of the bankruptcy is not always in the best interests of the creditors generally. Is that provided for in the bill?

Mr. REILLEY: There has not been any change in that regard; but the system of licensing has done away with almost all of that trouble. I have only known of one or two cases of that nature in the last ten years, because a trustee has to get a licence from each province.

Hon. Mr. FOSTER: I know.

Mr. REILLEY: A trustee in Quebec can get a licence in Ontario if he pays the extra fees.

Hon. Mr. FOSTER: That absentee management was prevalent at one time.

Mr. REILLEY: Yes, I know.

Mr. JUSTICE BOYER: If the creditors find it to their interests to appoint a non-resident trustee they will do so.

Hon. Mr. KINLEY: Could not the court appoint the trustee?

Hon. Mr. HAIG: No.

Hon. Mr. KINLEY: The big creditors appoint the trustee.

Hon. Mr. HAIG: No. They only appoint the trustee because they have the biggest interest and think they can run the business to the best advantage through that trustee. I have had a lot of experience in bankruptcy work in Manitoba. They always pick out the three largest creditors to be inspectors. They do so because they have the largest interest—I am not talking of the unsecured creditors—and by and large they generally run the business to the best advantage. If you had it any other way you would have all the little fellows forcing the larger creditors to buy them out. Abitibi is a good illustration of what can be done in this way. Abitibi was managed in this way for ten or twelve years, and at last it swung out and is now doing well; whereas had the company been cleaned up at that time every little fellow would have lost every dollar, and so would the large fellow too. I think the present table of voting gives a pretty fair bill.

The ACTING CHAIRMAN: Are there any other questions to be asked His Lordship?

Hon. Mr. KINLEY: It is the general impression that bankruptcy is awfully wasteful and the expenses are too heavy.

Mr. JUSTICE BOYER: I agree with you. I think the government fees, the trustees' fees and the lawyers' fees are always too high. The government takes advantage of it. I will give you an illustration. On a petition in bankruptcy the government exacts $4.50, and everything is done by petition. That means in any bankruptcy there may be quite a number of petitions. Originally the fees all went to the registrar, and he made heaps of money. There is a disposition in Quebec that the lawyers interested should meet to draft the notes of judgment and to engross them. In our province there is no such disposition. The judge gives his reasons for judgment when he rises, and if judgment is given from the bench it is drafted by one of the court employees without any

special charge. Previously the judge would simply put on the petition "petition granted" and the registrar would draw a form of judgment. He considered that he was instrumental in drafting the judgment or in having it drafted by some underling, and was entitled to a fee for settling and drafting the judgment, so he charged $4.50. When the law was changed to give the money not to the registrar but to the provincial government, they were very careful to carry on the same practice.

Hon. Mr. HAIG: I think I speak for all the members of the committee when I say that we are grateful to Mr. Justice Boyer for meeting with us to-day.

The ACTING CHAIRMAN: Thank you very much, My Lord.

The committee adjourned.

1946

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING COMMITTEE ON BANKING AND COMMERCE

to whom was referred the Bill A-5, intituled:
"An Act respecting Bankruptcy."

No. 3

THURSDAY, JUNE 20, 1946

CHAIRMAN

The Honourable Elie Beauregard, K.C.

WITNESSES:

The Honourable Mr. Justice Urquhart, Supreme Court of Ontario.

Mr. W. J. Reilley, K.C., Superintendent of Bankruptcy

Mr. Terence Sheard, representing The Dominion Mortgage and Investments Association.

OTTAWA
EDMOND CLOUTIER
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
1946

ORDER OF REFERENCE

EXTRACT from the Minutes of Proceedings of the Senate for 13th May, 1946.

Pursuant to the Order of the Day, the Honourable Senator Robertson moved that the Bill (A-5), intituled: "An Act respecting Bankruptcy", be now read a second time.

After debate, and—

The question being put on the said motion.

It was resolved in the affirmative.

Ordered, That the said Bill be referred to the Standing Committee on Banking and Commerce.

L. C. MOYER,
Clerk of the Senate.

STANDING COMMITTEE ON BANKING AND COMMERCE

The Honourable ELIE BEAUREGARD, K.C., *Chairman*

The Honourable Senators

Aseltine	Euler	Marcotte
Aylesworth, Sir Allen	Fallis	McGuire
Ballantyne	Farris	McRae
Beaubien (Montarville)	Foster	Michener
Beauregard	Gershaw	Molloy
Buchanan	Gouin	Moraud
Burchill	Haig	Murdock
Campbell	Hardy	Nicol
Copp	Hayden	Paterson
Crerar	Howard	Quinn
Daigle	Hugessen	Raymond
David	Jones	Riley
Dessureault	Kinley	Robertson
Donnelly	Lambert	Sinclair
Duff	Leger	White
DuTremblay	MacDonald (Cardigan)	Wilson—(48).

MINUTES OF PROCEEDINGS

Thursday, 20th June, 1946.

Pursuant to adjournment and notice the Standing Committee on Banking and Commerce met this day at 10.30 a.m.

Present: The Honourable Senator Beauregard, Chairman; The Honourable Senators Aseltine, Ballantyne, Burchill, Dessureault, Donnelly, Duff, Euler, Gouin, Hayden, Howard, Jones, Kinley, Lambert, Leger, McGuire, Molloy, Moraud, Paterson, Robertson, Sinclair and White—22.

Bill A-5, "An Act respecting Bankruptcy," was again considered.

In attendance:

The official reporters of the Senate.
Mr. W. J. Reilley, K.C., Supt. of Bankruptcy.

The Honourable Mr. Justice Urquhart, Supreme Court of Ontario, Toronto, Ontario, was heard and submitted a memorandum on several phases of the legislation proposed by the Bill.

Mr. W. J. Reilley, K.C., Superintendent of Bankruptcy, was heard with respect to the number of failures in Canada during 1945.

Mr. Terence Sheard, Assistant General Manager, National Trust Company, was heard and submitted a brief on behalf of The Dominion Mortgage and Investments Association.

At 12.20 p.m., further consideration of the Bill was postponed.

The Committee then adjourned to Wednesday, 26th June, instant, at 10.30 a.m.

Attest.

R. Larose,
Clerk of the Committee.

65440—1½

MINUTES OF EVIDENCE

THE SENATE,

OTTAWA, Thursday, June 20, 1946.

The Standing Committee on Banking and Commerce, to whom was referred Bill A-5, an Act respecting Bankruptcy, met this day at 10.30 a.m.

Hon. Mr. BEAUREGARD in the Chair.

The CHAIRMAN: Gentlemen, the Honourable Mr. Justice Urquhart, of the Supreme Court of Ontario, has been good enough to come here to give us the benefit of his experience with and study of the Bankruptcy Act, the proposed amendments to which, in Bill A5, have been referred to this committee.

Hon. Mr. JUSTICE GEORGE A. URQUHART, of the Supreme Court of Ontario: Honourable senators, I come here to-day to speak, not on the whole Act but on several phases of it which interest me as a Bankruptcy Judge and to which I think I may say generally that I take exception. I appreciate that as a revision of the Statutes of Canada is due in about 1947, the consolidation of acts is a good thing. Yet, speaking generally, it seems to me that the Bankruptcy Act in its present form is one that, with a few minor exceptions, needs little change. I say that because in the various provinces, after an administration of nearly thirty years, a very considerable body of law has been built up, and the course of the law has been pretty well charted by the efforts of the great Judges who have gone before which make the work of present Judges in Bankruptcy, like myself, comparatively easy. Our Bankruptcy Act, as you all know, is to a large extent based on the Bankruptcy Act of England; and in that country too there has been built up a considerable body of law, which is of great interest to us and to which we look for guidance. So I look rather askance at the somewhat drastic changes that have been proposed in this bill.

I have prepared a memorandum which I would be happy to file if that meets with your approval. (*See Appendix A.*) But there are three phases of the bill that I wanted particularly to discuss with you. I will begin with the third, because it is the one of the greatest interest to the High Court in Ontario and to me as the present Bankruptcy Judge of that Court. I have been sole Bankruptcy Judge of the province now for about eight and a half years. I refer to the putting of twenty-one bankruptcy offences mentioned in section 200 into the exclusive jurisdiction of the High Court, I presume without a jury. It will be noted that section 149 (1) (*f*) which is one of the new clauses, gives the court plenary power and jurisdiction:—

> to arraign, admit to bail, try and punish offenders for offences committed under this act.

The bill does not say that this is to be done without a jury, but I would assume the intention of the draftsman was that a Judge of the highest trial court shall try without a jury persons charged with what I should think are comparatively minor offences, for which the penalty is not more than two years. All of these are indictable offences.

Hon. Mr. HAYDEN: May I ask a question here?

The CHAIRMAN: Yes.

Hon. Mr. HAYDEN: I notice subsection (3) of section 159 provides for appeals to the Supreme Court of Canada. I take it that means appeals—

Mr. Justice URQUHART: From the Court of Appeal, I should think.

Hon. Mr. HAYDEN: In these criminal matters?

Mr. Justice URQUHART: I do not know what that means, to tell the truth.

Hon. Mr. HAYDEN: And then there is a question whether the appeal is to be subject to the ordinary provisions of the Criminal Code with reference to criminal appeals.

Mr. Justice URQUHART: I do not know. It is not made clear.

If you look at the notes to section 159, you will see it is stated that the object of the supplementary jurisdiction conferred under this section is to have all matters or disputes disposed of by the court exercising bankruptcy jurisdiction. Then the notes go on to say:—

> The most unsatisfactory phase of bankruptcy administration relates to the punishment for offences enumerated in the act. Experience indicates that in so many cases magistrates and judges of inferior courts do not fully appreciate the significance of the offences as related to commercial morality with the result that creditors at large are almost thoroughly discouraged by reason of the failure to obtain proper and sufficient penalties for offences committed.

Hon. Mr. HAYDEN: Have you found in your experience that bankruptcy offences vary very much in the type of fraud involved as compared with ordinary criminal fraud?

Mr. Justice URQUHART: I do not think so on the whole.

You will notice that twenty-one offences are set out in section 200. For instance, these offences include the bankrupt not discovering to the trustee all his property, or not delivering up to the trustee all real and personal property in his custody or under his control or not delivering up to the trustee all books, documents, papers and writings in his custody, etc. These are all smaller offences than those of fraud in the Criminal Code.

In the opinion I am about to express I have the concurrence of Chief Justice McRuer of our court, who took a great interest in this matter and collaborated with me in preparing the memorandum on this particular point. This proposed legislation we think is not only objectionable in form, as I have indicated in my memorandum, but it would be most difficult to work out. As I have said, section 200 creates twenty-one indictable offences. I have not compared them with the offences set forth in the Act, but I think they are very similar.

It is to be noted that they are indictable offences, and that the Criminal Code provides procedure for trial of such offences. The Supreme Court of Ontario now has jurisdiction to try indictable offences.

Hon. Mr. LEGER: There is nothing new in section 200.

Hon. Justice URQUHART: No. I am not objecting in the least to section 200. What I am objecting to is that what may be considered comparatively minor offences, and well within the jurisdiction of magistrates and county judges, should be placed under the jurisdiction of the Supreme Court. In a minute or two I will come to another reason that in my view lends added strength to this objection.

The Court of General Sessions has power to try all indictable offences, except those mentioned in section 583 of the Criminal Code; these must be tried before a judge and jury of the High Court, and include such grave offences as treason, murder, manslaughter, rape, and a few others. In all cases except a special class of case, which, if I remember rightly, is provided for by section 598 of the Code, the accused has the right to elect whether he will be tried by a magistrate

or by a judge and jury at the general sessions. Should it happen, however, that a man accused of an indictable offence in awaiting trial in the county jail, and a Judge of the Supreme Court is sitting in the county with a jury, he would have to try the accused, even though the offence might be comparatively insignificant. There is no objection to the Supreme Court dealing with the case in those circumstances.

The Supreme Court now has jurisdiction to try these offences only if the Attorney General of the province considers that they are important enough to direct the indictment to be laid and the trial to be by jury.

Is it intended by this section that a man charged with what in the scale of offences is a comparatively minor offence shall be tried without a jury against his will? It is suggested in the notes to the section that offenders would be tried by a judge of the highest trial court, and that thus they would not be deprived of their rights under the ordinary criminal procedure. While that is quite flattering to the judges, it might equally be said that murder, manslaughter or any other grave offence could be tried by such a judge and that would be all right; but the accused would be deprived of his right to be tried by a jury. The only cases in the Criminal Code which are tried without a jury are those dealing with trade conspiracies, section 598.

Hon. Mr. LEGER: Does the section impose an obligation on the bankruptcy judge to hear and interpret offences?

Mr. Justice URQUHART: Not as I read the section.

The purpose of this section appears to be that we should try those offences and the offenders would be deprived of their right to be tried by a jury. If, for instance, a man is accused of armed robbery, he has the right to be tried by a jury. He can be sentenced by a magistrate or judge of the county court, as the case may be, to imprisonment for life and whipping. There are numerous other offences for which life imprisonment can be imposed by county judges, and even by magistrates. Yet by this bill that jurisdiction would be taken away from them and transferred to the highest court in the case of offences not involving a penalty of more than two years.

There is another difficulty. The thirteen judges of the Supreme Court of Ontario have to cover forty-eight counties, and they sit at specified times throughout the province. As I have said, unless we find a man in jail there is no compulsory jurisdiction for us to act except in certain unusual cases. I can see no reason why the magistrates and county judges should not continue to try offenders charged with these indictable offences. If the Attorney-General considers any case of such importance as to warrant it he can order it to be tried before a judge of the Supreme Court.

Hon. Mr. ASELTINE: Has there been any dissatisfaction with the present practice?

Mr. Justice URQUHART: I am coming to that. One of the reasons for the proposed change is that creditors seem to think (*a*) they do not get a sufficient number of convictions, and (*b*) that the penalties on conviction are not adequate. Accordingly, there has been a tendency on their part to criticize the present procedure. Speaking for myself, I certainly will not convict a man who in my opinion is not guilty, neither will I impose a penalty that I do not think is justified by the nature of the offence, just because creditors might think that a bankrupt ought to be convicted and punished to the extent that they might deem sufficient. If this bill is enacted are we not going to subject the highest court in the province to criticism? Heaven knows there is already considerable criticism of our courts and other institutions. I do not think it would be advisable to add one more object of criticism.

Hon. Mr. HAYDEN: It is simply a question whether for the enforcement of the provisions in this bill it is necessary to have the High Court judges try

fraudulent bankrupts for what in many cases would be comparatively minor offences, while magistrates and county court judges have jurisdiction to try what I regard as being much more serious offences.

Mr. Justice URQUHART: Quite so. As I have said, magistrates and county court judges can sentence a man to jail for life and to be whipped.

Hon. Mr. HAYDEN: A magistrate, with the consent of the accused, can try him for almost any indictable offence and sentence him to very long terms of imprisonment.

Mr. Justice URQUHART: Yes.

Hon. Mr. ASELTINE: And do it much more speedily.

Mr. Justice URQUHART: Yes.

Hon. Mr. ASELTINE: This proposed system would seem to me to be very cumbersome and likely to cause a lot of delay.

Mr. Justice URQUHART: Yes. In the city of Toronto, where the courts are very busy, the proposed change would cause a considerable amount of delay, while out in the smaller towns, for instance, Kitchener, seeing that Senator Euler is present—

Hon. Mr. EULER: There are no offences committed there of course.

Mr. Justice URQUHART: Supposing there was a sitting of the Supreme Court on the 15th of January, for the trial of cases, and there was not another sitting until June, in the event of an offence being discovered on the 25th of January, the accused could not be placed on trial until June.

Hon. Mr. ASELTINE: That would apply particularly in the western provinces, where we have only a few judicial districts and two sittings of the Supreme Court every year.

Mr. Justice URQUHART: Quite so.

Hon. Mr. HAYDEN: That raises another point. I have not studied this section thoroughly, but its effect may be to take away from the accused his right of election under the Code to a speedy trial.

Mr. Justice URQUHART: Yes.

Hon. Mr. LEGER: It seems to me that the judge who has had civil matters before him would be more or less—and I am using these terms mildly—biased or prejudiced in trying these offences.

Mr. Justice URQUHART: There is that danger. Of course, there can always be an appeal against a sentence. The fact that there have not been appeals against sentences indicates that the Crown Attorney is satisfied, or that it is felt there was no purpose to be served in trying to increase the sentence by an appeal to the Court of Appeal.

The CHAIRMAN: I understand that the Supreme Court would be given power to dispose of those offences, but would not be given exclusive power to do so.

Mr. Justice URQUHART: I am not sure about that point. I have read over the bill, and I think the intention was to give us exclusive power, but it is not so expressed. Of course, we have the power under certain circumstances.

Hon. Mr. EULER: We might ask the Legal Officer what was the intention.

Hon. Mr. HAYDEN: What was intended does not matter; it is what was said. Section 159 has this to say, that these courts

> are invested in law and in equity with original, audiliary, ancillary and *plenary* jurisdiction in bankruptcy and in all matters of proceedings authorized by or under this act during their respective terms—

Hon. Mr. LEGER: Those powers of course are new?

Mr. Justice URQUHART: They are new under the Bankruptcy Bill, but we have those powers now.

The CHAIRMAN: I take it that you do not approve of the practice under this law to have a judge of the Supreme Court review these cases?

Mr. Justice URQUHART: Personally I think it is not the proper court.

Hon. Mr. LEGER: The court is not organized for that purpose.

Mr. Justice URQUHART: It is organized to try any criminal cases, but by section 583 of the Code we try only the major criminal cases, which keep us busy enough.

Hon. Mr. EULER: Mr. Chairman, not being a lawyer I hesitate to intervene in this discussion. It seems to me the point you have raised is an important one. These cases may not be referred to as trivial, but they are not as important as others, and in many places such as Kitchener, where there are only two sittings of the High Court a year, if these cases are left to the Supreme Court there would be no means provided for speedy adjudication; whereas if they were tried by the County Judges they could be dealt with almost immediately. It seems to me the matter of delay is an important one.

Mr. Justice URQUHART: I think so.

Hon. Mr. EULER: It should be made clear that it is not the exclusive jurisdiction of your court.

Mr. Justice URQUHART: If it is decided to include section 159 my fear is that the change in practice would give rise to innumerable irresponsible prosecutions. . The launching of prosecutions should be closely supervised by the court. Section 206 (2) (3) seems to leave this matter in the hands of the court. It is my belief that in all cases the responsibility for the prosecution of any indictable offence, including these 21 bankruptcy offences, should be the responsibility of the Crown Attorney of the county. Prosecution should not be left in the hands of a trustee's solicitor, who might have an axe to grind. He may, but not in many cases, carry on the prosecution in a way that is suggested as being objectionable by the Court of Appeal in our province in the case of Rex vs. Charmandy, reported in 1934 Ontario Reports at page 208. If the matter is left to the discretion of ordinary solicitors, many men who are inexperienced in quasi criminal matters will be handling these prosecutions.

Under section 206 (4) if the prosecution is under the Criminal Code the Crown Attorney must be consulted and the charge laid by him. The practice in Ontario, and it has worked satisfactorily as far as I am concerned, has been to come before the Bankruptcy Judge in Toronto and place all the facts before him. If in his opinion a proper case is justified on the facts, supported by documents and affidavits, the trustee is authorized to lay a charge on the advice of the Crown Attorney. That is the responsibility of the Crown Attorney, who is the officer appointed by law in our province to handle indictable offences. In that way you have an officer who understands the procedure in these cases, who is impartial and has no axe to grind and who will conduct the prosecution, I have no doubt, to the best of his ability. I was a Crown Attorney many years ago for a period of five years and I handled a number of these cases. I know that they are very difficult. It is sometimes a problem to demonstrate to magistrates and others the guilt of the accused.

May I come again to the question of court sittings in the county towns. In most instances we have only one week in these towns and have enough work to consume all the time allotted before passing on to another town. If additional prosecutions are put upon us it would certainly very seriously interfere with our work. It has been suggested by Senator Euler that the County Judges are located in the towns, they are used to handling indictable offences of this sort

and they can conduct speedy trials. It seems to me that practice should be followed. The fact that creditors are sometimes critical is something I think should not be taken into consideration.

Hon. Mr. LÉGER: The only feature you object to is the provision of Section 159 (*f*)?

Mr. Justice URQUHART: There is another clause in Section 159 (1) (*a*):—

> to hear and determine all matters in dispute arising out of the administration of an estate or in which any interest of the estate is involved or to which the trustee is a party, or in which the trustee is a claimant against any other person.

It quite often happens in bankruptcy matters that either a trustee is proceeding against some private person on behalf of the estate, or some such person is making a claim against the estate. It is often difficult for a judge to determine whether it is a matter of bankruptcy or a case that should be dealt with in the regular courts. The practice has been that where an outsider is involved, the matter shall be brought before the regular courts. There is a decision of the English courts to that effect in the case of Ellis *v.* Silber (1873), Law Reports, 8 Chancery, page 83, in which it is stated at page 86 as follows:—

> That which is to be done in bankruptcy is the administration in bankruptcy. The debtor and the creditors, as the parties to the administration in bankruptcy, are subject to that jurisdiction. The trustees or assignees, as the persons entrusted with that administration, are subject to that jurisdiction. The assets which come to their hands and the mode of administering them are subject to that jurisdiction; and there may be, and I believe are, some special classes of transactions which, under special clauses of the Acts of Parliament, may be specially dealt with as regards third parties. But the general proposition, that whenever the assignees or trustees in bankruptcy or the trustees under such deeds as these have a demand at law on in equity as against a stranger to the bankruptcy, then that demand is to be prosecuted in the Court of Bankruptcy, appears to me to be a proposition entirely without the warrant of anything in the Acts of Parliament, and wholly unsupported by any trace or vestige whatever of authority.

That is another phase of the section which I think should be left as it is.

The next subject about which I should like to speak is the proposed decentralization of the Bankruptcy Court. In Ontario we now have one bankruptcy office located in the city of Toronto. There are some receivers appointed under the Bankruptcy Act, but that is the only office of record that we have ever had. I would not like to see the process of decentralization invoked and forty-seven jurisdictions created. We have records for years, and those records will continue to build up. There is one place of record in the province where searches can be made. For instance, a person who is passing a title must search for bankruptcy against the man from whom he is buying. Having only one office also is conducive to uniformity of practice.

Section 160 of the act provides that the Local Registrars, forty-seven in number, shall be Registrars in Bankruptcy, and that the judicial powers of the Registrar are to be exercised by the Master of the court, but if there be no Master at that point, by the registrar if he is a duly qualified lawyer, or otherwise by the county judge. There is now power under the present act to appoint extra registrars in bankruptcy if necessary. I think it is in the public interest that there should be only one office of record for the province. This practice has been in vogue, as I said, since about 1920. If all offices were made offices of record it might require forty-seven searches to determine whether a man is bankrupt or not.

Hon. Mr. ASELTINE: Could that situation not be overcome by a system of double filing as is done in Surrogate matters?

Mr. Justice URQUHART: Yes; the information is reported to Toronto at the present time.

Hon. Mr. ASELTINE: In Surrogate matters one can make a search with the Surrogate Registrar at the provincial capital and can get all the information there no matter where letters of administration were applied for.

Mr. Justice URQUHART: We can do that in Toronto, I think.

Hon. Mr. HAYDEN: Is there enough work for forty-seven different jurisdictions?

Mr. Justice URQUHART: I do not think there would be. The bulk of bankruptcy work is in the city of Toronto, and most of the creditors are there or in the larger centres.

Hon. Mr. ASELTINE: Have you any record of the number of bankruptcies in the province of Ontario last year?

Mr. Justice URQUHART: There were not very many last year, because these are extraordinarily good times: but my recollection is that in 1932, which I suppose was the worst year of the depression, we had about one thousand bankruptcies. I doubt if we had two hundred last year.

The CHAIRMAN: Mr. Reilly is here to give us exact figures a little later.

Mr. Justice URQUHART: Another objection to decentralization is that you might have a petition in bankruptcy filed at two places or perhaps half a dozen places by different creditors on or about the same day, which would make for great confusion.

Hon. Mr. MORAUD: Could the jurisdiction not be the domicile of the debtor? If the debtor's domicile was in Toronto, then the jurisdiction would be in Toronto.

Hon. Mr. LEGER: That is done under the Bill of Sale Act.

Mr. Justice URQUHART: The point is that there is a disadvantage in having several places of registry. In 1932, when we had roughly one thousand bankruptcies in Ontario, it was not considered necessary with all that work to have more than one registrar. Why make a change now when the number of bankruptcies is so small?

Hon. Mr. MORAUD: Should we not consider the rights of debtors? They ought not all be required to go to Toronto or any other one place in the province.

Hon. Mr. HAYDEN: I doubt if this proposed amendment is intended to be in the interest of the debtors.

Hon. Mr. MORAUD: Well, should we not look upon it from the point of view of the interest of all parties concerned?

Hon. Mr. ASELTINE: I understand the creditors are asking for this.

Hon. Mr. HAYDEN: The creditors might be anywhere in the province.

Hon. Mr. MORAUD: If the debtor is in Hamilton and most of the creditors are there also, should they all have to go to Toronto?

Mr. Justice URQUHART: In practice it hardly works out that way. The creditors are pretty widely scattered, as a rule. As a matter of fact, many of them are in Montreal. I am astonished sometimes at the large number of creditors who are from Montreal, though of course that is the chief centre for certain lines of business.

Under the Act the Registrar in Bankruptcy is given wide powers. He can make receiving orders when unopposed, hear all unopposed and ex parte applications, make interim orders, hear appeals in certain cases, and so on. I

think there should be careful supervision of these matters by the court. It is important that expenses of administration should be carefully checked, and that trustees' disbursements and remuneration be approved, and also that solicitors' bills of costs be taxed. The proper place for passing accounts is in the courts, where the records are readily available to everyone.

Perhaps it would answer the question raised by Senator Moraud if I pointed out that under the present Bankruptcy Act a good many steps in the administration of a bankrupt estate can be taken outside of Toronto. By the way, I am not holding any brief here for the city of Toronto. Voluntary assignments in bankrupty are filed with the Official Receiver in the locality of the debtor; and there are 16 Official Receivers in various parts of the province. In the second place, power is given to the Official Receiver in each case when he receives an assignment to direct the disposal of perishable goods, hold meetings of creditors, fix bonds of trustees, and so on. Thirdly, trustees are appointed at the meetings of creditors held in the locality of the debtor, and such trustees immediately proceed to administer the estates. Claims are settled by the trustees and inspectors without application to the Court, except when there is an appeal from their decision. Under section 43 of the act, they can do almost anything within reason, without recourse to the court. Furthermore, trustees can apply personally for their discharge. In a great many estates in which the authorized assignments are made outside Toronto, the only applications to the court at Toronto are for the discharge of the trustee and debtor, and for the taxation of solicitors' bills.

Hon. Mr. MORAUD: Do you not think that simplification of the administration of justice is desirable, and that centralization is a wrong principle?

Mr. Justice URQUHART: I would not agree with the latter, with respect. I have an idea that the more uniformity you can get in the practice with regard to a complicated statute like this, the better. Although all the High Court Judges in Ontario have jurisdiction in bankruptcy, we have only one Judge who is assigned specially to bankruptcy work, and we have one Registrar. Mr. Reilley was the Registrar for many years, and since 1934 the Registrar has been Mr. Cook, who is a very competent man. Issues may be tried outside Toronto. Although as a rule I sit exclusively in Toronto in these matters I have on occasions when the convenience of the parties demanded it sat in London and a number of other places to hear important matters. As Bankruptcy Judge, I have power to direct an issue to be tried before any Judge or Officer of the Court in any part of the province. This power has been used in many cases. One that I might cite is *re* Bozanich, 23 C.B.R. 234, which at my direction was tried in County Court at Windsor. An appeal from that court's decision was taken to me, and the case ultimately went to the Supreme Court of Canada. I am sure the Honourable Mr. Martin would remember it very well. More recently there was the case of Paul Croteau, in which I directed that the claims of more than one hundred wage-earners be tried at Hearst, which is not a county town but was their place of abode, before the District Court Judge of the District of Cochrane. Many trials have been held in the locality of the debtor, and I do not see why it is necessary to change the Act.

I come now to my third point. Whereas the Bill aims at decentralization, it would centralize certain powers in the Superintendent of Bankrupty. I have the utmost confidence in the present Superintendent, who has been a friend of mine for many years, but he may not always hold the office.

Section 91 and other sections provide that trustees in bankruptcy shall apply for their discharge to the Superintendent instead of to the Court. It is my submission that the present Act should not be changed in this connection.

Hon. Mr. HAYDEN: Under the Bill the receiving order would be made by the Court, would it not?

Mr. Justice URQUHART: It would be made by the Registrar, if unopposed, but by the Judge if opposed.

Hon. Mr. HAYDEN: But he is an officer of the Court.

Mr. Justice URQUHART: Yes.

Hon. Mr. HAYDEN: Then the proceedings are conducted in the Bankruptcy Court?

Mr. Justice URQUHART: Yes. They are conducted in the locality of the debtor as a rule.

Hon. Mr. HAYDEN: Why should the court not be the one to discharge the debtor?

Mr. Justice URQUHART: That is my point exactly, Senator. I do not think there should be a change. If I read the Bill rightly, the trustee has no right of appeal if the Superintendent refuses the discharge, unless a creditor has opposed the discharge.

Section 82 provides that the trustee's accounts shall be passed and approved by the Superintendent instead of by the Court. This would have to be done from the remote parts of Canada by correspondence, I assume, because most estates would hardly pay the expense of sending a trustee to Ottawa to justify his accounts. My submission is that the trustee's accounts should be passed by the Court. It always has been the practice for the Court to pass the accounts of trustees, liquidators, receivers, executors and so on.

There are other sections which seem to divest the Court of its jurisdiction. I have referred to these in my memorandum, which I shall leave with the committee. Unless there are some questions, I do not wish to take up any more time, as there are others waiting to be heard.

The CHAIRMAN: I am pleased to know that we may have this memorandum for our own use.

Mr. Justice URQUHART: In the memorandum I have referred to a number of other matters that I thought ought not to be changed. The reference to various sections and points are indexed.

Hon. Mr. EULER: Have you any suggestions to make as to what, if anything, should be added to the Act?

Mr. Justice URQUHART: I am afraid I am a stand-patter on the Act. It has worked very smoothly. I have to thank the former Judges of Ontairo and the other provinces for the spade-work that they did when the Act was first passed: their work has made my duties as a Bankruptcy Judge a very pleasant and comparatively easy one.

The CHAIRMAN: Would you not consider it dangerous to change many things in the Act since we have behind us only five years of jurisprudence?

Mr. Justice URQUHART: Yes, that is my point largely. The chief objection I have to any change indeed is to this section 159.

The CHAIRMAN: In your experience would not even a small change give rise to new interpretations of the law?

Mr. Justice URQUHART: Yes.

The chairman has just reminded me of one other matter that I intended to deal with, that is, the discharge of the bankrupt. There is a provision in this bill for what is called the automatic discharge of the bankrupt. My opinion is, and I have so expressed it in two or three judgments, that the trustee and the bankrupt should be discharged together; that is, the trustee should not have his discharge before the bankrupt has his, and vice versa. I am not in favour of the present proposal to provide for the automatic discharge of the bankrupt.

Hon. Mr. MORAUD: Don't you think it would be unfair in many cases to tie up the trustee with the debtor? Oftentimes the debtor cannot get his discharge right away, it may be years after when the creditors are more inclined towards leniency, yet all this time the trustee would be tied up to the debtor.

Mr. Justice URQUHART: Yes, that is so, but the difficulty of the present practice is this. Your trustee dies or he moves away, or in some cases he has gone into bankruptcy himself—I recall one instance where he went to jail. It is very difficult after a number of years for a debtor to get his discharge. As I recall, there is no provision in the Act for his discharge without the intervention of the trustee. I am afraid I have broken the law occasionally by allowing the bankrupt to make an affidavit himself, for I took the view that necessity makes the law.

Section 146 shifts the onus of making the application for discharge from the debtor to the trustee. This is taken apparently from the American Bankruptcy Act. Two or three years ago I had some correspondence with Mr. Henry Chandler, when he asked me to advise him as to some way in which the practice of automatic discharge could be improved. I am speaking from recollection now, but, as I recall, the procedure in the States was found not to be satisfactory and was to be amended. I understand there is at present before Congress an amended Bankruptcy Bill. If I had had more time I would have been able to run that down, but it can be easily ascertained.

Hon. Mr. HAYDEN: We will do that.

Mr. Justice URQUHART: The American Act is different from ours in that it has no provision for making after-acquired property of the bankrupt available for distribution among his creditors, except that "all property which vests in the bankrupt within six months after bankruptcy by bequest, devise, or inheritance, shall vest in the trustee." Under our Act all property which may devolve upon or be acquired by a bankrupt before his discharge becomes the property of the trustee.

Another difference in the bankruptcy law of the two countries is that the American Act does not provide for conditional discharge as we have it under section 143.

Under our procedure the bankrupt makes a special application for his discharge, and this places the responsibility on him of satisfying the court as to his conduct and that he is entitled to his discharge. This has always been the practice under our Act. I am afraid that under section 146 (1) if the bankrupt does not wish to apply for his discharge he will not notify the trustee. While I think the present system has its disadvantages, I consider it is preferable to that which is now proposed.

Hon. Mr. HAYDEN: What do you think of a statutory limitation?

Mr. Justice URQUHART: That would not be feasible because some estates may take years to wind up, others may be distributed very speedily.

Hon. Mr. HAYDEN: You do not need the debtor to complete the winding up. The trustee just takes over the estate.

Mr. Justice URQUHART: Yes. The debtor has to satisfy the court that the bankruptcy was due to circumstances over which he had no control.

Hon. Mr. HAYDEN: That should be done within a year, should it not?

Mr. Justice URQUHART: It might be.

Hon. Mr. HAYDEN: I should like to see the bankruptcy shortened and more concentrated; get the job done without delay.

Mr. Justice URQUHART: That is up to the trustee and the creditors. It is a businessmen's act, and they do their work very efficiently.

Hon. Mr. HAYDEN: I am not taking up the position of the debtor, but he is subject to the second call of the creditors and during that time he cannot do anything else.

Mr. Justice URQUHART: That might be worked out in some way, but at the moment I am not ready to state specifically how it should be done.

The bill proposes another change on which I am not expressing any opinion. At present there are often two bankruptcies and sometimes three, and the debtor has not been discharged from any of them. Then he acquires property worth $2,000 or $3,000, the creditors become aware of it, and seize it. Under our law that is always the property of the first bankruptcy. I believe under the English law they allow subsequent bankruptcies to share parri passu. But in the recent case of re Hord—I do not know whether it is reported yet—I pointed out that under our present system the first bankruptcy is entitled to any after-acquired property, and that anyone who dealt with the bankrupt, who, so to speak, is financially dead, should do so at his own peril.

Are there any other questions, Mr. Chairman?

The CHAIRMAN: I think not. You have rendered an important service to this committee, Judge, and on their behalf I wish to convey to you their thanks for your attendance.

(For memorandum by Mr. Justice Urquhart, see Appendix A).

The CHAIRMAN: Mr. W. J. Reilley, K.C., Superintendent of the Bankruptcy Act Administration of the Department of the Secretary of State, is here to answer a question which was asked the other day as to the number of bankruptcies during the past year.

Mr. REILLEY: Mr. Chairman, in the Ottawa Journal of the 11th instant there appeared a report on the number of bankruptcies in Canada. The number is given as 60.

Hon. Mr. HAYDEN: When?

Mr. REILLEY: 1945. We can use that for what it is worth. My annual report for 1945 shows there were 264 failures, not including liquidations under the Winding Up Act, creditors arrangement compositions, bulk sales or similar proceedings. I just want to place that information before you, to correct the impression which may have been conveyed by the press report.

Hon. Mr. HAYDEN: Bulk sales are not necessarily indications of bankruptcy.

Mr. REILLEY: But in 99 cases out of 100 they are failures. There is the odd case where a man makes a bulk sale. I simply mention that to direct attention to the inaccuracy of this press report—60 failures against my reported 264 failures.

Hon. Mr. ASELTINE: Where did they get the information?

Mr. REILLEY: I do not know. They did not get it from me.

The CHAIRMAN: Gentlemen, we have in attendance Mr. Terence Sheard, Assistant General Manager of the National Trust Company, Toronto, representing the Dominion Mortgage and Investments Association, and Mr. R. B. F. Barr, of the Ontario Bar. I will call on Mr. Sheard.

Mr. SHEARD: Mr. Chairman and honourable senators of the committee, I appear on behalf of the Dominion Mortgage and Investments Association. I imagine that members of the committee know of this association. It is an association of loan, trust and life insurance companies to consider matters of mutual interest. When this bill was introduced the association formed a special committee to consider its provisions from the point of view of investors and trustees for investors. I am the chairman of that committee, and it is in that capacity that I am appearing before you today.

We have prepared a brief, (See Appendix B), which deals with only one aspect of the bill, but an aspect which we consider of great practical importance. Instead of reading the brief, which is always rather a dull process, with your permission I should like to speak to it and draw the attention of the committee to some of its more important aspects.

It is our understanding of the bill that it proposes to bring all corporate reorganizations under the terms of the Bankruptcy Act, and do away with procedure under the Companies Creditors Arrangement Act, although this Act is not specifically repealed in terms so far as I can discover.

The association believes that that would be a mistake. It thinks that the interest of investors, while technically they may in some cases be creditors, is really of a different type from that of ordinary creditors. Therefore it is quite appropriate to have two different types of procedure: in England reorganizations are of course under the Companies Act, and ordinary compositions under the Bankruptcy Act. It is true that in the United States company reorganizations come under the Bankruptcy Act because of the constitutional problem involved; but you may remember they are in a special part of the Act passed as a separate bill, and it is usually referred to colloquially as the Chandler Act.

The association recognizes that in the administration of the Companies Creditors Arrangement Act in the past there have been abuses and arrangements have been put through under that Act that probably were not fair to the creditors. Therefore the association is putting forward certain proposed amendments, which it submits for the consideration of the committee, to be made to the Companies Creditors Arrangement Act. We are not putting forward those amendments in any spirit of presumption, for we recognize that they will be carefully scrutinized by this committee and by the law officers of the Crown; but until the thing is actually put down in black and white it is often very difficult to understand just what is proposed.

I should like to say that these amendments have not been hastily prepared or ill considered. The association went into this matter a good many years ago, and in 1943 it asked three very experienced corporation lawyers, Mr. Gilbert Stairs of Montreal and Mr. Kaspar Fraser and Mr. R. B. F. Barr—he is here with me today—both of Toronto, to prepare amendments that might be considered suitable for the Companies Creditors Arrangement Act. The work was not gone on with at the time owing to the war, but the amendments presented for your consideration today are substantially the amendments prepared by counsel at that time, reconsidered and gone over by the representatives of the various companies concerned.

Perhaps it might be useful to the committee for me to recall something of the history of the Companies Creditors Arrangement Act. Prior to the first war, when all or most of Canada's foreign financing was done in England, the practice in issuing securities was to follow the English precedents, and practically all trust deeds contained clauses permitting a majority of the bondholders in a meeting to vary the terms of the contract. Later, when American financing became commoner, in the twenties, those provisions were deleted from a great many trust deeds because they were not usual in the United States. So when the depression came along it was discovered that a large number of companies had to be reorganized, and that the provisions of the trust deeds were inadequate to permit a reorganization by agreement, and in reality there was no way in which the companies could be reorganized at all.

It was as a result of that situation that the Companies' Creditors Arrangement Act was passed. Its provisions were very largely taken from the British Companies Act of 1929, and the body of British authorities and precedents of that act have been used in the Companies' Creditors Arrangement Act. Nevertheless at that time, and since, there was no way in which a company could make any kind of compromise with its creditors—that is an ordinary trading

company—without going into bankruptcy, except under the terms of the Companies' Creditors Arrangement Act. Therefore the provisions of that act were taken advantage of not only by the type of company for which it was fundamentally intended to serve, but by a great many other companies.

Investors, bondholders, debenture holders and shareholders have methods of organizing trustees for bondholders and so forth and are in a position to safeguard their interests; but the ordinary trade creditor does not have an organization of that kind, and so I think it is fair to say that in larger cases, the type with which my association is concerned, the act on the whole has worked reasonably well. In the case of smaller companies, who were trying to make a composition with their creditors, it did not work so well. We should consider what happens in England, where a company reorganization will come before a very small group of extremely experienced judges; it is handled by qualified people and the practice is very closely supervised by the court. Here we have the act administered from one end of the country to the other, and it is inevitable that in some cases applications are brought before judges who are not very experienced in such matters and who do not realize that because the application is unopposed it is not necessarily an application that should properly be granted. At any rate, there is the feeling that procedure probably should be tightened up, and we are proposing amendments for that purpose, which do not disturb the basic principle on which the act proceeds.

The basic principle of the Companies' Creditors Arrangement Act is reorganization and composition by consent. What the act does is to enable the consent and approval of a certain specified majority to be applied to everybody of the same class. That is necessary, because in the case of bondholders and bearer bonds widely scattered one never could possibly locate them all, and therefore anything that approached 100 per cent agreement would be physically impossible. Nevertheless, the whole procedure is based upon consent, and there is no suggestion of disturbing that principle.

It is proposed to introduce an initial and additional steps in the procedure by way of preliminary hearing, and it is provided that representatives of the different classes of security holders or creditors shall be given notice of such a hearing and will have an opportunity at that time to present to the court, before any expenses are incurred or meetings called, any objection or comment on the company's proposals. We think that will be of considerable practical advantage in all cases, not only in the cases in which abuses have occurred. At the present time, and even in the larger cases, the whole carriage of the proceedings is in the hands of the company's lawyers; if they make a decision which on the final motion to the court for approval turns out to have been unwise because they have called their meetings on too short notice, or persuaded the court in respect of some technical flaw, the only thing then to do is commence the proceedings all over again, resulting in great expense and loss of time.

Another point on which abuse and difficulties have occurred was in connection with amendments. Under the present Companies' Creditors Arrangement Act there is nothing to prevent a plan being amended at a meeting of creditors—and of course it is inadvisable to prevent all amendments. The suggestion is that if any amendment is to be made at a meeting, which substantially and adversely affects the interests of the creditors, that the chairman must go back to the courts for direction as to how long the period of adjournment should be and what additional notice should be given and so forth. This is what has happened before: A plan would go out which was quite favourable to the creditors, and they would all send in proxies voting in favour of the plan. When the meeting was called and the men with the proxies were there, amendments would be made which totally changed the whole basis of the plan, and the votes would be given in favour of it; and as this feature was not drawn to the attention of the court

on the final approval the creditors woke up to discover that they were getting something very different from what they thought they would get. It is now intended to prevent such a practice.

There have been a good many irregularities in connection with the solicitation of proxies. It is considered that some provision should be added tightening up the procedure. May I say that the suggestion of a preliminary hearing and also to some extent the provisions with respect to the solicitation of proxies are based upon the Bankruptcy Act in the United States. They do not go quite as far, but we would think that is probably not necessary in our situation.

Hon. Mr. EULER: What suggestion do you make in regard to the solicitation of proxies.

Mr. SHEARD: May I read from page 6 of the draft bill, section 29.

> It shall not be lawful for any person to solicit or knowingly permit the use of his name to solicit any authorization (which expression shall include any instrument appointing a proxy, consent or other authorization) in connection with any compromise or arrangement unless the following information is presented in writing to each solicited person at the time of the first solicitation:—
>
> (1) if the solicitation is by or on behalf of the debtor company, a statement to that effect; or
>
> (2) if the solicitation is not by or on behalf of the debtor company, the name or names of the persons on whose behalf or at whose instance the authorization is being solicited and particulars of the class or classes and aggregate amount of securities, obligations, claims or shares of, against or in the debtor company which are owned or controlled for voting purposes by any such persons; and
>
> (3) if the solicitation is by a person who is entitled to or may receive compensation or reimbursement of expenses for soliciting or recommending the giving of an authorization, a statement to that effect.
>
> 30. No person shall solicit or knowingly permit the use of his name to solicit any authorization by means of any statement which to his knowledge was at the time and in the light of the circumstances under which it has made false or misleading in any material particular.

Then there is the provision of a penalty in the event of contravention of those sections. It is our hope and belief that if amendments along those lines were made to the Companies' Creditors Arrangement Act that most, and possibly all of the abuses under the act, which have occurred in the past would be eliminated. I may say that we have discussed this matter at some length with other groups, particularly those representing the ordinary unsecured trade creditor, like the Board of Trade of the city of Toronto and others. I think the committee will find that when it examines the briefs which I understand are going to be submitted by groups of that kind, that the general recommendations which we are making are in line with their recommendations.

Perhaps I should revert for a moment and describe in a little more detail why we feel that it is unwise to attempt to do what this bill purports to do, namely, to bring all company reorganizations under the Bankruptcy Act. In the first place, and as I have said, because the interests of investors are very different from those of ordinary trade creditors, the practical difficulty of accomplishment seems to us to be very grave. I know that the Superintendent of Bankruptcy has been considering this matter for ten years, and therefore I do not think we can say the suggestions he is putting forward are ill-considered. At the same time I think it must be admitted that if this bill passed in this form no large company with securities outstanding in the hands of the public could ever be reorganized. I do not think that is an over-statement.

Hon. Mr. EULER: Mr. Reilley, is shaking his head.

Hon. Mr. HAYDEN: It is a matter of opinion, but I am inclined to agree with you.

Mr. SHEARD: For example, if you will turn to section 104 of the proposed act you will find that the secured creditors before voting at a meeting must value their securities and they are only entitled to vote for the difference between the value of their securities and the amount of their claim. How could you ever apply a section of that kind to a meeting of bondholders? It would be an impossibility. Furthermore, you will find that the act requires that notice of the proposal shall be given to every creditor affected. In the case of bearer bonds, or bearer share warrants, how would it be physically possible to give notice to every bondholder? You could not possibly find out who they were; you would not know them. That is a physical impossibility. There are provisions, for example, requiring a list of shareholders to be sent out to anyone who requests them. In a large company the list of shareholders might run to 10,000 or 12,000 names. The preparation of that list would cost ten cents per name; so that every time that is done you incur an expense of a thousand dollars. The purpose of that is very obscure to me.

There is another reason. When reorganization of a large company finally comes down to the place where action can be taken on it, after long periods of consultation, argument and negotiation between representatives of the different groups, the need for action is urgent. It may be, for example, that new capital and new management are coming into the situation, and they are not willing to sit around indefinitely waiting till somebody makes up his mind whether the terms are fair or not.

Hon. Hr. HAYDEN: Supposing the stage of bankruptcy is reached, then the difficulty of attracting new money into the enterprise would be an important factor, would it not?

Mr. SHEARD: That is quite true. If the matter is one of great urgency, the ability to delay the plan is really in effect the ability to defeat it. Under this scheme I think it would always be possible for the Superintendent of Bankruptcy and conceivably the Minister to whom he is resposible to delay any plan by simply ordering a further investigation. As a matter of fact, I think it would be very difficult for the minister to refuse to order an investigation. It is not easy for a minister to get up in the house and explain why he has not investigated something; it is much easier for him to state that he has investigated something and then to justify his conclusion after the investigation has been made. Any minority interest which was trying to delay or defeat the plan would of course immediately request the minister or the Superintendent to make a further investigation, and would put forth all sorts of allegations to support the request, in which circumstances I fear that an investigation would have to be made. If we get to the point where no reorganization of a large company can be made unless the Secretary of State consents or approves, we shall have reached a state of paternalism which goes beyond even the operations of the S. E. C. in the United States. Also, grave complications might arise because the provincial governments often take a great deal of interest in these things. As the members of the committee know, it is really not practicable to reorganize a newsprint company, for example, without getting the approval of the provincial government concerned. I think that was a lesson learned from the Abitibi proceedings. If it is also necessary to get the approval of the Dominion Government, and if the points of view of the two governments conflict, I should think the position of the investors in the company in question would be very unhappy.

We feel, therefore, that these proposals are fundamentally unwise, and that the thing desired, namely, rectification and elimination of certain abuses that have occurred in the past, can be accomplished by relatively simple amendments to the Companies' Creditors Arrangement Act.

One of the basic principles of the present Bankruptcy Act is the preservation of the rights of secured creditors, and we believe that principle should be left undisturbed. In our opinion the amendment whereby the rights of secured creditors would be brought for judication under bankruptcy is a dangerous one.

The arguuments that I have summarized here are set out more fully in the brief.

Hon. Mr. HAYDEN: Take a typical case of a company with at least one bond issue outstanding, with preferred and common shareholders and a number of creditors. If you were trying to operate such a company under the proposed new Bankruptcy Act, what would the problems be? Would you just develop that a bit?

Mr. SHEARD: Well, first of all you would have to appoint a trustee, who would have to make an investigation. That in itself would probably mean doing a lot of work that had already been done.

Hon. Mr. HAYDEN: Suppose there has been some default on the bond issue. Then you are going to have a conflict between the trustee for the bondholders and the trustee in bankruptcy?

Mr. SHEARD: You very well might.

Hon. Mr. HAYDEN: There might be conflict and that is not going to solve anything. This bill was designed to deal with the problems of corporate financing and the difficulties that might arise when a company became insolvent?

Mr. SHEARD: Quite so. Section 23, for example, gives the court power to appoint a committee, and the committee power to put forward a plan, and the court power to approve it. An amendment of that kind is entirely contrary to the whole principle of compositions with creditors and shareholders, which is that the compositions should be made by consent and voluntarily. I fancy that that amendment was prepared with the Abitibi case in mind. There was great difficulty in getting agreement in that case. But, after all, hard cases make bad law, and I think that in the vast majority of cases agreements can be reached. Our feeling is that that section, far from facilitating agreement. will probably make agreements more difficult. Indeed, I think that if anybody looks at this Part II carefully from the point of view of how it would operate in the reorganization of a large company with various classes of creditors, I think he is bound to reach the conclusion that it would be extremely difficult, if not utterly impossible to operate.

There are one or two other points. I notice that throughout the act there are minor changes of phraseology, which perhaps are not intended to have much substantial effect. As the members of the committee realize, that sort of thing is very tricky. There are sections that have been in the Act for a good many years, and there is a long chain of judicial decisions on them, and then some slight changes are made in the wording. Well, the presumption is that it was intended to change the meaning, so the question arises in each case: To what extent is the meaning changed, and to what extent are the old decisions good law? I do not want to weary you with illustrations, but there are two that come to mind. One is in connection with section 26, "Stay of Proceedings." Subsection (2) says:—

> Subject to the provisions of sections one hundred and eleven, to one hundred and eighteen inclusive, of this Act *and the preceding subsection,* any secured creditor or person holding security on the property of the *bankrupt* may realize or otherwise deal with his security. . .

The words "and the preceding subsection" have been added, and, according to the explanatory note, this has been done to broaden the effect of the section. Does that mean that proceedings by a secured creditor can be taken only with the leave of the Court? If that is the intention or the result of the change, I think it is very questionable.

Another example of something along the same line is section 43 (3):—

> No person shall, as against the trustee, be entitled to withhold possession of the books of account belonging to the *bankrupt or any papers or documents relating to the accounts or to any trade dealings of the bankrupt* or to set up any lien thereon.

Would that give a trustee in bankruptcy the right to demand books that were in the possession of a receiver or manager? Presumably under the old section, as the books of account were covered by security they did not belong to the bankrupt, but he had only an equity of redemption in them, and the receiver had rights of possession against anybody. Well, with the addition of the underlined words, although the bankrupt might not own the books, the trustee perhaps would be entitled to them. I refer to this just to show the kind of question that might easily arise when minor amendments of this kind are made.

Hon. Mr. LEGER: The explanatory note says that the change has been made in order that what was formerly Rule 167 should be a matter of substantive law rather than of procedure. So there would appear to be no change.

Mr. SHEARD: Is there no change, Senator, when you take something out of a rule and put it in a substantive provision of the Act?

Hon. Mr. LEGER: If the rules have the effect of law there is no change.

Hon. Mr. HAYDEN: A rule could not ordinarily have any greater effect than the statute under which the rule purported to be made.

Hon. Mr. LEGER: That is right.

Mr. SHEARD: The explanatory note also says that the added words have been taken from section 99 (3) of the Australian Act.

Hon. Mr. HAYDEN: It looks as if this might provide an opportunity for conflict between the receiver or manager and the trustee?

Mr. SHEARD: I would be apprehensive of that, certainly.

Mr. Chairman, I expect to be in Ottawa next Wednesday, which I understand is the next sitting of the committee. If at that time any member of the committee desires to ask any questions about the proposed amendments to the Companies' Creditors Arrangement Act, I shall be very glad to be present.

Hon. Mr. HAYDEN: I think that is an excellent idea.

The CHAIRMAN: We will no doubt take advantage of your offer.

Hon. Mr. HAYDEN: Have you given any thought to the conflict of jurisdictions? The provinces have jurisdiction in property and civil rights, so I suppose a deed of trust, which is a contract, would primarily be a matter within provincial jurisdiction.

Mr. SHEARD: Frankly, those provisions of Part II as applied to provincial companies that are not bankrupt seem to me of very doubtful validity indeed. I have not read recently the cases on the Winding Up Act. As you know, there are a great many of them and they are not all easy to reconcile. We do know, though, that Companies' Creditors Arrangement Act was referred to the Supreme Court of Canada, where its constitutional validity was upheld, so that is settled. I should think it is fairly safe to assume that whether all the provisions of this new bill are ultimately held to be intra vires of the Dominion Parliament or not, they certainly would be called into question and protracted litigation would almost certainly ensue.

Hon. Mr. HAYDEN: A lot of refinancing has been done in the last few years on the basis of the existing law.

Mr. SHEARD: Take this example. A perfectly solvent company, with a bond issue maturing in a year or two, does not want to call them and pay them off or float a new issue, but wants to extend the existing issue. Assuming it to be a provincial company, it is very difficult for me to see how the Dominion Parliament can get jurisdiction to legislate with respect to a transaction of that kind. Yet certainly the provisions of this bill contemplate such jurisdiction, because section 11 says:

> (1) Any person may either before or after bankruptcy make a proposal to his creditors, or to any class of them for
>
> (*b*) an extension of time for payment thereof.

Hon. Mr. LEGER: I would presume that that would apply only to insolvent companies.

Mr. SHEARD: Quite so. I think it is to be limited in that way, but it is not so limited in terms.

Hon. Mr. HAYDEN: The point is that it might lead to litigation.

Mr. SHEARD: I think it would be almost certain to do that. Another example is section 22. That section is of course in the present act, but presumably the present act only makes composition possible where the company is bankrupt. Now the proposal is to make them possible where the company is not bankrupt. I do not see how that section could possibly apply to a provincial company that was not insolvent.

Hon. Mr. LEGER: Could it apply even to a dominion company that was not insolvent?

Mr. SHEARD: Parliament can legislate with respect to dominion companies.

Hon. Mr. LEGER: But not with regard to property and civil rights.

Hon. Mr. HAYDEN: There appear to be some serious problems in this part to be considered.

The CHAIRMAN: I understand Mr. Sheard has not followed his brief very closely, and that he would like to have the brief included in the proceedings.

Mr. SHEARD: Yes, Mr. Chairman.

The CHAIRMAN: Would Mr. Barr care to add anything to what has been said?

Mr. BARR: No, Mr. Chairman, I have nothing to add to what Mr. Sheard has said. If there are any questions to be asked next Wednesday, after the brief has been read, I would be glad to come back and endeavour to answer them.

The CHAIRMAN: If you wish to come, we shall be pleased to have you.

Hon. Mr. HAYDEN: I should think that it might be left to Mr. Sheard and Mr. Barr to arrange which of them will be here next Wednesday.

Mr. SHEARD: We will try to arrange to have someone available that day.

(For Brief of the Dominion Mortgage and Investments Association, see Appendix B.)

The committee adjourned until Wednesday, June 26, at 10.30 a.m.

APPENDIX A

MEMORANDUM PRESENTED BY THE HONOURABLE MR. JUSTICE GEORGE A. URQUHART, OF THE SUPREME COURT OF ONTARIO

CONTENTS

In view of the fact that the proposed Act introduces radical changes which divest the Court of jurisdiction in many important matters and adds new matters to its jurisdiction; that it centralizes many matters in other hands, and proposes to decentralize the functioning of the Court, may I, as Bankruptcy Judge of the High Court of Justice of Ontario, submit the following observations on some of the sections, where changes are proposed and which affect the administration of the Act by the Courts.

Speaking generally, the present Act which is based largely on the English Act has been found satisfactory in most respects. In this Bill many sections of the Act have been rearranged and the wording changed.

The Courts have construed the sections of the present Act during the course of many years, and the law has been settled and clarified. If the wording of the sections of the Act is changed unnecessarily, much of the established Juris-

prudence and case law of Canada, and also of England in so far as it affects Bankruptcy law in Canada, would become obsolete, and this would probably lead to fresh litigation.

POWERS ARE TAKEN AWAY FROM THE COURTS AND VESTED IN THE SUPERINTENDENT OF BANKRUPTCY

One of the most radical changes in the new Act is the substitution of the Superintendent of Bankruptcy for the Court in so many cases, with no right of appeal to the court except in the one case of a creditor opposing the trustee's discharge.

Section 91. This section provides that trustees in bankruptcy shall apply for their discharge to the Superintendent of Bankruptcy instead of to the Court. These applications should be made to the Court, where all interested parties may be heard and the matter thoroughly considered on proper evidence, with the usual right of appeal. Otherwise, there is no assurance that correct decisions will be arrived at. Such matters cannot be properly dealt with by correspondence. This section gives the trustee no right of appeal if the Superintendent refuses the discharge, unless a creditor has opposed the discharge.

The same objections also apply to the following sections which substitute the Superintendent for the Court:—

Section 82. Provides that the trustee's accounts shall be passed and approved by the Superintendent instead of by the Court. The trustee's accounts should be passed by the Court. It has always been the practice for the Court to pass the accounts of trustees, liquidators, receivers, executors, administrators, committees in lunacy, etc.

Sections 90 (6) and 41 (3) provide for the remuneration of the trustee being fixed in certain cases by the Superintendent instead of by the Court, without the usual right of appeal.

Section 39 (7) provides:—

> The Superintendent may give such instructions to trustees regarding the estates under their administration *as may be deemed necessary or expedient.*

Any application for directions should be made to the Court where all interested parties may be heard and the matter thoroughly considered on proper evidence, with the usual right of appeal. Such matters cannot be properly dealt with by correspondence.

Section 39 (8) provides:—

> The Superintendent may intervene in any matter or proceeding in Court *as he may deem expedient* as though he were a party thereto.

Intervention by the Superintendent should only be by leave of the Court. Otherwise, proceedings might be unduly prolonged and unnecessary costs incurred.

Section 39 (6) provides:—

> —and the administration of any estates to which a trustee has not been appointed under the provisions of this section may be administered by the Superintendent in such manner *as he may deem expedient* for which purpose he shall have all the rights and powers of a trustee under this Act.

Section 39 (9) provides:—

> The Superintendent may take over and complete the administration of all uncompleted estates in such manner *as he may deem expedient.*

These sub-sections contain no provision for title to property of the debtor vesting in the Superintendent, who would not be able to sell or convey the same. There is also no provision for the Superintendent accounting either to the creditors or to the Court for such uncompleted estates.

"As he may deem expedient". Such unlimited power should not be given to one person, but should remain in the Court.

The same objections apply to Section 39 (10):—

—the Superintendent according as the circumstances warrant may cause such funds to be distributed or paid to the persons entitled thereto according to their respective legal rights *in such manner as he may deem proper.*

The distribution of the funds of all bankrupt estates should be subject to the supervision of the Court, as in the case of trustees, executors, etc.

Under section 108 (8 and 9) where the consent of the inspectors cannot be obtained, power is given to the Superintendent or the Court to exercise the powers of the inspectors. The inspectors as representing the creditors are given very wide powers under section 47 (1) involving the claims of creditors, the disposal of very valuable assets, etc. If the consent of the inspectors cannot be obtained, such matters should be dealt with only by the Court, where all interested parties may be heard and the matter thoroughly considered on proper evidence, with the usual right of appeal.

The comment opposite section 91 of the present Bill is as follows:—

No *material* change, *except to substitute the Superintendent for the Court.*

This sums up the general effect of these sections of the new Act.

In his note opposite section 160, the Superintendent states:—

The purpose of this section is to decentralize the courts—.

The effect of this new Act is to centralize the greater part of the administration of bankrupt estates throughout Canada in the Superintendent of Bankruptcy at Ottawa.

Decentralization of Bankruptcy Court

Another radical change introduced by the new Act is the splitting up of the Bankruptcy Court in Ontario into 47 different courts, with all the resulting confusion.

Since the passing of the first Bankruptcy Act in 1919, there has been only one office of Registrar in Bankruptcy for Ontario. This has proved satisfactory, and provides for one office of record for bankruptcy, where the records of every bankruptcy throughout Ontario are readily available. It also maintains uniformity of practice.

Section 160 of the new Act provides that the Local Registrars of the Supreme Court, 47 in number, shall be Registrars in Bankruptcy. The judicial powers of the Registrar shall be exercised by the Master of the Court, but where there is no Master, by the Registrar if he is a duly qualified member of the legal profession; otherwise, by a Judge of the County or District Court within the judicial district.

There is no power in the present Bankruptcy Act to appoint additional Registrars in Bankruptcy if necessary.

Advantages of the Administration Under the Present Act

1. *Uniformity of Practice*

It has always been the practice for one judge to hear all bankruptcy matters. Under the new Act all Supreme Court judges would be required to sit in bankruptcy. In the case of opposed petitions and other urgent matters, in most places no judge would be available to hear such applications except at the regular sittings. As bankruptcy is a special branch of the law in Canada, it is important that the practice should be uniform and the decisions consistent.

2. *Advantage of having only one Office of Record*

It is in the public interest that there should be one office of record for the whole province, as at present, where records of every bankruptcy in Ontario

since The Bankruptcy Act came into effect in 1920 are available. The only complete records of all such bankruptcies in Ontario are in the office of the Registrar in Bankruptcy at Toronto.

In the offices of the Local Registrars of the Supreme Court are made offices of record for bankruptcy, it will be necessary to search in all such offices, about 47 in number, to find out whether a person is bankrupt. (Apart from searching in *The Canada Gazette.*)

Petitions against the same debtor might be filed in several offices throughout the province contemporaneously, which would lead to confusion.

Even after the discharge of the trustee and the debtor, the public are continually searching the records of the court, sometimes for years back, particularly where questions of title to property are involved.

Bankruptcy business is not heavy at the present time. Although there were approximately 1,000 bankruptcies in 1932, it was not considered necessary to appoint additional Registrars then.

3. *Powers of Registrar in Bankruptcy*

The Registrar in Bankruptcy is given wide powers under the Act—to make receiving orders when unopposed, to hear all unopposed and ex parte applications, to make interim orders, to hear appeals in certain cases, etc. The jurisdiction of the Registrar has not yet been clearly defined, and must be carefully exercised.

There is already power vested in the Chief Justice of the Province to assign Registrars in Bankruptcy, and prescribe or limit the territorial jurisdiction of any such Registrar under section 157.

4. *Necessity for Careful Supervision by the Court*

It is important that expenses of administration should be carefully checked, and that trustees' disbursements and remuneration be approved, and solicitors' bills be taxed.

The proper place for passing accounts is in the Courts, where the records are readily available to everyone, creditors, debtors, trustees etc., and where they may attend on the passing of the accounts, with the usual rights of appeal. This has always been the practice of the court, as in the case of accounts of trustees, liquidators, receivers, executors, committees, etc.

5. *Matters Dealt With Outside Toronto*

Under the present Bankruptcy Act, the following steps in the administration of a bankrupt estate take place without the necessity of an application to the court at Toronto:—

(*a*) Voluntary assignments in bankruptcy are filed with the Official Receiver in the locality of the debtor, and there are 16 Official Receivers in the various parts of the province.

(*b*) Power is given to the Official Receivers to direct disposal of perishable goods, hold meetings of creditors, fix bonds of trustees, etc.

(*c*) Trustees are appointed at the meetings of creditors held in the locality of the debtor, and such trustees immediately proceed to administer the estates. Claims are settled by the trustees and inspectors without application to the court, except when there is an appeal from their decision.

(*d*) Trustees can apply personally for their discharge. In a great many estates in which the authorized assignments are made outside Toronto, the only applications made to the court at Toronto are for discharge of trustee and debtor, and for the taxation of solictiors' bills.

6. *Issues may be Tried Outside Toronto*

For the convenience of parties outside Toronto, the judge may direct an issue or a reference before any judge or officer of the court in any part of the province under section 171. This section has been resorted to in many cases, e.g. re Bozanich, 23 C.B.R. 234, and more recently in the case of Paul Croteau, where the contest of the claims of over 100 wage-earners was referred to the District Court Judge at Cochrane.

7. *Trustees have very wide Powers under Section 43*

In the administration of bankrupt estates, the trustee with the consent in writing of the inspectors can perform many acts in the locality of the debtor without recourse to the courts. Some of these are selling, mortgaging or leasing of property at will, carrying on business, bringing or defending actions concerning the debtor's property, compromising debts freely, making general compromises, and dividing assets in specie as well as the ordinary division.

8. *Trade Creditors*

As trade creditors are usually manufacturers and producers, they are located in all parts of the province, and often outside the province, and Toronto is a more convenient centre for applications to the Court.

With regard to the decentralization of the Courts, the Superintendent says in his memorandum on page 15 of the Minutes of Evidence before the Senate on May 22, 1946, that The Bankruptcy Act "should be dealt with in the same way" as the Winding Up Act.

The Bankruptcy Act is different from the Winding Up Act, in that the administration under The Bankruptcy Act is by the creditors acting through the trustee and inspectors who can complete the administration to a large extent without coming to the Court. Under the Winding Up Act the administration is entirely subject to the direction and supervision of the Court, either directly by a Judge exercising the jurisdiction of the Court, or by an Officer of the Court to whom the matter is referred or directed, and this Officer is a Judicial Officer. Nothing is implemented under the Winding Up Act without the intervention of the Court.

DISCHARGE OF BANKRUPTS (section 146 et seq.)

Section 146 dealing with the discharge of the bankrupt would prove most unsatisfactory. It shifts the onus of making the application for discharge from the debtor to the trustee. This section is apparently an attempt to provide "an automatic procedure" for the discharge of the bankrupt. The Superintendent in his note to the section states that this procedure has been taken from the American Bankruptcy Act, and reference is made to section 14 of the amendment to the Bankruptcy Act of the United States as approved on the 22nd of June, 1939. In 1943 I was consulted as Bankruptcy Judge by American authorities in Washington as to the Canadian procedure on discharges of bankrupts, and I understood that the American procedure was not satisfactory and was to be amended. I understand that a Bill to amend the American Bankruptcy Act is now before Congress.

The provision in the American Act for "an automatic procedure" for discharge of bankrupt is not so serious in its consequences as such a procedure would be in Canada, as, unlike the Canadian Act, the American Act has no provision for making the after-acquired property of the bankrupt available for distribution among his creditors, except that "all property which vests in the bankrupt within six months after bankruptcy by bequest, devise, or inheritance, shall vest in the trustee." See section 23 (*a*) of the present Canadian Act,

retained as section 25 (*a*) in the New Act, for the definition of "property of the debtor" which includes:—

> all property which may be acquired by or devolve on him before his discharge.

Also, the American Act does not provide for conditional discharges of bankrupts.

The present procedure is to be preferred. The bankrupt makes a special application for his discharge, and this places the responsibility on the bankrupt of satisfying the court as to his conduct and that he is entitled to his discharge. This has been the practice under the Canadian Act since it was first passed in 1919 and it has always proved satisfactory. It is based on the practice under the English Act, which has been found satisfactory through many years of experience.

The onus of applying for the discharge of the bankrupt should not be put on the trustee, as *section 146 (2)* provides. In many cases debtors not intending to apply immediately for their discharge might neglect to notify the trustee under *section 146 (1)* that they do not wish to apply for their discharge, yet the trustee is required to proceed with the application under this section. Apparently the costs of such an application would have to be paid out of the estate at the expense of the creditors, or personally by the trustee until he was reimbursed by the debtor under *section 158 (5)*.

Section 146 (2) provides that the trustee shall apply to the court for an appointment for the discharge of the bankrupt *not later than six months following the bankruptcy*. In many cases the administration of the estate would not have progressed to the point where it would be possible for the trustee to make the prescribed report to the Court showing the realization of the estate, and that the affairs of the debtor have been fully investigated, and it would be necessary for the trustee to oppose the application on these grounds.

The wording of the first 2 lines of section 146 (1) is defective.

In section 146 (4) the notices should be restricted to creditors who have proved their claims. Creditors who have not proved have no status in the bankruptcy under well recognized decisions.

Section 147 does not provide for a report on bankruptcy offences.

Section 147 (3 and 4) provides for reports to the Court by the trustee and the Superintendent. *Sub-section 9* makes these reports prima facie evidence of the statements contained in them. Sub-section 11 provides that the bankrupt may dispose any statement contained in the trustee's report, and the trustee may be required to attend in person and give evidence. There is no provision whatever permitting the bankrupt to dispute the Superintendent's report. Even if this right were given, it would not be practical for the Superintendent to appear in person in courts throughout Canada to give evidence in explanation of his report and be cross-examined on the same, which is a right to which every debtor is entitled under the law.

Jurisdiction of the Court

Section 159 (1) (*a*) provides that the court shall have power and jurisdiction to hear and determine all matters in dispute arising out of the administration of an estate or in which any interest of the estate is involved or to which the trustee is a party, or in which the trustee is a claimant against any other person.

See the explanatory note to this section:—

> The object of the supplementary jurisdiction herein conferred is to have all matters or disputes disposed of by the court exercising bankruptcy jurisdiction. Heretofore the trustees might be obliged to take proceedings in other courts and he might also be proceeded against in other courts.

Under this section, the bankruptcy court would be required to try and determine matters which involve strangers to the bankruptcy, and which are not proper matters to be dealt with by the Bankruptcy Court. For example, where the trustee is suing to recover book debts, or other property belonging to the debtor; and where the trustee is being sued for goods supplied during his administration of the estate. These are matters which should be determined by the ordinary courts, some of them by courts of inferior jurisdiction. From the wording of the section it would appear that even matters ordinarily brought in the Division Courts must be brought in the Bankruptcy Court with the increased scale of costs, thus not keeping costs under better control as stated in the explanatory note.

The present practice was settled by the decision In re Reynolds, Ex parte Thistle, 10 C.B.R. 127, in which it was stated by Fisher, J. at page 131:—

> I think it is quite clear on the material filed by the trustee that Thistle is a stranger to the estate that is now being administered in bankruptcy and that there is no jurisdiction to bring him in and compel him to submit his rights, whatever they may be, to be determined by the Bankruptcy Court.

This decision was affirmed by the Court of Appeal, and follows the leading English case of Ellis v. Silber, (1873) L.R. 8 Ch. 83, in which it was stated at page 86:—

> That which is to be done in bankruptcy is the administration in bankruptcy. The debtor and the creditors, as the parties to the administration in bankruptcy, are subject to that jurisdiction. The trustees or assignees, as the persons entrusted with that administration, are subject to that jurisdiction. The assets which come to their hands and the mode of administering them are subject to that jurisdiction; and there may be, and I believe are, some special classes of transactions which, under special clauses of the Acts of Parliament, may be specially dealt with as regards third parties. But the general proposition, that whenever the assignees or trustees in bankruptcy or the trustees under such deeds as these have a demand at law or in equity as against a stranger to the bankruptcy, then that that demand is to be prosecuted in the Court of Bankruptcy, appears to me to be a proposition entirely without the warrant of anything in the Acts of Parliament, and wholly unsupported by any trace or vestige whatever of authority.

Under section 159 (1) (*e*), in order to bring any proceeding involving a bankrupt estate in any other court, it would be necessary in all cases to obtain the leave of the Bankruptcy Court.

Procedure With Regard to Bankruptcy Offences

I have discussed some features of the new Section 159 (1). There is, however, one sub-section to which I particularly take objection as Bankruptcy Judge. That is sub-section (1) (*f*) which gives the Court power and jurisdiction to arraign, admit to bail, try and punish offenders for offences committed under this Act.

Section 159 (1) provides that in the Province of Ontario the High Court of Justice Division of the Supreme Court of the Province is invested in law and in equity with original, auxiliary, ancillary and plenary jurisdiction in bankruptcy and in all matters or proceedings authorized by or under the Act during their respective terms as they are now or may be hereafter held and in

vacation and in chambers and supplementary thereto shall have power and jurisdiction to arraign, admit to bail, try and punish offenders for offences committed under this Act.

Under the provisions of section 160 (1) the jurisdiction vested in the High Court of Justice shall be exercised in the same manner as the jurisdiction of the Court as exercised ordinarily within the judicial districts established by the Province of Ontario or otherwise for the administration of civil law.

Section 161 provides that the Chief Justice of the Court may nominate or assign one or more of the Judges of the Court ordinarily to exercise the judicial powers and jurisdiction conferred by the Act which may be exercised by a single Judge, provided that nothing in this section shall diminish or affect the powers of jurisdiction of the Court or of any of the Judges thereof not specially nominated or assigned.

Section 200 provides that any bankrupt shall in each of the cases set out be guilty of an indictable offence and liable to a fine not exceeding $1,000 or to a term not exceeding two years' imprisonment who commits any one of twenty-one named offences.

The notes to *Section 159* state that the object of the supplementary jurisdiction conferred under *Section 159* is to have *all matters or disputes disposed of by the Court exercising bankruptcy jurisdiction.* In reference to *Section 159 (f)* the note says:—

> The most unsatisfactory phase of bankruptcy administration relates to the punishment for offences enumerated in the Act. Experience indicates that in so many cases magistrates and judges of inferior courts do not fully appreciate the significance of the offences as related to commercial morality with the result that creditors at large are almost thoroughly discouraged *by reason of the failure to obtain proper and sufficient penalties for offences committed.*

The note goes on to say:—

> If offenders were brought before a Judge more familiar with the relative importance of such offences, punishment meted out would be more consistent and more nearly related to the nature of the offence.

It is further explained in the note that exception may be taken that offenders would hereby be deprived of their rights under the ordinary criminal procedure, but that it need only be remembered that this authority is not being exercised by some extraneous or incompetent authority but by a Judge of the highest trial Court in any Province through whom it is to be assumed justice will be best administered.

The proposed legislation is not only objectionable in form, but in practice it would be most difficult to work out even if it were in form to carry out the suggestion in the explanatory note. I deal with the form of the legislation first.

Section 200 creates 21 indictable offences. The procedure in respect to the trial of indictable offences is set out in the Criminal Code. The Supreme Court of Ontario has now jurisdiction to try all indictable offences and unless the legislation explicitly takes from the Supreme Court of Ontario that jurisdiction, it would continue to have such jurisdiction.

Under Part 9 of the Criminal Code, a Court of General Sessions of the Peace in Ontario has power to try all indictable offences except those mentioned in Section 583 of the Criminal Code which include offences such as treason, murder, manslaughter, rape, corruption of public officers, criminal libel, combinations in restraint of trade, etc. Except for special statutory provision, all indictable offences are tried by a jury. Under Part 18 of the Criminal Code the accused has a right to elect to be tried before the County Judge's Criminal Court for any offence triable before the Court of General Sessions of the Peace, and upon such election the County Judge is required to try him without a jury. Under Part

16 of the Criminal Code, the accused has likewise a right to elect to be tried before a Police Magistrate when charged with any offence triable before the General Sessions of the Peace. In such case the Police Magistrate may accept the election or commit the accused for trial.

Where an accused person is charged with an indictable offence there are only two methods of getting him before the Courts—(*a*) to proceed by way of information before a Magistrate or Justice of the Peace and obtain a warrant or a summons; (*b*) to prefer an indictment before the Grand Jury and apply for a bench wararnt.

In the light of the defined criminal procedure in Canada, let us now look at the provisions of the proposed Bankruptcy Act.

Section 159 (1) (f) gives to the High Court of Justice of Ontario during the terms of sitting and in vacation and in Chambers power and jurisdiction to arraign, admit to bail, try, and punish offenders for offences committed under this Act. Is it intended that a Judge shall have power to try an offender without a jury against his will? The Act does not say so, nor does it say that all rights to trial by jury are to be taken away although that is the suggestion in the explanatory note. However, *section 160* says that the jurisdiction vested in the Court shall be exercised in the same manner as the jurisdiction of the Court is exercised in the administration of civil law. This brings one to a dead end. How can jurisdiction to try and punish offenders be exercised in the same manner as jurisdiction to administer the civil law? There is only one offence in the Criminal Code in which it is provided that a Supreme Court Judge has jurisdiction to try an offender without a jury, and that is under the provisions of section 598 of the Criminal Code dealing with trade conspiracies. If it is intended to deprive the offender of all rights to trial by jury, I would think it would be necessary to explicitly say so in the legislation.

Section 161 provides that the Chief Justice may nominate or assign one of the Judges of the Court ordinarily to exercise the Judicial powers and jurisdiction conferred by the Act which may be exercised by a single Judge. It is difficult to consider this section as related to the trial and punishment of offenders. If a Judge in Bankruptcy is assigned, is it contemplated that he shall try and punish all offenders throughout Ontario?

Now may I deal with some of the practical difficulties.

If the legislation should be so framed as to confer on Supreme Court Judges the exclusive right to arraign, admit to bail, try, and punish offenders for the offences committed under the Act, it is undoubtedly going to create great confusion in the administration of justice in Ontario. The sittings of the Supreme Court are held at certain specified times throughout Ontario. Except in those cases where the accused person is in custody, only those cases coming within the compulsory jurisdiction of the Supreme Court are tried before a Supreme Court Judge, except in some unusual cases. It is submitted that it would unduly burden the trial Courts if Supreme Court Judges are to be required to try all the offences enumerated in Section 200 of the proposed Act, none of which carries a punishment of more than two years' imprisonment. The inconsistency of this legislation is quite apparent. The County Court Judges and Magistrates now have jurisdiction to try accused persons for offences for which they may be sentenced to jail for life and to be whipped. Surely judicial officers who have such jurisdiction are competent to try bankruptcy offences. If however, serious offences occur that it is thought in the public interest should be tried in the Supreme Court, it is always open to the Attorney-General to lay an indictment in the Supreme Court and have them tried before a Supreme Court Judge and a jury.

It is submitted that the reasons for attempting to confer this special jurisdiction on the Supreme Court Judge are not sound. In the first place, it is stated that there has been a failure to obtain proper and sufficient penalties

for offences committed. There is always a right of appeal vested in the Crown in criminal cases upon obtaining leave of a Judge of the Court of Appeal to appeal against the insufficiency of the sentence. If in the past the Crown has not appealed or has appealed and the appeal has been dismissed, it may be assumed that the contention advanced in the note in support of this drastic legislation is not well founded. It is also suggested that if the offenders were brought before a Judge more familiar with the relative importance of such offences, punishment meted out would be more consistent and more nearly related to the nature of the offence. I would suggest that if proper relief cannot be got from the Court of Appeal in an appeal against sentence, there is no assurance that Supreme Court Judges would give sentences more satisfactory to the creditors of the accused.

In answer to the exception that offenders would be deprived of their rights under ordinary criminal procedure, it is stated that it is to be remembered that the authority is not to be exercised by some extraneous or incompetent authority, but by a Judge of the highest Trial Court. Such a statement might be made in justification of taking away all an accused's rights to trial by jury for any offence whatsoever. While it is purely a matter for legislative consideration, and not for judicial consideration, it is respectfully pointed out that such a step would be new in the administration of the criminal law, as there is no precedent for depriving an accused person charged with an indictable offence of his right to a trial by jury, except on his own election.

May I refer briefly to two or three other sections of this Bill.

Section 92 (1). Any equities of redemption in real property should not automatically vest in the mortgagees. It frequently happens that real estate which would be difficult to sell at the time of the bankruptcy increases in value and later becomes saleable. The mortgagees should be left to their usual remedies.

Section 92 (2). This is highly objectionable. No assets of the debtor should be revested in him until his creditors are paid in full, except under the composition sections of the Act and with the approval of the Court.

Section 92 (3). All documents of title, etc., should be held by the trustee, subject to the rules and the direction of the Court.

Section 92 (5). Any directions as contemplated by this sub-section should be given by the Court.

In my opinion, the whole of section 92, except sub-section 4, is highly objectionable.

Section 53 (1) (line 41) provides:—

> ...the trustee may waive the filing of a proof of claim if fully satisfied that a claimant is legally entitled to recover possession of any such property or of any right or interest therein.

In all cases, creditors or persons claiming goods in the possession of the bankrupt should file a proof of claim verified by affidavit.

Section 110 (2) and note to same. Notwithstanding section 125, all proofs of claim should be verified by affidavit, following the regular practice of the Court, by which evidence is required to be under oath, and evidence upon a motion may be given by affidavit. The proof of claim as filed by the creditor is used in determining his claim against the estate. Proceedings under the Income War Tax Act and the Succession Duty Act are not Court proceedings in the same way as bankruptcy proceedings are.

Section 196. This provides for summary administration of estates by the Official Receiver where there are no assets, or insufficient assets to cover the

costs of administration. The Official Receiver must carry out the duties under this section in all such estates. These duties would involve considerable disbursements. There appears to be no adequate provisions in section 198 for providing funds for such purposes.

Section 9 (3) provides that in the case of an assignment by a corporation, the sworn statement of affairs which must accompany the assignment shall include (line 30):—

> a list of the shareholders showing the number of shares of stock subscribed for by each shareholder and the amount of capital paid up by each such shareholder.

In some cases this information would be very difficult to obtain, which would unduly delay the filing of the assignment, sometimes with serious consequences.

APPENDIX B

BRIEF PRESENTED TO THE SENATE COMMITTEE ON BANKING AND COMMERCE RESPECTING BILL A5 "AN ACT RESPECTING BANKRUPTCY" ON BEHALF OF THE DOMINION MORTGAGE AND INVESTMENTS ASSOCIATION.

June 20, 1946.

Mr. Chairman and Honourable Senators:

The Dominion Mortgage and Investments Association is an organization composed of loan companies, trust companies and life insurance companies to discuss and deal with matters of common interest to those groups of companies in regard to their investments. While it does not include all such companies, its membership represents the major portion of the business in Canada. The members of the Association are large investors in the securities of corporations and as such are very much interested in the provisions of Bill A5, respecting bankruptcy, and generally in the reorganization of corporations in financial difficulties.

The purpose of Part II of the Bill appears to be to bring under this part of the Bankruptcy Act all corporate reorganizations or arrangements between a company and its creditors. In particular the intention seems to be to abrogate the provisions of The Companies' Creditors Arrangement Act, although this Act is not specifically repealed.

The Association believes than any such attempt is unsound in principle and probably unworkable in practice. The position of investors in a corporation, whether as bondholders, debenture holders or the holders of preferred or common shares, is very different from that of ordinary trade creditors. A procedure quite appropriate for adjusting the rights of investors may therefore be quite inappropriate as a method of dealing with the claims of trade creditors and vice versa. Reorganization is really the converse of bankruptcy and it is quite natural for them to be dealt with in different statutes. In Great Britain company reorganizations are dealt with under The Companies Act and not under the Bankruptcy Act.

The Companies' Creditors Arrangement Act was passed to facilitate corporate reorganizations and, broadly speaking, imported into the law of Canada the relevant provisions of the British Companies Act. The principle of these Acts is reorganization by consent of the various classes of security holders affected and the purpose is carried out by permitting meetings to be held after which the wishes of a specified majority can be given effect to where it is impracticable to obtain the unanimous consent of all the members of a class. Under these provisions a great many important companies have been satisfactorily reorganized both here and in the United Kingdom.

From the point of view of investors the procedure under The Companies' Creditors Arrangement Act has worked well on the whole and has given general satisfaction. The investing public has a variety of instruments to protect its interest such as trustees for bondholders, large institutional investors, underwriters, etc., and the intervention of these groups has probably served to prevent any serious abuse. Nevertheless it is recognized that abuses did occur in the past under The Companies' Creditors Arrangement Act procedure in the compromise of the rights of ordinary trade creditors where there was no general public investment interest.

The Association believes therefore that—

1. The Companies' Creditors Arrangement Act should be retained in full force and effect but with such amendments as may be necessary to prevent the

kind of abuses that occurred in the past and to ensure that so far as small trading companies are concerned recourse will be had to The Bankruptcy Act for the purpose of effecting compositions.

2. The Bankruptcy Act should be amended so that its composition provisions will be made available in pre-bankruptcy situations and to permit the compromise of the claims of unsecured trade creditors prior to bankruptcy in a manner similar to the procedure now available after bankruptcy. This would not involve any interference with the rights of secured creditors and could be provided for in a manner much simpler than the elaborate phraseology of the proposed Part II of the Bill, although some of the provisions of Part II might be usefully included.

As indicative of the amendments of The Companies' Creditors Arrangement Act which the Association believes would be suitable to prevent the recurrence of abuses of the kind that have occurred in the past, there is submitted herewith a draft Bill embodying certain proposed amendments to The Companies' Creditors Arrangement Act and the Association has the following comments to make by way of explanation of the suggested amendments. In short, the proposals involve the addition to the Act of new Parts IV and V providing for a preliminary hearing on the initial application to the Judge for an Order directing meetings to be summoned, the incorporation of detailed provisions in respect of procedure and other matters incidental to the submission of a plan for the consideration of creditors and the subsequent proceedings. These suggestions are discussed in detail below.

It might be suggested that some of the provisions contained in the proposed Parts IV and V could be embodied in General Rules which could be made under Section 17 of the existing Act; however, certain provisions which in one aspect might be considered as involving only matters of procedure in another aspect might be considered as involving matters of substantive law and must therefore be embodied in the Amending Act itself. Moreover, the Association considers it advisable from the point of view of correcting the abuses which have undoubtedly arisen in the administration of the Act and the desirability of laying out a detailed and standardized procedure that the suggested amendments should be incorporated in the Act itself.

The following is an outline of the procedure to be followed under the Act after giving effect to the proposed amendments.

1. The first step is the filing with the court of a copy of the plan and any relevant material on the application for an order directing the summoning of meetings.

2. A preliminary hearing is then directed at which any objections to the plan may be discussed. If the objections are so substantial that it appears that the plan cannot obtain the requisite approvals, the court may dismiss the application; otherwise meetings will be directed to be summoned to consider the plan, either as submitted or as altered or modified to meet any objections.

3. If the plan does not receive the requisite favourable votes that will be an end of the matter. If on the other hand the plan receives the requisite votes, an application will be made to the court to sanction the plan. If the plan is sanctioned, it becomes binding.

4. If at a meeting of any class of creditors any amendment to the proposal is made that substantially and adversely affects the interests of any class of creditors, the meeting must adjourn and the Chairman apply to the court for directions as to the notice, etc., of such adjourned meeting.

The only radical departure from the established practice is the provision for a preliminary hearing.

We have the following specific comments to make on the proposed amendments. The references are to the section numbers of the proposed Amending Act and the new Parts proposed to be added.

Section 2—This section adds new Parts IV and V, assigning section numbers which continue after the last section (20) of the Act.

PART IV

21. Under the existing practice it is possible and sometimes happens that secured creditors who may be vitally affected by a plan hear nothing about it until they receive the notice of meeting. This section makes it requisite that at least representatives of all classes concerned receive notice of the plan proposed and be given an opportunity on adequate information to attend and raise any objections they may have to the proposals before the meetings are actually summoned.

22. Upon the preliminary hearing the court is to hear objections.

23. Adjournments of the preliminary hearing may be ordered.

24. If no objections are raised at the preliminary hearing, the proceedings will be of a formal nature and the court will order the summoning of meetings.

25. If, on the other hand, the objections taken on the preliminary hearing are substantial and it appears that the plan will be successfully opposed, the court may dismiss the application. Thus the expense of holding meetings at which the plan is certain to be defeated is obviated. An order dismissing the application is subject to appeal.

26. This section is designed to prevent several plans being put forward by different creditors of the same class.

27. Where the compromise requires the transfer of the assets to a new company, the debtor company might refuse to execute the requisite conveyances. The court is authorized to make an order vesting the assets in the new company.

PART V

28. It has been found that meetings are sometimes called without adequate information being furnished to the creditors attending or that the notice is insufficient or that the chairman is not always a person who will see that the meetings are fairly conducted.

29, 30 & 31. There have sometimes been abuses in the solicitation of instruments of proxy by irresponsible persons or by persons having a special interest which is not disclosed. These sections are designed to secure the necessary disclosure in the solicitation of instruments of proxy.

32. This section specifies the procedure to be followed at meetings. These provisions are designed to remove difficulties to which creditors are now subjected under existing practice.

Subsection (3) supplements the procedure available under section 11 of the Act, which is inadequate.

Subsections (4) and (5) are designed to prevent a radically changed plan from being voted on and approved with the use of instruments of proxy given pursuant to notice of a meeting called to consider the plan as originally proposed.

33. The Act does not now require notice to dissentients of the application to the court to sanction the plan. This section adopts the corresponding provisions of The Companies Act, 1934.

34 & 35. In some cases the preparation and carrying into effect of a plan of reorganization will involve substantial expenses. It has been thought desirable to adopt provisions which will make such expenses subject to review by the court and also to adopt provisions so that in a proper case expenses may be incurred and payment thereof provided for notwithstanding that the plan may eventually

not become effective. At the same time it has been thought desirable to give specific directions to the court to disallow excessive costs or any costs at all to interests not entitled to costs.

36. This section is desirable so that there may be no doubt as to the power of the court to require production of records or information which may be in the possession or control of a person who is not a direct party to the proceedings.

37. If orders of an interlocutory nature are subject to appeal the reorganization may be unduly delayed. On the other hand there must of necessity be provision for appeal where the rights of parties are finally disposed of. Accordingly, a distinction is drawn between orders which are to be appealable and those which are not to be appealable. The orders which it is considered should not be subject to appeal are those directing the holding of meetings (sections 3 and 4 of the Act and new Section 28); orders with respect to the procedure on the preliminary hearing (new sections 21-24 inclusive); vesting orders (new section 27); orders giving directions in connection with adjournments (subsections (4) and (5) of new section 32); orders directing notice to dissentients (new section 33); and orders with regard to expenses of the plan (new section 34); orders directing production (new section 36).

38. Provision is made for the making of orders directing that meetings be either proceeded with or adjourned pending appeal. Such orders are not to be subject to appeal.

39. It has been found that in some cases trading companies have put forward a plan which resulted in cutting down the claims of creditors without any real intention of carrying out such plan. Later on, after new creditors' claims have been created, a new plan is proposed, when former creditors are at a disadvantage as against new creditors because their original claims have already been reduced. The new section puts an obstacle in the way of this practice by preventing the debtor company itself from submitting a new proposal during a two-year interval.

40. The requirement that a copy of the order sanctioning the plan and a copy of the plan itself should be forwarded to the Dominion Statistician is along the lines of the similar requirements in the Winding-up Act.

Section 3—This section provides that the Amending Act is not to affect pending proceedings.

The Association has given consideration to the provisions of Part II of Bill A5 and submits that the provisions of the said Part are not suitable for effecting a reorganization of a large public company with issues of bonds and shares largely distributed in the hands of the public. The securities and shares of such companies are usually distributed through one or more houses of investment dealers and in most cases substantial amounts of the securities and shares are held by life insurance companies, investment trusts, trust companies and similar institutions. The proceedings for reorganization of such a company are usually initiated by representatives of the issuing houses and institutional holders either through the creation of protective committees on behalf of bond and share holders or through informal discussions between representatives of the chief security holders, issuing houses, representatives of the trustee for the bondholders and the directors of the company. The negotiations leading to the formulation of a plan of reorganization are usually extended and involve extensive and minute investigation of the affairs of the company in question. The provisions of Part II of Bill A5 require the commencement of proceedings for reorganization by the submission of the plan of reorganization to a licensed trustee who is thereupon required to make an investigation of the affairs of the

company concerned. In the cases of companies such as those under discussion, such an investigation would in most cases be entirely superfluous, because of the work already done by the committees or other persons negotiating the plan, and such a superfluous investigation would necessarily entail a considerable overlapping of work and in most cases considerable unnecessary expense. Moreover, when negotiations with the various classes of investors have reached the point when a plan of reorganization can be formally prepared, the carrying through of the plan is often a matter of great urgency in the interests of all concerned. The Provisions of the proposed Part II contemplating successive investigations at various stages of the proceedings might easily lead to delays resulting in the abandonment of even the most advantageous plan.

One of the basic principles of the existing Bankruptcy Act is the preservation of the rights of secured creditors. Part II of the Bill contemplates that the rights of such creditors can be compromised by means of the procedure defined therein. Such procedure, however, is quite inappropriate to the purpose as is shown by the provisions of the proposed section 104 which requires a secured creditor to value his security before becoming entitled to vote at any meeting. No effective meeting of secured creditors such as bondholders could therefore be held and no reorganization of a company with bonds outstanding could be made under Part II without extensive amendments to procedure and in particular to section 104. No such amendments are recommended, as in the opinion of the Association the existing provisions of the Bankruptcy Act preserving the rights of secured creditors should be left undisturbed.

Although the above are the basic objections of the Association to the use of proceedings under the Bankruptcy Act for the purpose of adjusting the rights of investors on the reorganization of a public company, the Association without examining all of the provisions of Part II of Bill A5 in detail wishes to point out the following among other respects in which the Bill as drawn is unsuitable for use in such reorganizations:—

(*a*) Section 12 (1) (*c*) requires a trustee in calling a meeting to forward to all of the creditors a list of the creditors affected by the proposal with their addresses and the amounts of their claims as known or as shown by the company's books, and subsection (2) requires that in the case of a corporation the trustee shall send to each shareholder, bondholder and debenture holder affected by the proposal the documents referred to in subsection (1), and in addition on request a list of such share, bond or debenture holders, showing in the case of shareholders the number of shares of stock subscribed for by each shareholder with the unpaid balance, if any, due thereon, and in the case of bond or debenture holders the serial number of the bonds or debentures held by each of them with the amount of principal and interest to be shown separately due thereon.

In the first place most issues of bonds or debentures of large public companies in Canada are in bearer form and it is utterly impossible to prepare a list of such bondholders. In many cases shares are held in the form of share warrants, in which case the same remarks apply to the list of shareholders.

Secondly, the preparation of lists of bond and share holders, if it were possible, and the distribution of such lists to any person requesting them, would in the case of many of the public companies whose bonds and shares are widely distributed and held by several thousand individuals involve an expense entirely out of proportion to any benefit to be derived therefrom.

(*b*) As mentioned above, reorganizations of large public companies are usually initiated through formal or informal committees of security

holders and the reports of such committees appear to the Association to be of greater value to the security holders than any material required to be furnished under the provisions of Section 12 of Bill A5.

(*c*) Section 22 of Bill A5 appears to us to raise difficult constitutional questions in so far as it relates to corporations incorporated otherwise than by or under an Act of the Parliament of Canada.

(*d*) The Association has grave doubts as to the wisdom of the provisions of Section 23 of Bill A5 enabling the court to appoint a committee to propound a scheme of reorganization where for one reason or another it has been found impossible to effect a reorganization in the ordinary course. It seems to the Association that instead of being useful in assisting the exceptional reorganization where an agreement could not be effected, it would tend to render other reorganizations more difficult in that classes of security holders or share holders would be inclined to refuse to approve of a reorganization which did not particularly favour their class with a view to the appointment of a committee on which they would be represented and which they would hope would provide more favourable treatment.

As intimated above, the foregoing comments are not intended to be an exhaustive criticism of the provisions of Part II of Bill A5, but merely indicate some of the outstanding points which render the draft Bill unsuitable for the reorganization of a large public company.

The Association understands that some suggestion has been made that the Winding-up Act should be repealed and that all the matters which would have come under that Act should be dealt with under the Bankruptcy Act. While the Association is not in a position to compare the provisions of the two Acts, it has been our experience that large public companies which are in financial difficulties are nearly always dealt with under the Winding Up Act and proceedings under that Act are to our knowledge well suited for coordination with receivership actions under Trust Deeds securing bonds and proceedings under the Companies' Creditors Arrangement Act. The Association doubts whether such proceedings could be as satisfactorily combined with proceedings under the Bankruptcy Act and submits that most careful consideration should be given before the Winding-up Act is repealed.

Respectfully submitted,

THE DOMINION MORTGAGE & INVESTMENTS ASSOCIATION.

J. E. Fortin,
Secretary-Treasurer.

DRAFT BILL submitted by the Dominion Mortgage and Investments Association in its Brief presented to the Senate Committee on Banking and Commerce respecting Bill A5 "An Act Respecting Bankruptcy," June 20, 1946.

AN ACT TO AMEND THE COMPANIES' CREDITORS ARRANGEMENT ACT, 1933

BILL

1933, c.36

His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

Short title

1. This Act may be cited as The Companies' Creditors Arrangement Act Amendment Act, 1946.

2. The said Act is hereby amended by adding thereto the following:—

PART IV

Duties of court on application under sections three and four

21. Upon the application to the court under sections three or four the court

Material to be filed

(1) shall require to be filed with it a copy of the compromise or arrangement with respect to which the application is made, a statement, verified by affidavit, setting forth the circumstances under which and the person or persons by whom the compromise or arrangement has been prepared, particulars as to the class or classes of creditors and shareholders and other persons (if any) consulted in the preparation thereof, and, unless the court otherwise orders, copies verified as being true copies of all financial statements, appraisals, reports and other material documents referred to in the compromise or arrangement;

Preliminary hearing

(2) shall direct a preliminary hearing (hereinafter referred to as the "preliminary hearing") for the consideration of the application, and shall fix the date, time and place for the preliminary hearing;

Statement to be filed

(3) shall require the filing with the court of a statement as of such date and verified in such manner as the court may prescribe, showing the creditors or classes of creditors, as the case may be, affected by the compromise or arrangement proposed, with the name and last known address of each such creditor as shown by the books of the debtor company and the amount of his claim stating whether such claim is secured or unsecured, in whole or in part (and if secured the nature of the security), provided that, in the case of claims represented by securities or obligations payable to bearer, a description of the securities or obligations with particulars of the aggregate amount, the rate of interest and the nature of the security, if any, shall be sufficient and provided further that, if the application is made by a creditor of the debtor company, the court may dispense, in whole or in part, with the requirements of this subsection;

Notice of preliminary hearing

(4) shall prescribe the form and period of notice of the preliminary hearing to be given, the persons to whom such notice shall be given, the manner of giving notice, the material to accompany such notice and the place or places where copies of such material may be obtained by any person to whom notice by advertising is directed.

Notice to others than creditors or shareholders

(5) may direct notice of the preliminary hearing to be given to any person who may be the beneficial owner of or may be otherwise interested in any claim against or share in the capital stock of the debtor company;

Preliminary hearing requisite before summoning of meetings

(6) Notwithstanding sections three or four shall not order any meeting or meetings to be summoned until the preliminary hearing shall have been concluded.

Objections

22. Upon the preliminary hearing the court shall hear any objections taken to the compromise or arrangement as proposed, may permit alterations or

modifications, may take evidence and may direct the preparation and filing with the court of such reports, financial statements, appraisals or other data as the court may deem requisite for the purposes of the preliminary hearing.

Adjournment

23. The court may direct the adjournment, from time to time, of the preliminary hearing without further notice or may direct the giving of notice of such adjourned preliminary hearing, not only to the persons to whom notice was directed to be given pursuant to section twenty-one but also to others.

Summoning of meetings

24. If no objections are sustained at the preliminary hearing to the compromise or arrangement proposed, then the court may order a meeting or meetings to be summoned, as permitted by sections three or four or both sections, as the case may be, for the consideration of the compromise or arrangement. Any such meeting may be ordered to be held at some place outside of Canada if the court, in its discretion, determines that, having regard to all the circumstances, such meeting should or may more conveniently be held at such place.

Dismissal of application

25. If, on the preliminary hearing, the court shall determine that a compromise or arrangement, to which objection has been taken, is not practicable or that such objections are so substantial that no meeting or meetings should be ordered to be summoned, the court may make an order dismissing the application. Such order shall not preclude or prejudice any future application under sections three or four.

Restriction on applications by creditors of the same class

26. Where an application has been made by a creditor under sections three or four no application may be made to any court by any other creditor of the same class for an order directing the summoning of a meeting or meetings in respect of any other or an amended compromise or arrangement unless the first mentioned application shall have been dismissed.

Vesting order

27. Where a compromise or arrangement provides for the transfer of the assets and undertaking (or any part thereof) of the debtor company to a transferee, then the court may, upon sanction by it of the compromise or arrangement under section five, make such vesting order or orders or may direct such conveyances and transfers to be made as shall be requisite for such purpose.

PART V

28. Upon the making of an order under sections three or four

(1) the order for the summoning of the meeting of creditors or classes of creditors and of shareholders or classes of shareholders (if the court directs a meeting or meetings of the shadeholders to be summoned)

Notices

(*a*) shall prescribe the form or forms of notices to be sent;

Designation of classes to be summoned

(*b*) shall designate the class or classes of creditors and the class or classes of shareholders (if any) to be summoned, and, if the order provides that more than one class are to meet at the same time and place, the class or classes required to vote separately;

Material to accompany notice

(*c*) shall designate the material to accompany such notice, which shall, in any event, include an explanatory circular, a form of instrument appointing a proxy (which form of instrument shall contain provisions permitting directions to be given as to voting and shall only name therein as proxies persons approved by the court for that purpose) and the latest balance sheet and statement of income and expenditure reported on by the auditors of the debtor company, and may direct other or additional financial statements to be included;

Service of Notice

(*d*) shall specify the manner of serving the notice of meeting or meetings upon the creditors or class or classes of creditors and shareholders (if the court orders a meeting or meetings of shareholders to be summoned) and, with respect to creditors holding securities or obligations payable to bearer or holders of share warrants, may direct notice by advertisement, and, where notice by advertisement is directed such advertisement shall name a place or places where a creditor or holder of a share warrant or his duly appointed agent may secure, without charge, copies of the material prescribed to accompany the notice of such meeting.

Chairman

(2) The court may appoint a person and one or more alternates whose consent to act has been filed, to act as permanent or temporary chairman of the meeting or meetings. In the absence of the appointment of a permanent chairman, one shall be elected when the meeting is called to order.

Solicitation of authorization to vote

29. It shall not be lawful for any person to solicit or knowingly permit the use of his name to solicit any authorization (which expression shall include any instrument appointing a proxy, consent or other authorization) in connection with any compromise or arrangement unless the following information is presented in writing to each solicited person at the time of the first solicitation:—

(1) if the solicitation is by or on behalf of the debtor company, a statement to that effect; or

(2) if the solicitation is not by or on behalf of the debtor company, the name or names of the persons on whose behalf or at whose instance the authorization is being solicited and particulars of the class or classes and aggregate amount of securities, obligations, claims or shares of, against or in the debtor company which are owned or controlled for voting purposes by any such persons; and

(3) if the solicitation is by a person who is entitled to or may receive compensation or reimbursement of expenses for soliciting or recommending the giving of an authorization, a statement to that effect.

Prohibition of misleading solicitation

30. No person shall solicit or knowingly permit the use of his name to solicit any authorization by means of any statement which to his knowledge was at the time and in the light of the circumstances under which it was made false or misleading in any material particular.

Penalty

31. In the event of any contravention of the provisions of sections twenty-nine or thirty any person who knowingly contravenes or permits or authorizes the contravention of said provisions shall be liable on summary conviction to a fine not exceeding five thousand dollars.

Meetings

32. The following provisions shall apply to any meeting or meetings ordered to be summoned pursuant to an application made under sections three or four:—

Proxies

(1) It shall not be necessary that a proxy designated by a creditor be himself a creditor in order to attend and vote at the meeting at which he has been appointed to act as proxy.

Voting

(2) Voting on the proposed compromise or arrangement at meetings of creditors and classes of creditors shall in each case be by poll taken in such manner as the chairman directs, and the chairman shall appoint one or more scrutineers to compute the votes at the poll and report to the chairman. Votes may be given by proxy appointed under any proper form of instrument of proxy, notwithstanding that such form may not be the form distributed in accordance with paragraph (*c*) of section twenty-eight.

(3) If a creditor shall have voted in respect of any claim the amount of which has not been established by proof or determined by the court as provided by section eleven of this Act, but has been admitted for voting purposes, the chairman, if he is of opinion that the amount of such claim should not have been admitted, or that there is some question whether the claim should have been admitted as to amount or at all, shall make a report thereon to the court before the application is heard for the sanction of the compromise or arrangement. If a creditor or his proxy at the meeting objects to the voting by a creditor in respect of any claim or to the extent of the recognition of such vote and delivers, within two days from the date of such voting, to the chairman, his objections in writing, the chairman shall file with the court such objections in writing before the hearing of such application. Upon such hearing the court may adjudicate upon such objections and upon such adjudication shall deliver its reasons in writing and if necessary the results of the voting shall be modified accordingly.

Alteration of compromise or arrangement

(4) If any alteration or modification in the compromise or arrangement is proposed at the meeting and the amendment is made would substantially and adversely affect the interests of the creditors or class of creditors summoned, the chairman shall adjourn such meeting for the purpose of seeking a direction of the court in accordance with section six of this Act, and if such adjournment is made all other meetings directed to be summoned in respect of the same compromise or arrangement, the proceedings at which shall not have been concluded, shall be adjourned for the like period.

Direction in case of adjournment

(5) Upon any application to the court under subsection four of this section the court may give directions as to notice of the adjournment and such further directions as to the use at such adjourned meeting of instruments of proxy given in respect of the meeting as originally summoned or the use of new instruments of proxy and such directions as the court may in its discretion deem necessary or advisable.

Notice to dissentients

33. Where a compromise or arrangement has been agreed to by the requisite class or classes of creditors at the meeting or meetings ordered to be summoned

but dissentient votes have been cast by creditors of a class or classes affected, it shall be necessary, unless the court in its discretion otherwise orders, that notice be given to each dissentient creditor of such class or classes in such manner as may be prescribed by the court of the time and place where application will be made to the court for the sanction of the compromise or arrangement.

Expenses of compromise or arrangement

34. The court may, upon such notice to the debtor company and to the creditors or class or classes of creditors affected as the court may direct

(1) approve in advance the incurring of expenditures in connection with the compromise or arrangement proposed including, without limiting the generality of the foregoing, the expense of holding the meeting or meetings, fees and disbursements of solicitors and counsel, and the expenses in connection with any appraisal, report or enquiry;

(2) order that such expenses and any costs allowed by the court may be paid as part of the expenses of the compromise or arrangement out of the assets of the debtor company in priority to the claims of the creditors or classes of creditors whether secured or unsecured affected and notwithstanding that the compromise or arrangement either as proposed or altered at the meeting or meetings may not be agreed to by the creditors or sanctioned by the court.

Costs

35. The court may allow costs. Such costs (subject as hereinafter provided) may be allowed not only to a successful applicant and any person supporting a successful application but also to an unsuccessful applicant and any person bona fide opposing a successful or an unsuccessful application. Provided always that the court shall not allow more than one set of costs to persons representing or purporting to represent the same interests unless the court in its discretion shall determine that the justice of the case so requires.

Production

36. The court may from time to time order any director, officer, employee, auditor, trustee in bankruptcy or liquidator of the debtor company or any creditor or other person whatsoever to produce or make available any books, records, reports or other information in his possession or under his control which the court may deem requisite or desirable in connection with the submission, consideration, voting upon or carrying into effect of the compromise or arrangement either as proposed or as altered or modified at the meeting or meetings ordered to be summoned.

Appeal

37. Notwithstanding the provisions of this Act no order, direction or decision of the court made under section three, four, twenty-one to twenty-four inclusive, section twenty-seven, section twenty-eight, subsections four or five of section thirty-two, sections thirty-three, thirty-four and thirty-six of this Act shall be subject to appeal.

Holding or adjournment of meetings pending appeal

38. Notwithstanding that leave may be obtained to appeal from an order or decision of the court, the judge appealed from or the court or a judge of the court to which the appeal lies may order that any meeting or meetings, ordered under sections three or four to be summoned, should be held in accordance with the order appealed from or should be adjourned from time to time pending the final disposition of the appeal or should be adjourned sine die and no appeal shall lie from such order.

Default under compromise or arrangement

39. If default shall be made by the debtor company under any compromise or arrangement sanctioned under section five of this Act, no application may be made under sections three or four of this Act by the debtor company until the expiration of two years from the date of the order made under section five of this Act sanctioning such compromise or arrangement.

Documents to be forwarded to Dominion Statistician

40. Upon any compromise or arrangement being sanctioned by the court, the person having the carriage of the order shall promptly after the issuance of the same mail to the Dominion Statistician, Dominion Bureau of Statistics, Ottawa, a true copy of the order including a copy of the compromise or arrangement so sanctioned."

Pending proceedings

3. This Act shall not affect any proceedings under the said Act which were pending on the date when this Act comes into force.

1946

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING COMMITTEE ON BANKING AND COMMERCE

to whom was referred the Bill A-5, intituled:
"An Act respecting Bankruptcy."

No. 4

WEDNESDAY, JUNE 26, 1946

CHAIRMAN

The Honourable Elie Beauregard, K.C.

WITNESSES:

Mr. J. M. Bullen, K.C., representing The Canadian Credit Men's Trust Association.

Mr. W. J. Reilley, K.C., Superintendent of Bankruptcy.

Mr. R. O. Daly, K.C., representing The Investment Dealers Association of Canada.

Mr. A. C. Crysler, Legal Secretary, Board of Trade of the City of Toronto.

OTTAWA
EDMOND CLOUTIER
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
1946

ORDER OF REFERENCE

EXTRACT from the Minutes of Proceedings of the Senate for 13th May, 1946.

Pursuant to the Order of the Day, the Honourable Senator Robertson moved that the Bill (A-5), intituled: "An Act respecting Bankruptcy", be now read a second time.

After debate, and—
The question being put on the said motion.
It was resolved in the affirmative.

Ordered, That the said Bill be referred to the Standing Committee on Banking and Commerce.

L. C. MOYER,
Clerk of the Senate.

STANDING COMMITTEE ON BANKING AND COMMERCE

The Honourable ELIE BEAUREGARD, K.C., *Chairman*

The Honourable Senators

Aseltine	Euler	Marcotte
Aylesworth, Sir Allen	Fallis	McGuire
Ballantyne	Farris	Michener
Beaubien (*Montarville*)	Foster	Molloy
Beauregard	Gershaw	Moraud
Buchanan	Gouin	Murdock
Burchill	Haig	Nicol
Campbell	Hardy	Paterson
Copp	Hayden	Quinn
Crerar	Howard	Raymond
Daigle	Hugessen	Riley
David	Jones	Robertson
Dessureault	Kinley	Sinclair
Donnelly	Lambert	White
Duff	Leger	Wilson—(47).
DuTremblay	Macdonald (*Cardigan*)	

MINUTES OF PROCEEDINGS

WEDNESDAY, June 26, 1946.

Pursuant to adjournment and notice the Standing Committee on Banking and Commerce met this day at 10.30 a.m.

Present: The Honourable Senator Beauregard, Chairman, The Honourable Senators Aseltine, Buchanan, Campbell, Crerar, David, Dessureault, Duff, Euler, Gershaw, Gouin, Hayden, Hugessen, Jones, Lambert, Leger, Macdonald (*Cardigan*), McGuire, Molloy, Moraud, Paterson, Sinclair, White—23.

In attendance: The official reporters of the Senate.

Mr. J. F. MacNeill, Law Clerk & Parliamentary Counsel.

Mr. W. J. Reilly, K.C., Superintendent of Bankruptcy.

Bill A-5, "An Act respecting Bankruptcy" was again considered.

Mr. J. M. Bullen, K.C., representing the Canadian Credit Men's Trust Association, Ltd., was heard.

Mr. W. J. Reilly, K.C., Superintendent of Bankruptcy, was heard in explanation of certain clauses of the Bill.

Mr. R. O. Daly, K.C., representing The Investment Dealers' Association of Canada, was heard.

At 1.00 p.m. the Committee adjourned until 8 p.m. this day.

At 8 p.m. the Committee resumed.

Mr. A. C. Crysler, Legal Secretary, The Board of Trade of the City of Toronto, was heard and submitted a brief on behalf of the Board.

Further consideration of the Bill was postponed.

At 9.40 p.m. the Committee adjourned until to-morrow, 27th June, instant.
Attest.

A. H. HINDS,
Chief Clerk of Committees.

MINUTES OF EVIDENCE

THE SENATE

OTTAWA, WEDNESDAY, June 26, 1946.

The Standing Committee on Banking and Commerce to whom was referred Bill A5, an Act respecting Bankruptcy, met this day at 10.30 a.m.

The CHAIRMAN: Gentlemen, we will now proceed with our business. I will call on Mr. Bullen who, I understand, is appearing for the Canadian Credit Men's Trust Association Limited.

Mr. J. M. BULLEN, K.C.: Mr. Chairman and gentlemen, I appear on behalf of the Canadian Credit Men's Trust Association Limited. This is a Canadian-wide organization for the promotion of a high standard of ethics between wholesalers, manufacturers and retailers. It has some 1,500 members, all prominent wholesale and manufacturing houses situated across the Dominion, and has a credit clearing house bureau through which members get information as to the financial standing and trade activities of the retailers with whom they deal. The organization has its head office in Toronto, with branches in New Brunswick, Quebec, Manitoba, British Columbia, one other in Ontario, two in Alberta and two in Saskatchewan.

The association has acted as a trustee in Bankruptcy ever since the inception of the Bankruptcy Act and has handled a great many estates and has had a great deal of experience with the Act in practically all its forms. Before that, it acted as assignee under the old Assignments and Preferences Act.

Whilst the association acts as trustee, the submissions contained in this memorandum are advanced on behalf of the membership, representing the various wholesale and manufacturing houses, who are the creditors of the bankrupt estates. Trusteeship is performed more as a service to these creditors and the association is more interested in the Bankruptcy Act from the creditor's standpoint rather than that of a trustee. It is on their behalf that I should like to address myself to your committee this morning.

The association approves of the provisions making it possible for a debtor to enter into a composition, extension, or scheme of arrangement before as well as after bankruptcy. There is always a stigma attached to bankruptcy as when one mentions bankruptcy to a trader it is like mentioning the preparation of a will to some people—they feel it is the beginning of the end. Aside from this there should be some provisions for proposals, extensions or schemes of arrangement being made without the necessity of dealing through a licensed trustee or invoking any provisions of any Act.

Hon. Mr. MORAUD: Do you approve of the principle of those schemes?

Mr. BULLEN: Yes, sir, we do approve of that principle. We say that it should not be necessary for a man to go to a licensed trustee on all occasions. There are many proposals and schemes of arrangement that can go through with the consent and co-operation of the creditors all joining in without the necessity of a trustee interfering at all, or at least without invoking the provisions of the Bankruptcy Act.

These schemes of arrangement and composition are dealt with in part 2 of the bill, sections 11 to 24. We suggest that some provision should be inserted in the bill to validate informal arrangements and compositions or provide that they do not require the services of a licensed trustee at all. I shall have some-

thing to say at a later stage about a section in the bill which seems to me to eliminate proposals under the Companies Creditors' Arrangement Act, bulk sales, and that sort of thing.

Hon. Mr. HAYDEN: Your approval of that principle does not necessarily mean that you approve of bringing proceedings under the Bankruptcy Act that now might come under the Companies Creditors' Arrangement Act?

Mr. BULLEN: As a matter of fact, Senator Hayden, I want to speak about that later on. We are against that principle of eliminating the present procedure under the Companies Creditors' Arrangement Act.

Hon. Mr. MORAUD: It is merged in this bill.

Mr. BULLEN: Just a word as to some of these sections and subsections. Subsection 3 of section 11 reads:

> No such proposal or any security or guarantee tendered therewith may be withdrawn pending the decision of the creditors and the court with respect thereto, nor shall any variation in the proposal by the court release the sureties thereunder, but the sureties shall have two days' notice of any amended proposal as approved by the creditors and the debtor, after which time, if no objection is taken, they shall be considered as having agreed to the amended proposal.

We think that interferes with the rights of sureties and is an encroachment on the law of suretyship that might lead to dangerous situations. As you know, the surety agrees—generally under some pressure—with the debtor to guarantee certain payments, say, ten, fifteen or twenty cents on the dollar, under certain conditions. We think if the court is going to alter any of these conditions the onus should strictly be put on the debtor or the creditors to get the surety's approval in writing, and there should be no procedure set up under which the surety might fail to get notice and be bound by changes he knows nothing about.

Hon. Mr. HAYDEN: Can you see any reason for departing from the general rule, that if I guarantee performance by some party it should be on my own terms?

Mr. BULLEN: No. Every law student from the time he enters on the study of the law is taught that principle.

Hon. Mr. HAYDEN: Is there anything on the ground of expediency that would justify it?

Mr. BULLEN: I would not think so. One takes a lot of time going to the courts to get approval, and there is no reason why the surety should not be notified. It seems to me it places too much of an element of chance in the fact that the surety might be away from his usual place of business or residence after he has guaranteed the indebtedness of the debtor for the purpose of the proposal. Then if some change is made and he does not object within two days, he is stuck with the change.

Subsection 2 of section 12 reads:—

> In the case of a corporation the trustee shall send to each shareholder, bondholder and debenture holder affected by the proposal the documents referred to—and they are set out. We suggest that no trustee should be put to the very laborious procedure of sending the proposal or scheme of arrangement or composition to each shareholder, bondholder or debenture holder. After all, the shareholders appoint the directors, and no proposal or scheme can be made unless it is initiated by the directors, and there is no necessity of notifying the shareholders of some arrangement between the company and its creditors.

Hon. Mr. MORAUD: I suppose there could be publication in the newspapers about some things, otherwise the shareholders, bondholders or debenture holders, would not be notified at all.

Mr. BULLEN: But the theory of all company law is that the directors represent the shareholders. Here they are making some arrangements with their creditors, and the directors are acting for the shareholders. So why should notice be sent to all of them?

Hon. Mr. MORAUD: But have not the directors the right to make an arrangement with creditors without consulting the shareholders? Supposing they do that, surely the shareholders should be notified in some way either by newspaper advertisement or by letter?

Mr. BULLEN: But I would not think that a scheme of arrangement or proposal with the company's creditors would be made without consultation with the shareholders.

Hon. Mr. LEGER: In other words, you want to authorize the directors to take whatever action they see fit?

Mr. BULLEN: That is what we suggest. That is what they are there for, to carry on business, and if they want to make an arrangement with the creditors the trustee should not be put to the burden of notifying all the shareholders.

Hon. Mr. LEGER: In the first place, he would not have the names of all the shareholders.

Hon. Mr. HAYDEN: Of course, what you are talking about now is something entirely out of the ordinary course of business of the company.

Mr. BULLEN: The shareholders would know about it, anyway.

Hon. Mr. HAYDEN: If the plan were approved it might have the effect of robbing the shareholders of any further interest in the assets of the company. That is a pretty important step.

Hon. Mr. CAMPBELL: You feel that the responsibility of notifying all the shareholders should not be on the trustee.

Mr. BULLEN: That is it.

Hon. Mr. CAMPBELL: Is it the responsibility or the burden of the work?

Mr. BULLEN: Both. Our view is that the directors would make the best proposition. They are the agents, so to speak, the representatives of the shareholders, and cannot make it without the knowledge of the shareholders. Why do they have to be notified after it is made?

Hon. Mr. CAMPBELL: Would it cover your point to say that the notice would not be effective unless it was approved by resolution of the shareholders?

Mr. BULLEN: Yes, that might do. I would not think the directors would make a proposition unless they had the resolution of the shareholders.

Hon. Mr. CAMPBELL: Your point is that rather than have the trustee required to send notices of the proposal to all shareholders and bondholders, a meeting should be called and a resolution passed approving of the proposal before it is finally adopted?

Hon. Mr. HAYDEN: If the plan is approved by the shareholders before it is submitted by the directors it should not be necessary to send a notice out. I have some difficulty in accepting the view that the directors would submit a plan or proposal without some reservations, unless it had been approved by the shareholders.

Mr. BULLEN: This would not be so important if the Companies Creditors' Arrangement Act were not enveloped in the Bankruptcy Act.

Hon. Mr. HUGESSEN: The subsection requires the trustee to send various documents to every shareholder, bondholder and debenture holder. I should think that is an obligation which the trustee would be entirely unable to fulfil in certain circumstances

Mr. BULLEN: The next thing that I want to deal with is subsection (1) of section 13:—

> If the creditors by a ten per cent vote of those voting in person or by proxy 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. . . .

I would suggest that a ten per cent vote of those present is too small. Ten per cent of those present at a meeting might hold a small amount of the indebtedness of the debtor. It was thought that perhaps the committee might give some consideration to having this provide for—

Hon. Mr. HAYDEN: A majority vote.

Mr. BULLEN: Well, at any rate a higher percentage than ten—probably twenty per cent of those present, provided they hold thirty per cent of the claims, or something of that kind.

Hon. Mr. HAYDEN: Why should less than a majority of those present have that power?

Mr. BULLEN: If you would go that far, it would be all the better.

Hon. Mr. HAYDEN: And there could be a provision that a certain dollar value be represented.

Mr. BULLEN: A ten per cent vote is too small. Some persons might have an ulterior motive and they could easily get ten per cent of the shareholders present to adjourn the meeting and create obstacles that the majority would not think of creating.

Then, the word "shall" might be changed to "may". The subsection says "the meeting shall be adjourned". This might be changed to "the meeting may be adjourned".

Hon. Mr. HAYDEN: How could you say that? That would ignore the vote.

Mr. BULLEN: I have the word "shall" underlined in my copy of the bill, but it is not referred to in my brief. Perhaps I considered it was not worthwhile putting in the brief.

Then we submit that section 23 is much too radical, particularly subsection 10. Business to-day does not warrant more interference by administrative officials. In our view there is enough at the moment.

Hon. Mr. MCGUIRE: Too much.

Mr. BULLEN: I quite agree with you, Senator, there is too much. We think it is a rather vicious principle to saddle these business arrangements with the sanction or approval of or interference by any administrative official, no matter who he may be. The court has the respect, generally speaking, of the majority of citizens and traders. It is the place of last resort where one's rights are adjudicated upon. When a matter is referred to the court the creditor feels, "Well, I have got the best I can get".

Hon. Mr. HAYDEN: Are you referring to the power proposed to be given to the court to formulate a proposal, notwithstanding the attitude of the shareholders or creditors?

Mr. BULLEN: That is subsection 10 of section 23, and it is so radical that it is hard for us to conceive why such legislation as that should be put on the statute books. After all, with the utmost respect to our judiciary, we know the judges are not business men; they have not had a training in business.

Hon. Mr. HAYDEN: Not necessarily.

Mr. BULLEN: I grant you that some of them have, but, as you know, judges as a rule are not business men. We submit that the court should not be burdened with the task of formulating a proposal, nor should it be given power to put it through irrespective of the wishes of the shareholders or creditors. If such legis-

lation as that has to be put through and we must have some tribunal able to make a compromise or proposal or scheme that the creditors must accept, one would suggest that probably the same procedure should be followed as in railway and telegraph matters. There is a Transport Board to deal with railway matters, and a Municipal Board to deal with municipal money by-laws. Bankruptcy is a kind of specialized piece of legislation, and if it is necessary to interfere with business to the extent that subsection 10 of section 23 does, we feel that probably a board of business experts should be set up. We are not advocating any such arrangement as that at all, because we realize how fatal and detrimental it would be to business men in the sale of their securities. You gentlemen would not buy securities if you knew the judge of a court could make some arrangement depriving you of some of your rights or adding some obligations without your having anything to say about it. That section we think could quite easily be deleted.

Coming to subsection (4) of section 18, you will note this provides:—

> The court may not make any material alterations in the substance of the proposal. . .

We submit that is much too wide and leaves room for appeals and arguments as to what is or what is not "material alteration in the substance of the proposal". This subsection might quite well be deleted, so long as the court has power to vary the proposal in the best interests of the creditors. I think some such language as that is used in the present act, and the committee might well consider whether it would not be advisable to leave the section as it is.

Hon. Mr. HUGESSEN: Would your suggestion be met by deleting part of the first and second lines of subsection (4), so that it would read: "The court may correct, or supply, any accidental or formal error or omission in the proposal," and so on.

Mr. BULLEN: Yes, Senator. I think the court can be trusted to make a change, so long as there is a qualification that it is to be in the best interests of the creditors.

Hon. Mr. HAYDEN: If the words referred to by Senator Hugessen were deleted, that would accomplish your object, would it not?

Mr. BULLEN: Yes, Senator.

I do not know what the draftsman meant by subsection (4) of section 19:—

> In proceedings by a person not bankrupt making a proposal for a composition the rights of all persons affected thereby shall be resolved as of the date of the filing of the proposal.

Mr. BULLEN: The draftsman says:—

> This is a new subsection. The effective date of all proceedings is otherwise fixed in the Act. This is deemed necessary with respect to these particular proceedings.

If this subsection is intended to mean that all actions or proceedings against a debtor are to be stayed while he is in the throes of having some arrangement with his creditors approved, it is not well expressed and should be clarified. As you know, there is a section in the Companies Creditors Arrangement Act to that effect. The draftsman seems to indicate that this subsection is inserted because rights are crystallized in other instances by other sections of the bill. If that is the only object, we think the rights of the creditors should not be interfered with in that way. It is more or less blind legislation: one does not know what it might lead to.

Hon. Mr. HAYDEN: Why should you crystallize the rights of creditors at the time when there have been no bankruptcy proceedings as we ordinarily understand them? But this is looking to proceedings outside of bankruptcy.

Mr. BULLEN: I do not think it is necessary, and again I say it is not advisable that the creditors' rights should be interfered with. Their rights should be protected right up to the time they get their money back.

Hon. Mr. LEGER: Is not the subsection inserted to prevent somebody getting a preference?

Hon. Mr. HAYDEN: The law is clear on that now.

Hon. Mr. MCGUIRE: Mr. Reilley is present. I suggest we ask him for an explanation of that subsection.

Mr. REILLEY: Its purpose is very simple indeed. In connection with the proof of claims of creditors and other matters in the ordinary bankruptcy proceedings, the creditors' rights are established as of the date of the filing of the petition or the assignment. If the proposal is made before bankruptcy, what time are you going to fix to have the right of creditors established? That is all it means.

Hon. Mr. CAMPBELL: What happens to the creditors between the filing of the proposal and the settlement of the proposal?

Mr. REILLEY: Their status is established as from the date of the filing of the proposal. Any creditors coming in after that would have their rights resolved in the same way as in bankruptcy.

Hon. Mr. CAMPBELL: In other words, creditors existing at the filing of the proposal might accept 50 cents on the dollar, and the creditors who came in after that might receive 100 cents.

Mr. REILLEY: Yes.

Hon. Mr. HAYDEN: If the creditor at the time of the filing assigned his claim, you are freezing his rights as of the date of the filing; you are not freezing the creditor's dealing with his rights?

Mr. REILLEY: No. It is a fixed date when the rights of the creditors in the case of a composition shall be determined.

Hon. Mr. HAYDEN: Why do you think that is necessary where there is no bankruptcy?

Mr. REILLEY: Because the same problems and differences may arise in the setting up of the claims as though bankruptcy had occurred, and you have to have some time when those rights are settled. There may be two preferential creditors who set up rights under a proposal, and they have to fight it out as to who has the preference and gets payment first.

Hon. Mr. HAYDEN: It seems to me, subject to further thought, we should let the creditors fix the cut-off date.

Mr. REILLEY: I do not see any radical change in this.

Hon. Mr. HAYDEN: Except that you are dealing with ordinary rights under the law, not under what we generally understand as bankruptcy. The debtor is not in bankruptcy and may never get into bankruptcy. I do not like freezing the rights of anybody unless an insolvency has occurred by a petition leading to bankruptcy.

The CHAIRMAN: Thank you, Mr. Reilley.

Mr. BULLEN: If that is the purpose of the draftsman, then we suggest there should be some section here as there is in the Companies Creditors Arrangement Act stopping the continuation of a proceeding that is already started by some creditor against the debtor or stopping him issuing a writ and commencing proceedings. I do not see any provision in the bill for that purpose. That is rather important, because one creditor might upset the apple-cart by starting something afterwards and causing a great deal of trouble.

Subsection 5 of section 19 reads:—

> Any person making a proposal shall act in complete good faith and failure on his part to make a full disclosure of his property and other material facts relating to the causes of his financial difficulties or his ability to pay or to make a fair and adequate valuation of his property shall vitiate the proposal unless the court is satisfied that there was no intent on the part of such person to mislead or deceive his creditors.
>
> We suggest that is weak legislation. It might be more effective if you inserted a penalty clause of some kind.

I see the draftsman has added section 203:—

> (1) If any creditor, or any person claiming to be a creditor, in any proceedings under this Act, wilfully and with intent to defraud, makes any false claim,—etc.

Then he is subject to some penalty. We think the aim of the draftsman could be still better accomplished by amending this section to include any debtor. There should be some teeth in the section in the way of a penalty.

Under section 4, subsection 3, a shareholder of a corporation may file a petition against the corporation. That in effect is incorporating provisions of the Winding Up Act and of the various provincial companies acts into the Bankruptcy Act. We think those acts should stay as they are, and that the winding up should not be brought into the Bankruptcy Act at all. A shareholder might cause a great deal of harm to a solvent organization. We have some individuals around Toronto who purchase one share, get into a meeting of shareholders, and cause quite a bit of trouble.

Hon. Mr. McGUIRE: Are there more than one of such persons in Toronto?

Mr. BULLEN: I have one that comes into my mind. He causes a great deal of trouble. A shareholder under the Bankruptcy Act might suggest some company is insolvent, and the advertising might be very harmful.

Hon. Mr. HAYDEN: You are giving rights to persons who in the bankruptcy would be the lowest in the scale of ranking creditors.

Mr. BULLEN: Yes. Subsection 3 of section 4 is the only subsection that deals with the question of insolvency. If it is meant to bring the winding up of a corporation under the Bankruptcy Act—and it looks as though the draftsman had this in mind, as many of the conditions set out in the subsection are based on grounds other than insolvency—a great many provisions of the Winding Up Act would have to be made applicable or incorporated in the bill. We think the principle of bringing into the Bankruptcy Act the winding up provisions of the Winding Up Act is wrong, and that the right of filing a petition should not be given to a shareholder.

Hon. Mr. HUGESSEN: I am disposed to agree that paragraph (*f*) of section 3 would empower the shareholder of any corporation to present a petition for winding up in bankruptcy against the company if "for any other reason it is just and equitable that the property of the company be realized upon and administered for the benefit of the creditors and the shareholders." He could support that by his own affidavit.

Mr. BULLEN: Yes. He might be disgruntled because he has not received any dividends and thinks the manager has a good job.

Hon. Mr. HAYDEN: He may want his money back.

Hon. Mr. HUGESSEN: Yes.

Mr. BULLEN: As you gentlemen know, that is one of the most contentious sections of the Dominion Winding Up Act as to what is admissible. The courts have wrestled with that for some time. It seems to me that the stigma attached

to the word "bankruptcy" against a corporation might cause tremendous harm to it.

Hon. Mr. HUGESSEN: It is pretty dangerous.

Hon. Mr. HAYDEN: It might occur while the directors of the company followed a policy to improve the whole value of the assets before giving any benefits to the shareholders, and the shareholders might not like that. I do not know what "just and equitable" means.

Mr. BULLEN: No, there is no hard and fast definition of that yet.

Hon. Mr. HAYDEN: You just take a run at it.

Mr. BULLEN: This bill eliminates the custodian. The association approves of that step. In practically all its bankruptcy experience it finds that the custodian is merely a "fifth wheel." There are very few instances where the custodian is not continued as the trustee, and there seems to be no valid reason why there should be an accounting for the usually short period that the custodian is in possession for the purpose of preserving the assets and breaking off when he is appointed trustee.

Hon. Mr. HAYDEN: Since the trustee is the representative of all the creditors, maybe he should ascertain their views before acting.

Mr. BULLEN: I was just going to say that one helpful suggestion might be made here. Under subsection (5) of section 9 the Official Receiver, on accepting an assignment, appoints a trustee, "whom he shall, as far as possible, select by reference to the wishes of the most interested creditors or shareholders". Now, we all know there is favouritism. It is only human nature to favour certain individuals; we all have our friends and our associations. This wording, we think, leaves room for the Official Receiver to appoint one man as a trustee, or one association—it might be us for example, though we would not kick so much in that case.

Hon. Mr. HAYDEN: That would be well-deserved recognition.

Mr. BULLEN: Yes. In our opinion the word "shareholders" should be deleted and "most interested creditors" should be made clearer and definite. Too much room is left for favouritism by some particular registrar. Perhaps the words "substantial trade creditors" would help if substituted for "interested creditors".

Subsection (2) of section 32, which deals with the registration of the receiving order, seems to me to conflict with subsection (5) of section 27. That subsection (5) is a revamping of a section that is in the present act. The subsection says:—

> On a receiving order being made or an assignment being accepted by an Official Receiver, a bankrupt shall cease to have any capacity to dispose of or otherwise deal with his property which shall, subject to the provisions of this Act, and subject to the rights of secured creditors forthwith pass to and vest in the trustee named in the receiving order or assignment...

But section 32, subsection (2), states that the trustee is not the registered owner of the interest of the bankrupt until the receiving order or assignment is registered. It seems to me that the conflict between the two subsections might lead to some difficulty.

Hon. Mr. HAYDEN: Of course, you have to look to the interest of the general public. A person may purchase a bankrupt property without any notice.

Mr. BULLEN: When he purchases a property he searches in the sheriff's office, and he could search in the bankruptcy office just as well. If he finds an authorized assignment there he takes the property at his peril.

Hon. Mr. HAYDEN: Why not leave it that way?

Mr. BULLEN: We think this change interferes with that.

Hon. Mr. HAYDEN: It might. It seems to leave a gap, doesn't it?

Mr. BULLEN: Yes, that is the point. There might be some machinations that would cut out the effect of section 6 of the present act, which says that the property becomes the property of the trustee upon the making of the authorized assignment or receiving order.

Hon. Mr. HUGESSEN: Whereas section 32, subsection (2), makes the registration of the receiving order essential for that purpose.

Mr. BULLEN: That is correct.

Now I come to section 38, licensing of trustee. Perhaps I could leave that until I deal with the discharge of trustees.

Section 39 (4) (*g*), which provides that the Superintendent shall audit and examine trustees' accounts, would have to be deleted if what is suggested hereafter as to the granting of trustees' discharges is adopted. We think the courts should examine and audit the trustees' accounts, our view being that the creditors have absolute faith in the courts. It is true that at the moment we have a most excellent and benign Superintendent, but we may not always have him. In surrogate matters and winding-up matters and so on the accounts are passed before the court. We know of no agitation by any body of creditors, debtors or trade associations to have the present practice changed.

Hon. Mr. HAYDEN: The lawyers too take their bills to the court.

Mr. BULLEN: Yes. As I say, without disparaging anybody's standing, reputation or ability, the general public have absolute confidence in the courts, because of their continuity and suitability. For my part, I think it would be poor legislation to take the power to pass accounts away from the courts and vest it in a government official.

Hon. Mr. CAMPBELL: I suppose from a practical standpoint as well it is better to have the auditing done by the courts rather than by one centralized official.

Mr. BULLEN: We think it is much more practical as it is at present. We cannot conceive how, when bankruptcies become numerous, an official in Ottawa could possibly audit all the accounts coming in from the whole country. The debtor, the trustee, the creditor, or anyone else concerned with bankruptcy proceedings has always had the court in his locality available to him. One can have accounts audited and passed much better across a table, as it were, than by correspondence. An official at Ottawa might have some complaint about the manner in which a trustee was administering an estate. It would take some time to explain the matter to the official at Ottawa, whereas it would be thrashed out before a court on the day set for the hearing.

Subsections (7), (8), (9), (10), (11) and (12) of section 39 lead to too much administrative interference with the winding up of individual bankrupt estates. If this section must go through, the word "Court" should be inserted in lieu of "Superintendent" in a great many instances which will be patent to those considering the bill.

In section 41 (3) the word "Court" should be inserted for the word "Superintendent" in the third line. This subsection says:—

> The new trustee, shall, as soon as funds are available, pay to the former trustee, his proper remuneration and disbursements, as approved by the Superintendant . . .

We suggest that the approval be left with the court.

Hon. Mr. HAYDEN: You will notice that the same subsection goes on to say:

> and in the event of sufficient funds not being realized to pay the remuneration and disbursements of all the trustees the court shall determine the remuneration and disbursements that each trustee shall receive . . .

Mr. BULLEN: Yes. There is no reason to divide the authority.

I come next to section 44 (5). If this subsection means that all the trustee's records, including his accounting, are to be contained in one book, it is impracticable in many instances. It is a mistake to make such an over-all coverage such as this, as the books necessary in one estate may not be suitable, adoptable or sufficient for some other estate. The present section, which requires the keeping of "proper" books, along with the power of supervision given the superintendent, should be sufficient. We feel it is an error to try to cover every situation that might arise in bankruptcy. There are large, small and medium corporations. Some of them take two or three months to wind up, while others take years. An effort to have the section state what books the trustee must keep in connection with every estate is aiming at the impracticable and the impossible. The present section reads to the effect that the trustees shall keep proper books of account, and if any difficulty arose we think the court would decide whether or not the books were proper.

Section 44 (6) says that the estate record book and all other books relating to the administration of an estate shall be the property of the estate.

Hon. Mr. HAYDEN: Have you given a correct interpretation of subsection (5)? It says:—

> The trustee shall keep proper records of the administration of each estate to which he is appointed, which shall include an estate record book . . .

It does not seem to be dogmatic.

Mr. BULLEN: I prefaced my remarks with the statement that if that means the trustee has to keep all his records, including his account, in one book, it is impracticable. I have in mind one winding up, the Canadian Department Stores. That company had a large number of stores all over Ontario, and it would be impossible to keep all the trustees records for a company like that in one book.

Hon. Mr. HUGESSEN: "As prescribed."—what does that mean? The same words are in the old section 55.

Hon. Mr. HAYDEN: Would it be by regulation?

Mr. BULLEN: There are no regulations yet attached to this bill. They might fix that up.

Mr. REILLEY: That is my intention.

Hon. Mr. HUGESSEN: Under subsection 5 of section 44 the books to be kept by the trustee "shall include an estate record book, as prescribed."

Mr. BULLEN: They must be proper books.

Hon. Mr. HAYDEN: That is what it says now. The difficulty is if you leave it as it is you would have books of account containing receipts and disbursements, on top of which you would have to transfer all those entries into an estate record book, unless you made some change in the language.

Mr. BULLEN: I come now to section 53. This is a very important section, as it gives any person dealing with the bankrupt under a conditional sale agreement, hire-receipt or the like, the right to claim his property. What notice is to be given, whether it is to be personal service, in writing, registered or ordinary post should be set out in the bill. This is a lengthy section and deals with the establishment of a claim by a secured creditor. Our suggestion is that the subcommittee should analyse that very carefully for any infringements on the rights of the secured creditor, and the notice to be given should be very clear and specific.

Subsection 5 of section 53 reads:—

> The trustee shall in no case be liable for the costs of establishing a claim to any such property or of such appeal or for any loss or damage suffered by the claimant while such property was in the possession of the trustee or occasioned by such dispute made in good faith.

If the creditor has got a claim, and is dragged into court and substantiates his claim, why should he not be indemnified for proving his claim? The trustee should take some responsibility. If he disputes any claim we feel the creditor should not be burdened with the costs of the proceedings.

Hon. Mr. HAYDEN: In other words, there should be some penalty on him in his representative capacity for any step he takes which proves to be wrong.

The CHAIRMAN: I suppose good faith should be the rule. So the creditor would have to prove bad faith. How can he?

Hon. Mr. LEGER: Does it not mean he is personally liable?

Hon. Mr. HAYDEN: No. I think there must be another section as to that.

The CHAIRMAN: How is one to prove bad faith?

Hon. Mr. HAYDEN: It is a little bit better than some wartime regulations where you cannot even sue.

Mr. BULLEN: Subsection 6 of section 53:—

> No other proceedings shall be instituted to establish a claim to or to recover any right or interest in any such property except as provided in this section.

It seems to us that this is rather dangerous legislation, in that it is curbing the rights of creditors too much and is too wide. The other courts should not be shorn of jurisdiction in such matters. Often points arise in the administration of the bankrupt's estate, and the creditors and the trustee should have the right to go to the other courts, they should not be confined to the Bankruptcy Court on all matters that arise. There are many branches of the law that some judges are better versed in than others. You can get an adjudication on a particular feature that might arise in bankruptcy from one of the circuit judges rather than from the Bankruptcy Court. It is just a consideration whether we should take jurisdiction away from the other courts. I have in my experience often had a judge direct the issue to the other court because he thought it could be better disposed of by a judge there than by himself.

Section 68 deals with preferences. This section replaces section 64, one of the most important sections in the old act. It has been the subject of a long line of jurisprudence which has been established more or less since the inception of the old Assignments and Preferences Act. The whole difficulty in the mind of the draftsman seems to be that in some provinces you are required to prove concurrent intent on the part of the debtor and the creditor, and in other provinces you are not so required. If it is the better part of wisdom that concurrent intent need not be proven, the present section can easily be amended by adding that a creditor shall not have to establish concurrent intent in order to succeed.

It seems a pity, as it were, to junk the line of jurisprudence that has been established over that section. I do not suppose there is any other section of the act that has had more legal interpretation than the section dealing with preferences. Now we have it pretty well dfined by precedents. All those would have to go overboard and we should have to determine what came within the term "transaction" used in this section.

Section 78. This deals with the disbursement of dividends, both interim and final. It is submitted on behalf of the association that the amount and time of payment of dividends is an administrative function that can best be

left with the trustee and the inspectors of the estate, and any interference therewith by the superintendent should be eliminated. Inspectors of the estate do not hold up dividends; they are subsidiary creditors, and in my experience they want their money as quickly as they can get it. Generally speaking the trustees act in good faith, and the inspectors more or less force their hands on the payment of dividends. They can make application to the court if the trustee is not shelling out as they think he should. We feel that that should be left to the trustee and the inspectors.

Hon. Mr. CAMPBELL: Is not this to give inspectors power in extreme cases?

Mr. BULLEN: That may be. That only takes me back to the remark I made a short time ago, Senator Campbell, that as long as we have the present efficient bankruptcy superintendent that is all right, but we do not like to leave something blank on the statute book which might work a hardship on the trustee.

Hon. Mr. HAYDEN: That raises another question. Why should the superintendent have the power; why should it not be the court? Is there any reason one way or the other?

Mr. BULLEN: No. As I say, the inspectors can always apply to the court.

Hon. Mr. HAYDEN: The ordinary procedure would be for the trustee to decide to pay a dividend. Supposing the inspectors say, "Go ahead and pay a dividend." But the trustee may say, "No, I will not pay a dividend." Then you reach a point where some higher authority, whether the court or the superintendent, should give that direction.

Mr. BULLEN: I am wondering, Mr. Chairman, whether I should ask a question on section 68. It occurs to me that possibly the object of the draftsman was to try to take the question of intent out of it altogether. If a transaction occurs following a certain pattern or style, then it is deemed fraudulent and void. This removes the question of intent altogether. Just say that if the transaction happens it is fraudulent and void. This raises a principle that I think we might very well consider,—whether intention should be a factor in determining what is a fraudulent transaction, or whether the transaction itself should be the determining factor. That is the trend in modern legislation, and certainly in wartime legislation.

Hon. Mr. HUGESSEN: The trouble arises under the present section on the interpretation of the words "with a view of giving such creditor a preference." Under the present section fraud is deemed to be the result of giving a preference.

Hon. Mr. HAYDEN: There is no question of intent. That raises the principle.

Hon. Mr. HUGESSEN: Yes.

Mr. BULLEN: Section 82. On this section I have the following note: It is much too wide and interferes with the court's function. A trustee now has to apply to the court, which, it is submitted, is the proper place for his discharge. On that application the superintendent may intercede, and as the trustee has to file his report with the superintendent, it would seem that the better procedure would be to have the trustee continue to apply to the court on notice to the superintendent, and if the superintendent objected to the discharge for any reason he can appear and so state rather than have the trustee await the superintendent's approval at his convenience. Courts are always available and officials are not.

This section conflicts with the power of the court and the discretion of inspectors and creditors in that the superintendent under subsection 2 thereof may reduce or disallow any charges which to him appear unreasonable or excessive. In other words, the superintendent is put in a position where he may veto the discretion of the creditors or inspectors on a matter with which they are actively concerned and there is no review of his veto, if exercised.

That would be the effect of section 82.

Hon. Mr. HAYDEN: Yes. You could overcome your objection in one of two ways: one, give the court that power; the other, give the trustee the right to go to the court over the veto of the superintendent.

Mr. REILLEY: Tha is given, an appeal to the court.

Hon. Mr. HAYDEN: Is that in section 91?

Mr. BULLEN: I am not sure that it is from the way it is worded. That brings up the point of release of the trustee. Probably I am repeating myself to some extent, but I want to make it clear that we are strongly in favour of continuing the present practice of having the trustee discharged by the court. Section 86 of the present Act provides for that, but section 91 of the Bill substitutes the superintendent for the court. I will not take up your time by going all over what I have said as to the court being the forum in which everybody has confidence for the auditing and passing of accounts of officials, liquidators, executors and so on.

Hon. Mr. HUGESSEN: Would it perhaps not be more convenient to have the accounts passed by an official like the superintendent than by the courts?

Mr. BULLEN: We say not, Senator. I have just given one reason. Another reason is this. When a trustee is being discharged his conduct in the administration of the estate and his records have to be gone over, and it is impossible for all that to be done between Ottawa and Vancouver, Ottawa and Edmonton, Ottawa and Halifax, Ottawa and Toronto, or Ottawa and any other place at some distance. We ask, what is wrong with the present method? The trustee comes before the judge, and any creditor or anyone else connected with the bankrupt can appear and say, "You should have done that," or "You should not have done such and such a thing." That is all thrashed out in a day or so; these matters do not take very long, in my experience. Furthermore, the superintendent has his eye on the administration of the estate all the time, and he can make representations to the court. If he notices that a trustee is not acting in good faith or is not administering the estate as he should, he can intervene and make a report to the court.

Hon. Mr. HAYDEN: The right of appeal in section 91 would appear to be a right of appeal by any creditor or by the bankrupt. I do not see any provision for an appeal by the trustee from the Superintendent's determination of his accounts.

Mr. BULLEN: Subsection (7) says:—

> The Superintendent shall consider such objection

That is a creditor's or bankrupt's objection.

> and may grant or withhold a release accordingly or give such directions as he may deem proper in the circumstances.

And subsection (8):—

> Notice of his decision shall be given by the Superintendent by registered mail to the objecting creditor or creditors, bankrupt or trustee, as the case may be, and an appeal therefrom may be filed in the court within ten days of the date of the notice, and the court on such appeal may make such order as it deems just.

It did not appear clear to us from those subsections whether or not it was just in the case of a creditor or bankrupt filing some objections that an appeal lay, or whether an appeal would lie from the discretion exercised by the Superintendent against the trustee. Someone might very well interpret these subsections as meaning that they do not give a right of appeal to the trustee

from a refusal of his discharge by the Superintendent. If the Superintendent is to be given the power to discharge or refuse to discharge the trustee, there should be an appeal available.

Hon. Mr. HUGESSEN: The note opposite section 91 states that the change in the section, whereby the Superintendent rather than the court may release a trustee, was recommended by the Montreal Board of Trade.

Mr. REILLEY: That is the note I have in my file.

Hon. Mr. CAMPBELL: Mr. Chairman, I wonder if we could have a statement from Mr. Reilley as to the reason for this proposed changed. The change seems to me to be far-reaching, and from a practical point of view I do not think it would work nearly as well as the present system of having the application heard in court, where all the parties can appear and present their case.

The CHAIRMAN: Are you prepared to make a statement as to that, Mr. Reilley?

Mr. REILLEY: Mr. Chairman, in order to check on the administration of a trustee it has been necessary for the Superintendent to obtain a statement of the trustee's receipts and disbursements and go through it very analytically, to find out whether or not he has administered the estate properly. In all the time since we have been doing that in my office, going through the accounts and straightening out certain items of disbursements which appeared to us to be unwarranted, I do not think there has ever been a case where a trustee has gone to court and had the accounts changed after we had passed them. The result is simply that we have done all this work and the court has been nothing more than a rubber stamp for what we have done. In fact, in some of the courts there arose the practice of putting on their order a note that the accounts had received the approval of the Superintendent.

Hon. Mr. CAMPBELL: Do you make an audit of the accounts before the court does?

Mr. REILLEY: Yes. We have to go through the trustee's statement and check the expenses in order to know whether the estate is administered properly.

Hon. Mr. CAMPBELL: That is done before it goes to the court?

Mr. REILLEY: Yes. And in the thirteen years of my experience there has never been one case where the court has objected to the accounts after our approval. So the present system means duplication. In England the Inspector General of Bankruptcy, under the Board of Trade, passes on the trustees' accounts. The reason why we adopted a different system was that when our Act was first passed there was no Superintendent of Bankruptcy in Canada or any other official who could pass on accounts, so this work was assigned to the courts. What is proposed now is the adoption of the system that has been followed in England for so long.

Hon. Mr. CAMPBELL: Why would it not be well to leave the court with the apparent authority that it now has to audit accounts, if that would satisfy the public?

Mr. REILLEY: It would be only a duplication of work.

Hon. Mr. CAMPBELL: Not necessarily, if a right of appeal is provided.

Mr. REILLEY: I am quite agreeable to that. I want the Committee to understand that so far as I am concerned I think the discretion of the Superintendent in any matter of this sort should be subject to appeal to the court. I am not trying to set up the Superintendent as an arbitrary bureaucratic official from whose decisions there should be no appeal. I would be the first one to say, "Yes, provide for the right of appeal to the court from the discretion of the Superintendent in such matters." But to go to the court for the passing of accounts after the Superintendent has done all the work in connection with it is merely a duplication of work.

Hon. Mr. CAMPBELL: The reason why I suggest that you might still leave the right to go to the court is that I think there is in our legislation to-day a tendency to rob the courts of power and authority, but I believe the people over the country are far more satisfied to have the court as the final tribunal in matters of this kind. Probably a right of appeal would be sufficient. Do you have the parties appear before you at the time the audit is made, or is that done by correspondence?

Mr. REILLEY: It is done by correspondence, and we get along well. There has never yet been any occasion when we have not arrived at a satisfactory adjustment of accounts, except perhaps in a few odd cases where the differences were such that I simply told the trustee he had to take the matter to the court; and in every such case the court decided the matter at issue. But otherwise, in 999 cases out of 1,000, the matter is adjusted satisfactorily by correspondence. We ask for explanations on this point and that when necessary, and eventually the thing is ironed out and the trustee is notified that there is no objection to his statement and that he can go ahead.

Hon. Mr. HUGESSEN: Normally, then, he does not apply to the court until he has received your O.K.?

Mr. REILLEY: No.

Hon. Mr. HUGESSEN: And normally the court will not hear him until it knows that he has received your O.K., is that it?

Mr. REILLEY: Very often that is the case.

Hon. Mr. GERSHAW: Does the application to the court increase the costs in these matters?

Hon. Mr. HAYDEN: A negligible amount, I should imagine.

Mr. REILLEY: The costs would not be increased by one cent by the application to the Superintendent, because in my office I have a staff to check these statements as they come in.

Hon. Mr. GERSHAW: My question was whether the application to the court would increase the costs in the action.

Mr. REILLEY: Yes.

Hon. Mr. GERSHAW: By any appreciable amount?

Mr. REILLEY: Well, they would be increased by the amount of the fees that the court collects, which on the average amount to about $9 or $10.

Mr. BULLEN: May I say to Mr. Reilley through you, Mr. Chairman, just what section in the bill requires approval of the superintendent, so that I can deal with that. I cannot find it.

Mr. REILLEY: There is nothing in the act to that effect, and that is why it was put in subsection (*g*) that you referred to previously.

Hon. Mr. HAYDEN: The practice has developed by reason of the attitude taken by the judge on the hearing.

Mr. BULLEN: I could not find in the act anything requiring the superintendent's approval. Our main objection is that it is impracticable. We would have to come to Ottawa before we could get approval of the superintendent.

Hon. Mr. HUGESSEN: That is already done now.

Mr. REILLEY: Yes. There is no difficulty whatever in getting the necessary records. They are merely sent by mail in a small parcel. Any part of the country is within one day of Ottawa practically. As a matter of fact Vancouver is no further from my office than Fort Frances is from Toronto. The question of distance does not enter into it at all.

Hon. Mr. HAYDEN: It was not the question of distance that I understood was raised; it was the question of the bulkiness of the records.

Mr. REILLEY: That does not enter into the picture at all.

Mr. BULLEN: May I reiterate that we do feel that if you leave it open to have the superintendent grant the discharge that it does and will leave it open for delay and confusion in getting the records down here. One knows that air-mail can go from Ottawa to Vancouver in a day, and that sort of thing, but bulky records do not come by air-mail. We suggest that the important matter of discharging the trustee should be left where it is now, in the hands of the courts: (*a*) because the general public, creditors, debtors, trustees and everybody else have more respect for the court and what the court does than for any administrative official. The more you can keep regulations dealing with the commercial relationship of individuals before the court the more those individuals will be pleased with it.

Hon. Mr. CAMPBELL: Mr. Bullen, I have not had much bankruptcy experience in recent years—

Mr. BULLEN: Nobody has in recent years. I think there were only three bankruptcies last year.

Hon. Mr. CAMPBELL: Do you not sometimes find creditors or persons interested in the estate appear when an application is made for discharge of the trustee and make representations why he should not be discharged?

Mr. BULLEN: Yes. He cannot do that without the superintendent. He will have to write and there will be more correspondence. He will be asked: What is your claim, what is your difficulty, why are you disgruntled, why should he not be discharged? Whereas if the application is made to the court everybody can come there, it is an open forum, and make whatever representations may be considered necessary.

Hon. Mr. CAMPBELL: Is the creditor entitled to notice?

Mr. BULLEN: The creditor is entitled to notice at the present time on discharge of the debtor and the discharge of the trustee.

Section 91, subsection 6. This subsection provides for creditors filing objections, but no provision seems to be made for the trustee to have an opportunity of answering or meeting them. This is the subsection:

> Any creditor or bankrupt desiring to object to the release of a trustee shall forward to the Superintendent and to the trustee, not less than two days before the date fixed for the release of the trustee, particulars in writing of his objection.

A creditor may file objections that may not have any merit in them at all, yet there is no direction that the trustee shall answer them.

Hon. Mr. LEGER: Would he not have an inherent right to answer?

Mr. BULLEN: He may not have the time.

Hon. Mr. LEGER: It is two days.

Mr. BULLEN: It is not less than two days before the date fixed for the release of the trustee.

Hon. Mr. LEGER: It is the time you object to?

Mr. BULLEN: It comes down to that. I think he should have lots of time to answer.

The CHAIRMAN: Should we not understand that the superintendent receiving the objection would communicate with the trustee?

Hon. Mr. HAYDEN: Only if he feels any consideration should be given to the objection I would think.

The CHAIRMAN: If he gives it consideration he might communicate with the trustee.

Hon. Mr. HAYDEN: Yes.

Mr. REILLEY: May I say, gentlemen, that in our practice in the office we get innumerable objections of all sorts from the creditors with regard to the administration of the estate. Sometimes we do correspond with the trustee to find out what he has to say about the objections, but in nine cases out of ten we know enough about the matter to say that there is nothing in the objections, in which case we dispose of them without communicating with the trustee. But if in any objection there is anything which we cannot dispose of in that way, it would be unreasonable to make a ruling without giving the trustee an opportunity to make a statement.

Hon. Mr. HAYDEN: There can be no objection to giving that right?

Mr. REILLEY: Absolutely not. It is difficult to think of everything when preparing a draft bill. I would be the first to want to have it included.

Mr. BULLEN: Section 105, subsection 3. The present act defines those who are not entitled to vote and is clearer than naming any degree of relationship. The subsection reads:

> The following persons shall not be entitled to vote on the appointment of a trustee or inspectors, namely:
>
> (i) any person related to the bankrupt to the third degree by blood or marriage, or a partner of the bankrupt or any person associated with the bankrupt or a member in any co-operative undertaking.

The subsection in the Act reads:

> The following persons shall not be entitled to vote on the appointment of a trustee, namely:
>
> (i) the father, mother, son, daughter, sister, brother, uncle or aunt by blood or marriage, wife or husband of the bankrupt or authorized assignor.

Hon. Mr. HAYDEN: What does "associated with the bankrupt" mean?

Mr. BULLEN: We do not know. We think it better to retain the wording in the present act. When you say father, mother, son, daughter, sister, brother, uncle or aunt by blood or marriage, you know who are excluded.

Section 108, subsection 2. This subsection gives the shareholders the right to vote for the appointment of inspectors. In view of the fact that the shareholders constitute the "debtor" in such a case, we think they should not have the opportunity of outvoting the creditors as to who the inspector of the estate should be.

Section 110, subsection 2. This reads:—

> A debt may be proved by delivery or sending through the post in a prepaid and registered letter to the trustee, a proof of claim in the prescribed form or to the like effect verified by the creditor as being true in substance and in fact.

That eliminates the swearing of an affidavit by the creditor on his filing his proof of claim. We think if you do away with the affidavit in connection with the filing of the claim it would lead to untold trouble. Certain groups of individuals might file claims that are not so, but they would probably back up at swearing an affidavit. Of course, we know that some people won't back up. I can't help digressing here to tell this story. A chap walked into his friend's office and inquired, "Are you ready for your game of golf?" His friend replied, "Wait a moment," and he started to sign his name to letter after letter without reading them through. The chap said, "My God! You don't mean to say that you let letters go out of the office without reading them?" "Letters? I thought they were affidavits."

In his explanatory note to this subsection the draftsman said:—

> This subsection is changed to remove the necessity of every claim being made in the form of an affidavit.

We think claims should be filed in the form of affidavits, because after all, I don't care how bad a man may be, if he is going to swear to an affidavit that is false he knows he may have to face a charge of perjury. If he knows he can file a claim and nothing will happen to him he will say, "I will see if the trustee or trustees will let my claim go through." We think the affidavit feature of the claim should be retained.

Section 110, subsection 5. This seems a bit drastic to the association. The subsection reads:—

> The proof of claim shall state whether the creditor is or is not a secured or preferred creditor, otherwise the claim shall be deemed to be unsecured and not secured or preferred.

It is rather drastic to take away from the creditor his status if by reason of some error he puts his claim on an ordinary form and has not said, "I have a certain security or stand in a certain preferred class."

The CHAIRMAN: You do not see any possible correction to that? If he makes an error he is just out.

Mr. BULLEN: It says so. "The proof of claim shall state whether the creditor is or is not a secured or preferred creditor, otherwise the claim shall be deemed to be unsecured and not secured or preferred."

Hon. Mr. HUGESSEN: It is the "otherwise" that you object to?

Mr. BULLEN: Yes.

Hon. Mr. HAYDEN: If it stopped at the word "otherwise" it would be all right?

Mr. BULLEN: Yes.

Section 118. This is too drastic. There appears to be no good reason why a secured creditor should not get his costs of realizing his security or collection charges.

The CHAIRMAN: That is similar to the remark you have already made that a man's claim may be refused for some reason.

Mr. BULLEN: Oftentimes you will have a bank in this position. They say, "We have got an assignment of book debts here. There is evidently going to be a surplus, but we don't want to be bothered collecting these book debts. You have all the records of the debtor, you are winding up the estate, you are administering it. Collect these book debts and pay us the amount of our claims." That is what they will say to the trustee. This would eliminate what the bank pay for the collection. They should not be out that cost.

Hon. Mr. HAYDEN: Section 111 is retained in the bill. It reads:—

> If a secured creditor realizes his security, he may prove for the balance due to him, after deducting the net amount realized.

That is a case where he realizes on the security itself, so I take it he would charge the cost of realization against the proceeds.

The next general section I want to come to is section 125, which deals with admission and disallowance of claims. It is submitted that the present sections dealing with this phase of bankruptcy are more satisfactory than this suggested section obligating the trustee to notify all creditors whose claims have been admitted. The trustee is generally not in a position either to consider or get advice in connection with all claims until quite some time after proceedings have started, and it would not be good practice to have him create an estoppel against himself by admitting a claim that later investigation during the bank-

ruptcy administration would indicate should be disputed. Little harm or inconvenience is done a creditor if he hears nothing of his claim, for he knows that if it is a bona fide claim, as by far the great majority of claims are, it will not be disputed. It is submitted that it would not be good practice to have the trustee lose his right to dispute a claim at any time before the first dividend is sent out.

Hon. Mr. HAYDEN: Why not?

Mr. BULLEN: Why should there be a time, Senator, when the trustee's right to dispute a claim is cut off?

Hon. Mr. HAYDEN: The creditor is recognized as a creditor in the proceedings and he has a right to vote. Surely that is an important right, and one that he should not have if he is not a creditor. So why should his status as a creditor not be determined as early as possible. If it appears later that there is any fraud in his claim, the fact that the trustee has admitted the claim would not prevent him from disallowing it afterwards.

Hon. Mr. HUGESSEN: Nor would the trustee be bound if a mistake had been made.

Mr. BULLEN: It sometimes takes a trustee many months to determine all claims. I can recall some stockbrokers' assignments in the city of Toronto where it took years to establish what were good and what were bad claims. If the trustee has to notify every creditor as soon as his claim has been admitted, the trustee might find himself in great difficulty later on if it should develop that some of these claims are not good. I do not think that any creditor who files a legitimate claim is injuriously affected by the present system.

The CHAIRMAN: There is the possibility that a creditor who received a trustee's certificate that his claim was admitted might sell that claim to another party, and later on that claim might be found to be no good.

Mr. BULLEN: Then the innocent purchaser or assignee of the claim would be before the court.

Hon. Mr. HAYDEN: I wonder if what is suggested here should not be applied in reverse? In other words, should the trustee not notify as early as possible every creditor whose claim is to be disallowed?

Mr. BULLEN: The trustee does notify every creditor whose claim is disputed.

Hon. Mr. HAYDEN: That should be done as soon as may be reasonable.

Mr. BULLEN: Yes. It would seem to be the better part of wisdom, I suggest, to notify as early as possible every creditor whose claim is disputed. Difficulty is bound to arise if the trustee, before he knows just what the situation is, notifies creditors that their claims have been admitted.

The next section that we comment on is 146, which deals with the discharge of the bankrupt. Under the present act a bankrupt applies for his discharge after the administration of the estate. A report is made by the trustee to the court, the creditors are notified, and the court discharges the bankrupt. That practice has had the test of some twenty years, and we have not heard much complaint about it. The draftsman seems to suggest that the difficulty with that practice is, that, first of all, the bankrupt does not know his legal status, does not understand that he can get a discharge; and, secondly, that the procedure is expensive. We suggest that these difficulties do not warrant the radical change proposed in the new section. We submit that, generally speaking, a man who gets as far as the bankruptcy court knows how he can get out, or what he should do to get out. Then, in my experience, the main item of expense in obtaining a discharge is counsel fees. If this section is included in the act the bankrupt will still have the opportunity to retain counsel, so that item of expense will not be eliminated. Again, the time for application suggested by the draftsman is much too short. The administration of a bankrupt estate of any size takes

much longer than six months, and in a great many instances the trustee is in no position to make the report that is required by the court as to conduct of the bankrupt or what his estate will pay. In the discharge of a bankrupt, according to my experience, the court is governed chiefly by the report of the trustee as to the conduct of the bankrupt. If the trustee makes a favourable report on the bankrupt, says that the bankruptcy has been brought about by conditions over which the bankrupt had no control, that he has given the trustee every assistance and has not committed any of the offences enumerated in the act, the court generally gives the discharge. We think that from the standpoint of the bankrupt and the trustee it is better not to have the act changed in the way proposed here.

I pass to section 160, which deals with decentralization of the work of the courts. This section proposes that the Registrars, clerks and prothonotaries of the courts having jurisdiction in bankruptcy, and their deputies and assistants be given the powers of a registrar. The powers of a Registrar are enumerated in section 167 of the bill; they are wider than the present powers of the Registrar and are very important. As far as Ontario is concerned, the suggested widening of jurisdiction would mean that the powers and duties exercised by the present Registrar at Osgoode Hall would be spread among a number of officials in some 47 counties and judicial districts. We think that would lead to a great diversity of opinion, judgments, orders, regulations and interpretations of the law; in fact, it is only common sense to expect that it would.

There is another feature. Bankruptcy work, as I said before, is more or less a special branch of the law, and has become centralized in or about the larger metropolitan areas where the wholesalers and manufacturers who distribute to the retailers are situated. This has resulted in certain men becoming specialists in bankruptcy law, such as Mr. Justice Urquhart, the Judge of the Bankruptcy Court of Ontario, and Mr. Gordon Cook, the Registrar at Toronto. They get a broad experience which a man in, say, Timmins, or L'Orignal or Fort Frances could never get. We think it would not be good legislation to decentralize the powers of the Registrar.

Then again, we have at Osgoode Hall, Toronto, a central registry, where all the records for the province are kept. One can go there and make a search with respect to any person or company, wherever located in the province. In that way there is less possibility of error than if a search had to be conducted at various places.

The CHAIRMAN: Might that objection be overcome by having reports sent from the various districts to a central registry office, where searches could be made?

Mr. BULLEN: That might be done, Mr. Chairman. I believe that is the practice in connection with surrogate matters. I am not sure, for that is not in my particular branch of the law, but I believe that wills and letters of administration and so on are sent from all over the province to Osgoode Hall. Mr. Sheard would probably be able to make a statement as to that.

However, this is a subsidiary point. Our main objection to that is that you have got there room for a diversity of action under the Bankruptcy Act, and it will not tend to have the uniformity that it should have.

The CHAIRMAN: Would Mr. Reilley care to answer the suggestion right now?

Mr. REILLEY: My comment, Mr. Chairman, is simply this. In the different provinces you have different ways of dealing with the matter. It is left to the Chief Justice of the province to appoint such registrars as he sees fit. In some provinces the Chief Justice appoints every registrar of the District Courts as a bankruptcy registrar, and in my thirteen years' experience I have never heard of any objections being raised that have been raised here to-day. Take Kamloops, Fort George, Prince Albert, all up through that country, in each case the

registrar of the Civil Court is registrar in bankruptcy, and they all do their work in a satisfactory way. I do not think for a moment that the registrars in Ontario are all numbskulls and cannot deal with bankruptcy as well as the registrar in Toronto or any other place. You have a registrar in bankruptcy sitting in Hull. There is no registrar in bankruptcy in Ottawa. There are some seventeen registrars in bankruptcy throughout Quebec. We have only one for the province of Ontario. The same thing obtains in Nova Scotia, New Brunswick, Manitoba, Saskatchewan—they have only one registrar in the centre of the province. In the other provinces where the work is performed by the registrars in the various judicial districts they get on all right with their bankruptcy work just the same as with their other work. If they can do all the work connected with the Criminal Code, and if they can do all the work connected with the Companies Creditors' Arrangement Act, which is bankruptcy or insolvency legislation, is there any reason why, with the help of the superintendent's office when they want information, they cannot do the work required of them under the Bankruptcy Act? Besides—and I say this as emphatically as I can—it is wrong in principle that any time any little matter in bankruptcy has to come before the court a solicitor should have to write from Fort Frances, Ottawa, or any other place and have it all done in Toronto.

Hon. Mr. HAYDEN: You mean there must be a better objection than just mere geography?

Mr. REILLEY: That is one objection and a good objection, because the very contention made here to-day with regard to time and distance applies in this case. Suppose you want a stock order in a For Frances bankruptcy matter, you have to go a thousand miles to Toronto to get it. It is not reasonable. I do not admit for one moment that the officials throughout the various judicial districts of the province are not capable of handling these matters in bankruptcy just as well as other civil matters.

The CHAIRMAN: Will you proceed, Mr. Bullen?

Mr. BULLEN: I am wondering how under this bill anyone filing a petition in bankruptcy in Fort Frances would get it adjudicated if it was disputed. The judge goes around twice a year.

Mr. REILLEY: That would have to be worked out. There are other ways of doing it perhaps, but it is done in British Columbia. How is a petition filed at Prince Rupert or Fort George dealt with?

Mr. BULLEN: If it is disputed.

Mr. REILLEY: They deal with it there and apparently satisfactorily. I grant it is a serious matter in most cases, but surely it is not beyond the competence of a county court judge. In England, outside of London practically all bankruptcy is handled by the county court judges.

Hon. Mr. HAYDEN: When Mr. Justice Urquhart was before us the other day he said that the county court judges were capable of dealing with bankruptcy offences, and he was criticizing the bill because you were trying to push them all on the Supreme Court judges.

Mr. REILLEY: To meet this objection I am quite willing that jurisdiction be given the county court judges, where the Supreme Court judges are not available.

The CHAIRMAN: Would it be possible to have the Attorney General in each province define the setup. He is a good judge of judicial ability.

Mr. BULLEN: It is left to the Supreme Court judge now.

Mr. REILLEY: We shall have to decide how to deal with it.

Mr. BULLEN: Thank you very kindly, Mr. Chairman and gentlemen. I did not intend to take up so much of your time.

The CHAIRMAN: We thank you, Mr. Bullen, for your assistance.

We will now hear from Mr. R. O. Daly, K.C.

Mr. DALY: Mr. Chairman, I am representing the Investment Dealers Association of Canada. As you know, this is a country-wide organization comprising investment houses in Canada engaged in the distribution of government, municipal and corporation securities. Naturally when an investment house puts out an issue of securities it confidently expects or at least hopes that nothing will ever go wrong with that issue. It scrutinizes the present financial position of the company and its future prospects, and trusts that the issue will survive all the vicissitudes of time. But conditions change, management becomes inefficient, wars come, depressions come and the burden of debt gets too heavy for the company to carry. Then a financial reorganization is necessary. That is why the members of our association are particularly concerned in seeing that there is an efficient method of carrying out corporate reorganizations; and that is why also we are concerned with the provisions of the proposed statute.

My remarks will be directed purely to part 2 of the bill dealing with company reorganizations. As I understand it, this bill would transfer to the Bankruptcy Act and exclusively to the Bankruptcy Act the machinery for carrying out corporate reorganizations, and eliminate the existing machinery otherwise available, including the present machinery under the Companies Creditors Arrangement Act. Anyway, I take that to be the meaning of section 19, subsection 6, which reads:

> Any composition, arrangement or settlement made by an insolvent person with his creditors generally otherwise than under the provisions of this Act unless the creditors unanimously agree thereto—

which of course is too much to be hoped for.

> —shall be voidable by the court on the application of any creditor.

I have prepared a short statement, and I think I can be less discursive if I read it.

The principal reason for the proposed change appears to be the desirability of eliminating certain alleged abuses of the existing machinery under the Companies' Creditors Arrangement Act by virtue of which, in some cases, ordinary unsecured trade creditors have been defrauded, and of preventing compositions being carried out by companies or individuals with their ordinary creditors without the intervention of a trustee in bankruptcy to supervise the proceedings and to protect unsecured creditors against lack of full disclosure of the financial position of the debtor and against such other undesirable practices as may have arisen.

However desirable it may be to eliminate such abuses against ordinary creditors in relatively small trading companies, it is equally desirable to see that nothing is done to impair the machinery for carrying out corporate reorganizations in companies where the investing public is concerned and where there may be various classes of creditors, both secured and unsecured, as well as different classes of shareholders, both common and preferred. The members of the Investment Dealers' Association of Canada do not come into professional contact with the small trading company where there is no public investment interest but are primarily concerned only with those companies which have bonds of one or more classes and shares of one or more classes in the hands of the investing public. In the reorganizations of such companies it frequently happens that there is no proposal at all to cut down the principle amount of the claims of unsecured creditors. Hitherto reorganizations of such companies whose securities are in the hands of the public have been carried out as to the rights of shareholders under the arrangement sections of the relevant Companies

Acts of the Dominion and the Provinces and so far as bondholders are concerned under the trust deeds securing such bonds or under the Companies' Creditors Arrangement Act where it is necessary or desirable to take advantage of the latter statute.

The Companies' Creditors Arrangement Act has been in force since 1933 and is based on similar legislation which has been in force in England for many years. Its constitutionality has been upheld in the courts, and jurisprudence and procedure has been developed over the years both here and in England which it would be unwise to disturb. The procedure for obtaining the approval of the various classes of creditors is carried out under the supervision of the court and the reorganization before becoming effective must be approved by the court. In most cases the proposed plan of reorganization is worked out over a period of many months as a result of discussions between the company and committees, either formal or informal, of the classes of creditors, and shareholders concerned, the trustees under the trust deeds securing the various classes of bonds, and the investment dealer through whom the securities were originally distributed. The creditors have both the protection of the court and the guidance and protection of their own committees or representatives and have ready access to the financial records of the company. Fundamentally, therefore, there seems to be no objection in principle to a continuation of the present course of company reorganization under the Companies' Creditors Arrangement Act, and, in fact, there seems every reason why the present procedure should be continued in the case of reorganizations of the bond and share structure of companies whose securities are in the hands of the public. On the other hand, it is alleged that certain smaller companies whose creditors are for the most part ordinary unsecured creditors have used the provisions of the Act to defeat or defraud their creditors. If this is the case, it is submitted that the better procedure is to introduce amendments into the Companies' Creditors Arrangement Act to correct such abuses rather than to scrap the Companies' Creditors Arrangement Act and substitute for it the contemplated provisions in the Bankruptcy Act which might work in the case of small trading companies with no securities in the hands of the public but which would not be workable in the case of large companies where the rights of various classes of creditors, both secured and unsecured, may be involved. The Investment Dealers' Association of Canada would be glad to co-operate with the Superintendent in Bankruptcy and with others concerned, in an effort to devise such amendments as would be necessary to eliminate such abuses as have come to the attention of the Superintendent.

It is submitted, therefore:

1. For a great number of years, corporate reorganizations involving hundreds of millions of dollars have been successfully carried out, as to shares, under the provisions of the Companies Acts, and as to bonds, under the provisions of the trust deeds securing the bonds, and in many cases, under the Companies' Creditors Arrangement Act as to creditors, both secured and unsecured, where it has been necessary or desirable to take advantage of the provisions of that statute; for example, the recent reorganization of the Abitibi Company.

The provisions of section 19 (6) of the proposed Act appear to contemplate that the Companies' Creditors Arrangement Act will no longer be available for the purpose of carrying out a corporate reorganization and appear to be sufficiently wide even to cast doubt on the propriety of a modification of the rights of bondholders under the provisions of the trust deed under which the bonds have been issued.

Well-established legal procedure for carrying out corporate reorganizations should not be disturbed except for the most compelling reasons and then only after the most careful consideration. The Companies' Creditors Arrangement Act was not enacted for the purpose of dealing with the rights of unsecured creditors except where incidental to a modification of the rights of secured creditors such as

bondholders, but if companies have been using the provisions of the Act for the purpose of defrauding their unsecured creditors, the proper procedure would appear to be to amend the Act to correct such abuses rather than to eliminate an Act which has functioned smoothly and without criticism in the great majority of corporate reorganizations.

2. The proposed provisions of the Bankruptcy Act are not adequate to deal with the more elaborate capital structures of the larger companies where one or more classes of bondholders and one or more closses of shareholders and possibly unsecured creditors as well may be involved. The proposed provisions contemplate a general meeting of creditors and a valuation of their securities and such machinery could not possibly be applied in the case of a reorganization of a company having outstanding two or three classes of bondholders with the great bulk of the bonds in bearer form. Moreover, where corporate reorganizations have already been worked out through the careful studies and investigations of the various groups concerned, the proposed provisions involve unnecessary delay and expense.

3. That proposed Part II of the Bankruptcy Act should be limited to provisions calculated to correct whatever abuses may presently exist in connection with compositions with creditors (either before or after bankruptcy) where there are no outstanding securities, either bonds or shares, in the hands of the public which are affected by the reorganization scheme.

4. The new provisions relating to corporate reorganizations should be eliminated from the proposed provisions of the Bankruptcy Act and the machinery of the Companies' Creditors Arrangement Act should be maintained intact and concurrently in force (subject to such amendments as might appear desirable to correct any abuses against ordinary creditors) to deal, in conjunction with the Dominion and Provincial Companies Acts, with the capital structures of the larger companies where the interests of one or more classes of secured creditors may be involved. This would maintain the present practice under which the meetings of the various classes of creditors are called by the court itself and this practice would appear to be more desirable and more in the interests of uniformity of procedure than the calling of meetings of creditors by a trustee in bankruptcy as contemplated by the proposed provisions of the new Bankruptcy Act.

5. To the extent that abuses of the present machinery exist, the obvious procedure appears to be to introduce any essential amendments in the Companies' Creditors Arrangement Act rather than to repeal an Act which, in the main, has worked satisfactorily, and to replace it with legislation which appears to be neither necessary nor adequate to deal with corporate reorganizations involving an adjustment of the rights of various classes of bondholders and shareholders.

Respectfully submitted.

Hon. Mr. HAYDEN: Have you seen the suggested amendments of the Dominion Mortgage and Investments Association?

Mr. DALY: I glanced through them, Senator. I have not had time to study them carefully.

Hon. Mr. HAYDEN: Do they deal with and correct the points that you think should be corrected to make the Companies' Creditors Arrangement Act more effective?

Mr. DALY: I think they are very comprehensive. Mr. Reilley could tell us just what he is trying to correct.

Hon. Mr. HAYDEN: We can get that from Mr. Reilley.

Hon. Mr. CAMPBELL: Mr. Daly, I understand that you are definitely opposed to putting in this act provisions which would take the place of present provisions of the Companies' Creditors Arrangement Act?

Mr. DALY: Yes, sir.

Hon. Mr. CAMPBELL: That act, you say, should be left as it is?

Mr. DALY: That act should be left intact.

Hon. Mr. MCGUIRE: Have you copies of your statement to distribute?

Mr. DALY: No, Senator, I have none available.

The CHAIRMAN: The statement will appear in the report of our proceedings.

Thank you very much, Mr. Daly, for coming here and giving us the benefit of your views.

Hon. Mr. HAYDEN: Mr. Terence Sheard is here and I understand is ready to answer questions, if there are any.

Mr. TERENCE SHEARD: Mr. Chairman, at the committee's meeting last Thursday we presented a draft bill to amend the Companies Creditors' Arrangement Act, and we said then that we would be available to-day if any member of the committee wished to ask questions about that bill. If there are no questions to-day, we shall be available whenever we may be required.

The CHAIRMAN: Thank you, Mr. Sheard. I do not believe we are in a position to question you about the bill to-day, but we shall notify you later if we wish to go into this.

The committee adjourned until 8 p.m.

The committee resumed at 8 p.m.

The CHAIRMAN: I think you are already introduced, Mr. Crysler. Will you proceed.

Mr. A. C. CRYSLER (Legal Secretary, Board of Trade, Toronto): Mr. Chairman and gentlemen, as you probably know, I am the legal secretary to the Board of Trade in Toronto. The text of our brief is before you. If it would be agreeable to the committee I might save you some time to-night and perhaps make our real purpose even clearer if, instead of reading the brief, I ask that it be filed for reference later on and content myself with speaking to a few of what we think the more important parts of it.

The CHAIRMAN: All right.

Mr. CRYSLER: If you will refer to the opening paragraph on page 1 of the brief you will find that we tell you a little bit about who we are. We have a membership of some 4,000, principally drawn from Toronto and the surrounding district. We draw our membership from every walk of business and professional life, both large and small.

When Senate Bill A5 was received, we bore in mind that we have three classes of members particularly interested. First of all, unsecured creditors—business firms with trade accounts; secondly, secured creditors—such as insurance companies, trust companies, banks and so forth. In that connection our membership also comprises certain of the larger trust companies, whose duties are to carry out the large financial reorganizations which are encountered under the Companies Creditors' Arrangement Act. Thirdly, licensed trustees.

Under those circumstances we could not present anything to this committee which did not carry the approval of all those groups. We got together a small subcommittee of the most outstanding gentlemen in those groups, and they prepared what is now before you. The brief was eventually approved by the council of the Board of Trade and it is our submission to you.

Before going into the submission, I might mention that some of the things proposed in the bill we approve; some we do not approve. The things that we do not approve fall mainly into two classifications: No. 1, extension of the traditional bankruptcy field into wider areas; No. 2, increasing the power and centralization of the administration of bankruptcy.

To guard against any possible misunderstanding, I should like at once to make it perfectly clear that we do not wish our remarks to be taken as in the

slightest reflecting on the present bankruptcy officials. You will see that in certain places in the brief we express our complete satisfaction with the manner in which bankruptcy is administered. We have certain reasons for not wanting to go further. Among those reasons are the consideration that the present officials just by the lapse of time cannot always be with us, and we do not know who may be put in their place. We hope of course that they will be equally able men, but we do not know. So when this act is amended we should like to feel that it will be on a rational workable basis, conforming to the underlying principles, and as thoroughly practicable an instrument, apart from the influence of personalities, as can be devised.

The first subject I should like to speak about in the bill is the basis of voting. You will find that that comes up in two places: the voting on special resolutions under section 2 (gg); and concerning the acceptance of proposals under section 15. The point we have in mind is the same in each case and I will cover it by speaking to section 15 only. This section will be found at page 16 of the bill. Starting at the third line, it reads:—

> —with proven claims of twenty-five dollars or over, and holding three-quarters in amount of all such proven claims of creditors or class of creditors, as the case may be, insofar as the proposal affects any such class, present in person or by proxy,—

We are not sure whether the qualification "present in person or by proxy" modifies only " holding three-quarters", or whether it also modifies "a majority in number." We think it should apply to both, and in our brief we suggest that the section be further clarified by simply repeating in each case the words "in person or by proxy." The clause would then read something like this:

> A majority in number of all the creditors holding proven claims of twenty-five dollars or over, present in person of by proxy in voting, and seventy-five per cent in amount of those present in person or by proxy in voting.

The next point I should like to touch upon comes under the general heading of Changes in Wording. Of course no such revision of legislation as is contained in the bill can be carried out without many changes in wording, but there are two points in the bill on which there are a considerable number of judicial cases and quite a body of settled law. Those points are, first, the definition of "transaction" which is proposed in section 2 (jj) and the new section concerning avoidance of preferences mentioned in section 68. With regard to section 2 (jj) there will be a number of words, such as contracts, gifts, deliveries, settlements, and so forth, no longer used. We are not sure whether the settled law that has been built up on those words, no longer to be used, will be carried forward to the use of the word "transaction." If they are the change would be good. We do not advance ourselves as a committee of lawyers, and therefore we do not profess to know the answer. We do ask, however, that the purely legal side of that matter be looked into, and that all necessary steps be taken to avoid any undue lack of settlement of jurisdiction and jurisprudence.

Many of the same points apply in section 68 of the bill, concerning avoidance of certain preferences. With regard to that section of the bill we notice that the principal difficulties indicated to date seem to have been the divergence of view on the necessity for concurrent or unilateral intent. Rather than using the new section 68 we would favour retaining the old section with simply an addition to that section providing that within the three months' period it would not be necessary for the trustee or creditors attacking an alleged preference to show concurrent intent.

I should like next to touch briefly on three of the new clauses under acts of bankruptcy. Section 3 (d) reads as follows:—

> If in Canada or elsewhere he makes any conveyance, or transfer of his property, or of any part thereof, or creates any charge thereon, which would have the effect of defrauding, delaying or defeating his creditors or any of them;

We understand quite well the purpose of that section, but we are afraid that its terms are so broad that they may cast a legal cloud over what we would regard as legitimate transactions, and we suggest the advisability of legal scrutiny to see that no such results should follows.

Section 3 (i) reads:

> If he makes any bulk sale of his goods under the provisions of any Bulk Sales Act applicable to such goods in force in the province within which he carries on business or within which such goods are at the time of such bulk sale wherein the sale price will not be sufficient to pay his creditors in full;

The point there, gentlemen, is that we are told by trade creditors that very often one of their merchant outlets get into some sort of financial difficulty where it becomes apparent that they are not going to be able to pay their creditors in full and continue in business. Under those circumstances the cheapest and most efficient way of liquidating that business is a bulk sale under the provincial laws. Many people, in a wholesaler's business, would wish to see that privilege of effecting a bulk sale retained; and, therefore, we think that if a bulk sale complies with the provincial law, which has a reasonable safeguard, it should not be invalidated.

The last paragraph on which I wish to touch is 3 (1), which reads as follows:—

> If he ceases to meet his liabilities generally as they become due, or fails to pay any particular debt or debts after repeated demands for payment.

The point there is "any particular debt". We understand that it has been an underlying principle of bankruptcy jurisdiction that it would not apply where there is only one creditor; he would have his means of remedy through the courts by way of judgment debtor proceedings. There is no question of insuring a rateable or equitable distribution among creditors. Where there are two or more creditors we believe it becomes necessary to follow the traditional practice of administration so that those creditors share equally.

I should like to deal next with petitions by shareholders, found in section 4 (3) of the bill. If you refer to that section, gentlemen, you will see that sub-paragraphs (b) to (f) touch on matters other than insolvency.

Hon. Mr. HAYDEN: May I ask a question on section 4 (3)? Are you generally opposed to that section?

Mr. CRYSLER: We are generally opposed, sir. Those sub-paragraphs (b) to (f) touch on matters other than insolvency. For your convenience and reference I might cite a legal case which enters into it. The case is in re Empire Timber, Lumber and Tie Company 1920, 48 O.L.R., 193. The gist of that case, which sums up a considerable line of decisions, is that the Dominion Winding Up Act does not have jurisdiction over non-solvent firms incorporated otherwise than under Dominion laws. We suggest the constitutional feature might be examined in this proposed legislation to see whether there might possibly be danger of creating an enactment which could be a trap in some cases for the unsuspecting who do not realize the constitutional limitation.

Hon. Mr. HAYDEN: You are opposed then in that respect?

Mr. CRYSLER: In non-solvent cases.

Hon. Mr. HAYDEN: You are opposed generally to bringing in the field covered at present by the Companies' Creditors Arrangement Act?

Mr. CRYSLER: That is quite right.

Hon. Mr. HAYDEN: Then that covers the whole point.

Mr. CRYSLER: That covers the whole point. As regards sub-paragraph (a) of section 4 (3), I heard that discussed this morning at some length. It is all summed up under the danger of "the one-share artist who could threaten the life out of a company with one share."

Section 4 (11) provides by silence for the elimination of custodian. We are agreeable to that. As we understand bankruptcy proceedings there is not a sufficient function left for the custodian to justify the continuance of that officer. Likewise, we approve the provision for the petition against the estates of deceased persons. There is, however, a matter that I should like to draw to your attention. Section 5 of the bill commences to read as follows:—

> Any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition—

We understand the meaning of that paragraph, but we think that it would be advisable if some additional wording was put in to insure that the clause is only operative when the estate is actually insolvent. There should be a few words there to complete the intention.

Hon. Mr. HAYDEN: Then you approve of that section?

Mr. CRYSLER: Generally, we approve of that section, subject to clarification. We also approve of the clarification of the powers of the interim receiver.

Dealing with the question of assignments, which we find in sections 9 and 10 there are a few comments to be made. Section 9 (2) as you will see provides for assignments by corporations other than for debts. The remarks that I made a moment ago in connection with petitions by shareholders, and in relation to the constitutional feature, can be taken as applying here again, and I do not need to repeat them.

Hon. Mr. HAYDEN: This deals more with winding up.

Mr. CRYSLER: Yes, that is correct, sir.

Hon. Mr. HAYDEN: You think the winding up provisions should remain as they are?

Mr. CRYSLER: Quite, sir. We have the same view as to the Winding Up Act as to the Companies' Creditors Arrangement Act, namely, that they should remain as they are. The last four lines of section 9 (3) reads as follows:—

> and in the case of a corporation also a list of the shareholders showing the number of shares of stock subscribed for by each shareholder and the amount of capital paid up by each such shareholder.

Hon. Mr. HAYDEN: Let us stop there. This whole section deals with assignments. Or do you think it deals with more than that?

Mr. CRYSLER: I think, sir, the application is a little more than winding up, because I would think that this section would continue to have application in the event of providing in the place of the present sections 11 to 24 for composition before bankruptcy in the case of trading firms. I think it would still have a connection there. Our point in regard to section 9 (3) is that it is a very awkward thing for a trustee to supply that information in connection with large estates in the time available. We rather think that in the draftsmanship of the act that feature may have been overlooked. We believe that those four lines should be deleted.

Hon. Mr. CAMPBELL: What particularly do you say is burdensome to the trustee, the supplying of the information to the shareholders?

Mr. CRYSLER: Yes. We have had trustees tell us that with large corporations —take for instance a mine, with thousands of shares widely distributed—the list of shareholders might run into many pages.

Hon. Mr. HAYDEN: And the list might be 50 to 60 per cent inaccurate, because there would be street certificates?

Mr. CRYSLER: Yes. We think that possibly the draftsman overlooked that there is that type of company where this work would run up into a very considerable item of expense. And above all, perhaps no practical purpose would be served in a no-dividend estate.

Hon. Mr. CAMPBELL: Is the proposed amendment not obviously intended to show the amount of capital paid up and any unpaid capital which would form part of the estate?

Mr. CRYSLER: Yes. We believe that the trustee should investigate the matter and acquire all this information in due course of administration. Our only question is as to the advisability of obliging him to go to the trouble and expense of circulating it all.

Section 9 (6) relates back to what I said a moment ago about bulk sales. We hope that that section will be carefully studied and either dropped or at any rate not put into the act in such a form that it would have the effect we fear.

Section 10—Application of summary provisions where a trustee cannot be found to act—is of course approved by us.

At this point, rather than speaking extemporaneously on compositions, extensions and schemes of arrangement, I would like to read a few paragraphs from the brief before you, commencing at the middle of page 3:—

> Sections 11 to 24 deal with compositions, extensions and schemes of arrangement. They involve the introduction of two important features. Provision is made for compositions, etc. without bankruptcy and there appears to be an intention to bring under the Bankruptcy Act all forms of insolvencies, reorganizations, liquidations and winding-up proceedings.

Hon. Mr. HAYDEN: May I interrupt you, Mr. Crysler? We have your general view, that you are opposed to the inclusion in this Act of proceedings relating to matters other than bankruptcy, such as proceedings under the Companies' Creditors Arrangement Act.

Mr. CRYSLER: Yes.

Hon. Mr. HAYDEN: It is up to us to consider sections that deal with that, and your brief indicates them?

Mr. CRYSLER: Yes.

Hon. Mr. HAYDEN: I was wondering why it should be necessary to read the brief, unless you want to wield the sledge-hammer twice. You are opposed generally to the incorporation of the provisions that you have indicated, and it is not going to do us any good to look at the particular sections now.

Mr. CRYSLER: I understand. I might explain that in the following parts of this brief it is not so much the sections we discuss as the principles upon which we base our opinion. I dare say that these principles are not new to any of you gentlemen. I have no particular wish to read the paragraphs, but if you desire me to read them I will do so.

The CHAIRMAN: I do not think these paragraphs need be read now.

Mr. CRYSLER: In that case, Mr. Chairman, I would like to skip over to page 5 of the brief, dealing with the Companies' Creditors Arrangement Act.

Hon. Mr. CAMPBELL: Mr. Chairman, for the sake of continuity I wonder if it would not be well to have included in the evidence of Mr. Crysler that part of his brief which he proposed to read.

Hon. Mr. HAYDEN: The whole brief is being put into the record.

Mr. CRYSLER: I would like to read the three short paragraphs on page 5 concerning the Companies' Creditors Arrangement Act:

> The Companies' Creditors Arrangement Act was passed to enable the reorganization of corporations where classes of securities are involved. It has proved a valuable instrument for realization by investors and it is most important that it be retained for that purpose.
>
> However, the provisions of the Companies' Creditors Arrangement Act were wide enough to permit ordinary trading compositions, extensions and schemes of arrangement under it and, in the years before the war, when insolvencies were more numerous than now, certain defects, principally of a procedural character, did become apparent from the point of view of unsecured creditors in proceedings taken by purely trading debtors under that Act.
>
> It is necessary that the Act be amended to guard against a recurrence of these defects and prevent its use for all practical purposes where trade creditors' interests are primarily involved. It is understood secured creditor interests are preparing suggested amendments to accomplish this purpose.

I wished to read that so that I could say that since the brief was prepared we have had an opportunity of reviewing the amendments prepared by the Dominion Mortgage and Investments Association and presented to this committee, and we are quite satisfied that those amendments carry out the purpose which it was said that they would.

The next group of sections affect the duties of the Superintendent of Bankruptcy. Section 39 (4) (*g*) provides that he shall audit and examine trustees' accounts. Section 91 relates to release of trustee. Section 82, statement of receipts and disbursements; and section 83 (1) (*c*), notice of final dividend. I heard those four sections discussed at considerable length this morning, and I think no good purpose would be served by repeating what has been said. There was some discussion as to the inconvenience involved in having to furnish the Superintendent with all the material required. I had a talk subsequently with one or two gentlemen who carry on the business of trustees, and I understand that, broadly speaking, the practice is for the trustees to supply the Superintendent with statements of their receipts and disbursements; and, if he requests it, they supply him with further detailed information in the form of vouchers. However, it is said that when the trustee takes his statement of receipts and disbursements to the court, the practice, at least in Toronto, is to take the actual vouchers there for the inspection of the court, and what ordinarily happens is something in the nature of a spot check by the court. Hence the statement that cratefuls of documents would have to be shipped if all those original vouchers were required by the Superintendent in order to make a spot or full check as the court now does.

Hon. Mr. HAYDEN: Generally speaking, wherever there is any decision to be made on the accounts or fees of the trustee, you think the reference in the first instance should be to the court?

Mr. CRYSLER: We do, sir. That brings me to the next point that I wish to make In the courts you have the protection of forms of judicial procedure which have been built up over the ages to secure the best justice known to man. I would not for the world suggest that an administrative official would give anything but the best possible justice, but my point is that he does not follow

through the procedure of the court. There is an inherent difference between court procedure and administrative procedure. For that reason we believe that the passing of accounts, the release of trustees, and so on, should remain under the jurisdiction of the courts. I am told that especially in large estates there is almost invariably considerable oral argument to support the statements, and that if there was no opportunity to make oral argument there would almost inevitably be a somewhat protracted exchange of correspondence in its place.

Hon. Mr. HAYDEN: Do you not think the stronger ground is the one you stated first?

Mr. CRYSLER: From the point of view of immediate purposes, yes sir. One does not want to get too far afield in large questions, but we all know the tendency towards administrative procedure rather than court procedure; and I think those of us who are trained in the law and have a knowledge of the history of administration in courts and so forth, are rather of the view that the further that tendency develops the further you tend to get from abstract justice. I am not so sure that in the long run the second point may not be as strong as the first one, sir, though of course it is not as immediate.

In regard to the Superintendent there are certain other reeferences in sections 78 (3) and 78 (4). We believe that these should be deleted. The inspectors are the governing body of the estate; and our thought is that they should do the job and that it is probably not the most suitable function for the Superintendent to intervene in. After all, he is in Ottawa and is likely to be less closely in touch with some aspects of the situation than those officials who are on the spot.

Hon. Mr. CAMPBELL: I do not know why that amendment is suggested, but might it not be because the larger creditors are represented by the inspectors and that many small creditors feel that, although money is available for distribution by way of dividends, they are unable to get the inspector or trustee to make a distribution at a particular time? If this amendment were carried the smaller creditors could communicate with the Superintendent and ask him to intervene and see that a distribution was made. After examining the affairs of the estate he might come to the conclusion that the inspectors represening the larger creditors were improperly withholding the distribution for some purpose.

Mr. CRYSLER: I can see that possibility.

Hon. Mr. CAMPBELL: How would the amendment interfere with the act at all? It seems to me that the Superintendent would not override the decision of the inspector or trustee except in an extreme case.

Hon. Mr. HAYDEN: The court could do that just as well as the Superintendent, could it not?

Mr. CRYSLER: Would you please refer to subsection 208 (*d*) of the act? This says:

> Section 208 (*d*). Any person who, having been appointed a trustee, without reasonable excuse, fails to observe or to comply with any of the provisions of this act, or fails duly to do, observe or perform any act or duty which he may be ordered to do, observe or perform by the court or the superintendent—

We question the wisdom of that provision insofar as the superintendent is concerned. The court order is issued as a result of judicial process, and if the trustee does not happen to agree with that order he has his remedies in appeals through judicial process. There is not the same protection either at the beginning or the ending of an administrative order issued by an administrative official. We doubt whether that is quite a fair position in which to leave the trustee in bankruptcy. As you will recall the discussion this morning, at the time we prepared our statement we were unable—as Mr. Bullen was unable—to find any

right of appeal from the superintendent's decision provided in the bill. Of course we heard Mr. Reilley say this morning if that was the case he would be very happy to have it changed. In any event, sir, I am not inclined, and I do not think my members are inclined, to raise a very important issue concerning the superintendent's right to intervene to the extent of interim dividends. We mention it, but we do not regard it as a very important point among the amendments.

Carrying on with a group of kindred sections dealing generally with the trustee, I would just refer again to the fact that as the act stands now there is this section 208 (*d*). There is apparently a suggestion that the trustee should take his receipts and disbursements to the superintendent and get his discharge from the superintendent. As I have said, we were unable to find a right of appeal, and we do not think that would be a fair situation in which to leave the trustee. Our preference would be for these matters to be left with the courts, where they are now. But we do believe the trustee should have the right of appeal if matters are to be left to the superintendent.

I come now to a few minor matters in connection with the trustee. If you would please refer to section 39, subsection 7 which reads:—

> The superintendent may give such instructions to trustees regarding the estates under their administration as may be deemed necessary or expedient.

We do not know exactly the purpose of that. It is perhaps a little broad. There may be some specific purpose that the superintendent has in mind, and perhaps it should be clarified. For instance, relating to what I have just said, supposing that the trustee should get instructions to pay an interim dividend before he has settled the income tax for which the estate is liable. It may be an extreme instance of what might happen, but you could see the difficult position in which the trustee might be placed. We suggest he should not be left open to such a difficult position.

Section 40, subsection 3 reads:—

> No trustee shall be bound to assume the duties of trustee in matters relating to assignments or receiving orders or to compositions, but having accepted an appointment as such he shall until released or another trustee is appointed in his stead perform the duties required of a trustee under this act.

You will notice that that falls under the general heading of administrative officials. It follows the assignment and we think there should be some more or less definite time limit pause there to give the trustee an opportunity to at least make a superficial examination of the estate to determine whether he wants to take it on. You will notice on page six of our brief we suggest that the trustee should not be bound to act until following his acceptance he has been confirmed at the first meeting of creditors, the point being that that will give him an opportunity to investigate.

Section 44, subsection 1. We are inclined to believe that this is somewhat impracticable in so far as theft insurance is concerned. Trustees tell us that sometimes they cannot buy such insurance for certain types of assets. Sometimes they get heavy equipment, which could not be possibly stolen, and they consider it a waste of money to insure it.

Hon. Mr. HAYDEN: You favour—

Mr. CRYSLER: Leaving that out.

Hon. Mr. HAYDEN: Supposing the inspector wants it?

Mr. CRYSLER: Then let each estate be dealt with according to its merits, and whether or not the insurance can be obtained.

Section 44, subsection 3—moneys to be deposited in the bank. The last two lines of this subsection read:—

> All payments made by a trustee shall be made by cheque drawn on the estate account.

I should like to draw attention to the fact that cheques are not legal tender. You might possibly get into difficulties there. Then again, trustees have told us that quite often they get in positions where they go out to small towns and have to hire from three to six or eight persons for a day to take stock, and so on, and it is more convenient to pay them out of hand with cash. Trustees feel they would be seriously inconvenienced if they could only draw cheques on the estate account.

Now section 44 (5). This is the books and records section, and it was discussed so fully this morning that I shall not take you over the ground again, but I think I can clarify something about it. The difficulty of the present section is that it seems to read as though requiring separate accounts in the book of records. Here is why we do not like that. Very often in the early days of the bankrupt estate the trustee has to advance his own money and obviously he must show where the money is.

The CHAIRMAN: That would apply to the previous section.

Mr. CRYSLER: Yes. By allowing the trustee, as at present, in most cases to keep track of estate moneys in a separate ledger account in his own general books you avoid a multiplicity of books to keep up. One trustee in Toronto told me he had some hundreds of estates, and if he had to keep his accounts separate in the record books he would have to have some hundreds of sets of books. This trustee balances his books monthly, and he said to me, "My goodness! I don't want to have to balance all those sets of books monthly. At present I balance my own books. There is a separate sheet for each estate, the job is done, and I know I am all right." I mention that as it may clarify some of the discussion of this morning. Another trustee pointed out that occasionally he had to deal with what is termed a multiple estate. This was instanced this morning by Mr. Bullen in reference to the Canadian Department Stores. You cannot possibly have your books of account in the trustee's office if the estate continues in operation, for they must be out in the branches. All the trustee can have are the controlling accounts. We mention those things in the hope that they will be taken into consideration.

The CHAIRMAN: Would you be in a position to suggest a remedy?

Mr. CRYSLER: The old section, sir. We do not know of any case where it has substantially gone wrong. If it has gone wrong in some particulars, perhaps those particulars can be corrected without the whole body of the section being changed.

Dealing with the next two or three subsections, 6, 7 and 8, in certain circumstances the records will go to the superintendent. We question the advisability of that for this reason. Trustees say that for a year or two after the estate is closed they are forever getting inquiries, and they need the records in order to answer those inquiries. Then there is the other angle. I think one must be fair with the trustees. If they pass away their records, and somebody should charge wrong practice in some respect, where are the trustees when their records are gone? I suppose the answer is they could be returned, but after all I think most people in the matter of protection prefer to keep their means of protection in their own hands. I do not know why trustees should not be permitted to do that.

Section 53 (1). This has to do with persons claiming property in possession of the bankrupt. The subsection provides that a trustee may waive the filing

proof of claim. We question the advisability of this for two reasons: One. It may lead to loose practice. Two. It does not leave a permanent record of the disposition of the claim, as to why it was so disposed. We think the proof should be filed.

Section 53 (2)—Disposal of Filed Claims. There, as you will notice, the trustee is allowed a certain time within which to admit or dispute claims. We think the fifteen-day period should be increased to thirty days. The trustee should normally have thirty days to complete his investigation. Then as regards the claimant, there seems to be practically a statutory adjudication of his claim, and by reason of distance he might almost lose his claim if he did not put it in within fifteen days. We think this period also should be lengthened to thirty days.

Section 53 (5)—Trustee not liable for costs or damages. This subsection was discussed this morning. We believe the court should have power to award costs where a creditor is rather obviously unnecessarily put to the expense of establishing his claim.

Section 63 (1). Another question arises in this subsection which deals with proceedings by creditors when the trustee refuses to act. When we first looked at that subsection we were prepared to regard it favourably; on second thought we consider it of doubtful value. First of all, there would have to be a legal transfer of title from trustee to the creditor, and we rather doubt whether if that was done there is sufficient protection for the other creditors interested receiving their full share. For those reasons we doubt the advisability of that subsection.

I come now to assignments and preferences. Section 69 (2) deals with protected transactions. There is a feature we do not like. It seems to place a permanent onus of proof on the person supporting the validity of the transaction. If that were limited to the three months' period for the avoidance of transactions where preferences have occured, I do not know that one would quarrel with it very much; but it does seem to us rather unreasonable that the person supporting the validity should bear the onus of proof, whereas under normal legal process the onus is the other way around. For that reason we would much prefer the former section 65. We think it should be retained rather than the new section should be adopted.

The matter of dividends is covered by sections 87 and 88 (2). Whether it is contemplated that these sections would remain if sections 11 to 24 go, I do not know. At any rate we should like to comment that once creditors are paid in full the function of bankruptcy is complete. Then the assets of the corporation should be given back to the corporation, as there is no provision for distribution to shareholders. Following that the corporation would then have the usual processes under the Companies Act or the Winding Up Act for reducing its capital and carrying on, or having itself wound up and assets distributed. At any rate we question whether bankruptcy should deal with these matters, once the creditors have been paid in full. They should, we think, go to other remedies.

Hon. Mr. CAMPBELL: What practice is followed now with respect to that sort of thing, assuming there is a petition in bankruptcy and that the trustee finally sells the assets and makes a distribution to the creditors and has on hand say $100,000?

Mr. CRYSLER: Well sir, I asked one trustee what light he could throw on that practice, and, although he is a man well up in years now, he said that there was only once in his life where he met that situation.

Hon. Mr. CAMPBELL: Do you mean where he had a surplus?

Mr. CRYSLER: Where he attempted to handle a surplus. He did not say that there were no cases where he had surplus to hand back to the corporation, but

only in one instance did he have a surplus and attempted to distribute it to the shareholders. Then in the distribution to the shareholders he did not attempt to proceed under the Bankruptcy Act; he worked entirely apart from it. He did not say under what he did work, but one would obviously think it would be to get consent from the shareholders.

Hon. Mr. CAMPBELL: I wonder if Mr. Reilley could answer that question in a practical way? What happens, Mr. Reilley, in a case of that kind?

Mr. REILLEY: I really do not know myself. In 99 cases out of 100, in fact in all the cases that do arise, you get to the point where the assets are being sold and there may be something left—some small asset or money—you have not got any corporation or anybody to which you can hand back the money.

Hon. Mr. HAYDEN: The corporation is still there?

Mr. REILLEY: It may not have cancelled its charter with the Secretary of State, but you will not find in any of those cases that there are officials to carry on the functions of the corporation, and you find that the money is there at loose ends; there is no one to receive it. It is turned in to me as an undistributed asset, and we have a good deal of it lying in the Receiver General's office today, because there is no company to claim it or do anything with it. My idea in that instance was not to add on some bankruptcy function, but merely to give the trustees the right to go ahead and give this money to the people who are entitled to it when it is apparent that otherwise they are not going to get it. That is the sum and substance of the whole idea. But I do know that at the present time there is a good deal of money lying in the Receiver General's office belonging to companies that do not function and there is nobody to claim it and divide it among the shareholders.

Mr. CRYSLER: Could I address a question, Mr. Chairman? I have been rather interested in what Mr. Reilley has said. Frankly that aspect had escaped going to ascertain the shareholders entitled to it? I would be inclined, on my my attention: if there is no official way to hand the money over how are you own initiative, to withdraw the point if I could be satisfied that there is a feasible way of carrying out Mr. Reilley's proposition?

Hon. Mr. HAYDEN: You might be able to find a list of shareholders in the company's books; then you could check with them and ask them to produce their certificates to show whether or not they are still shareholders. I can understand that procedure might be possible, and yet you would not be able to find a board of directors that would function.

Mr. CRYSLER: Frankly, we were not thinking of the problem Mr. Reilley has mentioned. We were reviewing this section not at all apart from sections 11 to 24; and that fastened our attention on it, and we did not approve of it as applied to companies where there was a corporation that could be found, and where there were sizeable assets. We did not consider the point that Mr. Reilley has brought up. There may be something to it.

Hon. Mr. CAMPBELL: If a company has not applied for its discharge within sixty days after distribution of the assets the Superintendent could direct them to be distributed amongst the registered shareholders.

Mr. CRYSLER: That would seem to answer the problem.

Mr. REILLEY: May I be permitted to reply on that question. I have never yet known a corporation to apply for its discharge.

Hon. Mr. CAMPBELL: I can see the necessity for having some procedure, because the money properly belongs to the shareholders; all the creditors have been paid and there is no reason why it should be held by the Receiver General.

Mr. REILLEY: Not at all.

Mr. CRYSLER: As far as we are concerned, if there is a reasonable time limit fixed in which the corporation may apply for its money, then I believe we would be satisfied to withdraw our present objection.

In connection with release of the trustees, there are certain results which fall from that provision. Section 92 (1) would result in undisposed of equities in real property automatically vesting in mortgages. Our view is that it goes a little too far; that property sometimes has an increased value, which would be to the benefit of the creditors, and we do not know just why the bankrupt should get it back. Section 92 (2) automatically vests in the bankrupt certain unrealized property. Again we do not know just why he should get it back.

Hon. Mr. HAYDEN: What are you going to do, when the trustee is released?

Mr. CRYSLER: Is there not a section somewhere in the act which provides to the effect that even though the trustee is released, if something later on should arise in that estate, he is still trustee for that purpose?

Hon. Mr. HAYDEN: You mean de facto?

Mr. CRYSLER: Yes, de facto.

Hon. Mr. HAYDEN: I should think that is only to cover matters where a title or clearance is required.

Mr. CRYSLER: We have in our mind the question of real estate, where you have property subject to mortgage an dthere is no market for it, or so little that can be realized that nothing is done with it. Then there comes a land boom, and it does not take much increase to widen that spread.

Hon. Mr. HAYDEN: But surely there should be some end to the period of bankruptcy, in which time the trustee is released and the creditors have taken their bit, whatever it is. The bankrupt should be able to emerge and gather up whatever tatters are left. Now if you are going to hang some kind of tail on to him, that anything that is left is going to be held for all time for the benefit of the creditors in case there may be an appreciation in value, you are going to make bankruptcy proceedings unending.

Mr. CRYSLER: I can see the danger of that. Of course what we have to say here has nothing to do with the bankrupt getting his discharge; that is a separate matter.

Hon. Mr. HAYDEN: It may occur without the releasing of the trustee.

Mr. CRYSLER: Our people felt rather definitely that these assets should exist for the benefit of the creditors if they ever have any value.

Hon. Mr. HAYDEN: You mean for all time?

Mr. CRYSLER: Yes. Although, frankly sir, I do not believe there is much in it from a practical point of view.

Hon. Mr. HAYDEN: I do not think there is much in it and I think you would make bankruptcy proceedings, as far as the Superintendent's function is concerned, unending.

Mr. CRYSLER: I can see that point. I do not think my principals would be inclined to press that matter.

I wish next to deal with two subsections, 92 (3) and 92 (5). We rather definitely feel that those items should be disposed of on the direction of the court, rather than by return to this person or that; the court should definitely instruct what should be done with them.

Next, meetings of creditors, 93 (1). There is a small point of interpretation there that we should like to draw to your attention. The last sentence reads: "Provided that the official receiver may, when deemed expedient, authorize the meeting to be held at the office of any other official receiver." To our mind it is a necessary implication that the official receiver could only hold meetings in his own office in his own locality. Now if there is anything

to that apprehension, we think some clarification should be inserted to make it clear that the official receiver can instruct the holding of meetings otherwise than in his office.

Section 96 (3) has rather a delicate aspect. In cases of a tie vote the chairman has the casting vote, and often at the meeting the chairman will be the official receiver. In effect he would be put in the position of choosing a trustee by his casting vote. There is one way of looking at it, that as a court official he should not take that responsibility; or, perhaps it is not good to put a public official in the position of dividing up business. To avoid this, it is suggested that the following words be added to the subsection: "in the case of a tie vote, on the appointment or removal of a trustee, the chairman should not have a casting vote, and the trustee presently appointed shall continue in office." We think that might get the official receiver out of the occasional awkward position, and at the same time be a sound way of dealing with such matters.

The next section upon which I wish to touch is 100 (1). We think that all proofs of claim should be filed before the meeting. The section says, before the meeting or before voting. If they are not filed before the meeting it does not give a trustee a chance to check them.

Section 105 (3) (*i*) says that any person associated with the bankrupt may not vote. That provision strikes us as being rather broad. We do not know what it means.

Hon. Mr. HAYDEN: Mr. Bullen suggested retaining the old section. Would you be agreeable to that?

Mr. CRYSLER: We would agree to that, sir.

Section 108 (2) should have shareholders struck out, partly to conform with our view that sections 11 to 24 should go, and partly because fundamentally the shareholders should not be voting for a trustee; that is a creditor's function

Section 108 (7) reads:

> A majority of all the inspectors appointed shall constitute a quorum for a meeting which may be called by the trustee or any inspector as and when he deems necessary on three clear days' notice to all of the inspectors unless notice is unanimously waived or the consent to hold such a meeting be given in writing by an absent inspector.

We think it rather inadvisable to put in the hands of an inspector the power to delay meetings three days. When that matter was discussed this morning reference was made to the arbitrary trustee, and the giving to one inspector a chance to call the meeting. We should like to draw to your attention the picture that, there may be a trustee here and inspectors there, and the inspector tries to be a law unto himself. We are told that sometimes exists. To guard against that we think the section should be modified along the lines which I have mentioned.

Hon. Mr. HAYDEN: You think three days is too long a notice?

Mr. CRYSLER: To block the calling of a meeting. Sometimes the purpose of a meeting has passed in three days.

Hon. Mr. HAYDEN: You mean that an inspector will waive notice of a meeting?

Mr. CRYSLER: Yes; he blocks the meeting; he will not waive notice. He can hold it up for three days, and there is some rare dickering in these estates.

Hon. Mr. HAYDEN: If three days is too long perhaps two days would be satisfactory.

Mr. CRYSLER: Any lessening of the time would be helpful.

Hon. Mr. HAYDEN: You think three days is too long a notice?

Mr. CRYSLER: To allow an inspector to block the calling of a meeting. Sometimes the purpose of the meeting is over in three days. Occasionally rare dickering goes on in those estates.

Hon. Mr. HAYDEN: If three days is too long, why not make it two days?

Mr. CRYSLER: Any shortening of the time would help.

Section 108 (14), inspectors' fees. Trustees, especially those who handle large estates, tell us that the remuneration of inspectors is really inadequate for the services that they are expected to perform. So far as Toronto is concerned, we think that the scale of fees should be doubled; and if any further increase is necessary, that should be left to the court.

Section 110 (2) and (7) contemplates doing away with the swearing of proof of claim. That was discussed this morning, and I think it is sufficient for me to say that if these amendments were adopted they would let in a lot of loose practice.

Section 110 (5) was also discussed. We are in favour of the deletion of all the words from "otherwise" to the end of the subsection, but we suggest that the words "and, if so, to what extent" should be substituted therefor. We think that a creditor should not only say whether he is secured or not, but should state that portion of his claim which is secured. Often there are claims which are not wholly secured.

Section 118—No creditor to receive more than 100 cents on the dollar. That was dealt with quite effectively this morning. We think it should be made clear that secured creditors may recover the cost of realizing their security.

Section 121—Postponement of wage claims of relatives. We agree with what was said this morning and think the old section detailing the relatives affected should be retained. At our meeting more than half of the men skilled in this work could not agree on what a third-degree relative was. We fear that the proposed amendment would give rise to a good deal of misunderstanding.

Section 125 (1) requires the trustee to notify all creditors whose claims have been admitted. We cannot see that this is necessary and we think it should be deleted.

Hon. Mr. HAYDEN: There was a suggestion this morning that notification of disallowance should be sent as quickly as possible.

Mr. CRYSLER: That would overcome one aspect of the difficulty, namely, the time and trouble of sending out notices to all creditors whose claims have been admitted. But there is another aspect which was not discussed this morning. In the early's stages of a bankruptcy, before the trustee has had adequate opportunity to investigate, he should not be in the position of having to admit claims or dispute them and force issues. Sometimes, and especially in large estates, it takes a long time for the trustee to satisfy himself as to just what claims are justified.

Hon. Mr. HAYDEN: This subsection simply says "The trustee shall as soon as may reasonably be done examine every proof of claim filed".

Mr. CRYSLER: Oh, I am sorry; I thought there was a time limit on it.

Section 125 (2) and (3) and following subsections are approved by us. These subsections enable the trustee, without taking a stand, to require that doubtful claims be proved.

Section 126 clarifies and revises priority of claims. We like this too.

Section 133, duties of bankrupts. Generally, we approve of this, but there is one point with which we de not agree, and that is the latter part of paragraph (*e*):—

> Where the affairs of the bankrupt are so involved or complicated that he cannot himself reasonably prepare a proper statement of his affairs, the Official Receiver may, as an expense of the administration not

to exceed twenty-five dollars, authorize the employment of some qualified person to assist in the preparation of the statement.

We doubt whether $25 is at all an adequate figure, and we question whether any figure should be mentioned.

Hon. Mr. HAYDEN: Perhaps "a reasonable amount" would be better.

Mr. CRYSLER: Yes. The cost might run into hundreds of dollars, or even conceivably into thousands of dollars.

Hon. Mr. CAMPBELL: As in the Abitibi case, for instance.

Mr. CRYSLER: Section 137 (4)—Examination of bankrupt at meeting. The provision for the evidence of the bankrupt being taken down in shorthand is impractical. Many trustees would not be able to find a competent stenographer just when required. We doubt whether that subsection should be retained.

Section 143—Questions must be answered. That section in its present form appears to us to be rather unfair to the bankrupt.

Hon. Mr. HAYDEN: I was waiting for your comment on that.

Mr. CRYSLER: May I read the comment on this in our brief?:—

> The provision in section 143 that evidence taken on examinations may be given in evidence in subsequent proceedings should be limited to evidence given at the formal examination mentioned in sections 138, 139 and 142 (but not including examinations before the Official Receiver), of the Bill. It would be unfair to give in evidence, evidence taken at an informal examination.

We are told that often the best ends are achieved by a very informal examination, which actually is just a chat in the Official Receiver's office. We do not think it would be fair to report that and give it in evidence against a person. If that practice were followed a few times, it would probably result in bankrupts becoming very reticent in those little chats.

Hon. Mr. HAYDEN: It is a very dangerous principle to compel a person to answer questions and afterwards prefer a charge against him and read his answers in an effort to convict him.

Mr. CRYSLER: We agree, Senator. As stated in the brief, we would go so far as to support that if it were confined strictly to the evidence given at the formal examination mentioned in sections 138, 139 and 142, but not including examinations before the Official Receiver. The reason for that is that while we thoroughly subscribe to the principle you have mentioned, we also fully appreciate the kind of persons that trustees in bankruptcy often have to deal with, and the difficulty of getting any information out of them—indeed, in many cases it is almost impossible to get any information.

Hon. Mr. HAYDEN: This section is not on the point of getting information.

Mr. CRYSLER: I see your point, sir. That is right.

The CHAIRMAN: It has to do with the further use of the answers.

Hon. Mr. HAYDEN: Yes.

Mr. CRYSLER: Quite frankly, sir, we would not go so far as to support that section, but we presume that the draftsman had some cogent reasons for putting it in and we would withdraw our opposition if the section were confined to the formal examination.

Hon. Mr. HAYDEN: It is not entirely new.

Mr. REILLEY: It is almost exactly as in the present act.

Hon. Mr. HAYDEN: That does not make it any better. I do not like it, but I am only one.

Mr. REILLEY: I have my doubts about it myself.

Hon. Mr. HAYDEN: To me, it is inherently wrong.

Mr. CRYSLER: Whatever my personal feeling about it may be, I am in the position of having a written instruction and perhaps I had better not say more than I have said.

The sections dealing with the discharge of the bankrupt were discussed at some length this morning. I think perhaps I need not go over a great deal of detail in connection with these. We are aware of certain reasons why it would be desirable to have what might be termed an automatic discharge principle in operation, but on the whole we think the present system should be retained. Generally speaking, I would suggest that the state should not be called upon to look after, shall we say, the foolishness of human beings who by doing certain simple things, could protect their own interests. I believe that the expense of applying for discharge should be left to the bankrupt. Even though the cost of obtaining the discharge is small, it is questionable whether that is an appropriate item to include in the expenses of the estate.

Section 146 (4) requires the trustee to give notice of the application for discharge to every creditor of whom he has knowledge, whether or not his debt has been proven. We cannot see why notices should be sent to people who have not proven their debts. Surely until they prove their debts they have no interest.

Section 146 (5)—Procedure when trustee not available. The proposal is good enough, but we wonder just how the necessary records and information will be available in most cases if the trustee is not available.

The CHAIRMAN: If the records were filed with the Superintendent they would be available. A previous section provided for filing of the records with the Superintendent.

Mr. CRYSLER: Yes, sir, but you will perhaps recall that my principals did not like that section. If our view were to prevail, the two amendments would be dropped.

Section 147 (9)—Evidence at a hearing. Section 147 (11)—Right of bankrupt to oppose statements in report. We think that these subsections are impractical. The bankrupt is not given any right to dispute the Superintendent's report, and even if he were it would not be feasible for the Superintendent to appear for evidence and examination whenever there was a dispute.

Section 159 (1) (*a*)—Courts vested with jurisdiction. This states that the jurisdiction of the bankruptcy court is "to hear and determine all matters in dispute arising out of the administration of an estate or in which any interest of the estate is involved or to which the trustee is a party, or in which the trustee is a claimant against any other person."

Hon. Mr. HAYDEN: When Mr. Justice Urquhart was here he criticized this extension of the jurisdiction of the Bankruptcy Court, and suggested that matters which were not bankruptcy matters should be determined in other courts.

Mr. CRYSLER: That is our point. We suggest a revision of this subsection so as to limit the Bankruptcy Court to what are properly bankruptcy matters. Other matters should go to other courts where they are handled now.

There was some discussion this morning on the question of judicial districts. I have not much that is new to say, but I should like your permission to read this paragraph near the bottom of page 11 of the brief:—

> So far as Ontario is concerned, section 160 would split up the Bankruptcy Court, now centralized at Toronto into 47 Bankruptcy Courts in the Registry Offices of the Supreme Court of Ontario. This is most undesirable as it would result in dispersion of bankruptcy records and lack of uniformity of practice. It is also undesirable that the local Registrars of the Supreme Court, all of whom are inexperienced in

> bankruptcy matters, should be vested with the Registrar's judicial power as local Registrars. Further, action on petitions in outside districts would be delayed until the arrival of Judges on circuits.

I would ask you to bear in mind the importance of that consideration and just what would happen in the case of an estate where there was that delay. The creditors could not do anything until they reached Toronto or until the Circuit Court judge arrived. Where a petition was pending there might be rare doings in a considerable number of estates before the judge arrived on circuit or arrangements were made for an application in the Supreme Court at Toronto.

Hon. Mr. CAMPBELL: That would not necessarily be the case. A petition could be filed in a town like Chatham and the hearing could take place in London or wherever there happened to be a weekly court, or in Toronto.

Mr. CRYSLER: That is right, but remember this much, especially in the worst type of bankruptcy—shall we say where the debtors are real swindlers upon their very face, if you file your petition in Chatham one day and the bankrupt gets knowledge of that, and you have to wait until only next day to act in Toronto, much may happen over night.

Hon. Mr. CAMPBELL: It would not be compulsory for the petitioner to file his petition in the county town. He could use the same practice that prevails now and file in Toronto, and so get over that.

Mr. CRYSLER: I am not familiar enough with court practice to be sure of that point. Could anybody here help us? I am just doubtful.

Hon. Mr. CAMPBELL: Here concurrent jurisdiction is intended, and the lodging of the petition could take place anywhere.

Mr. CRYSLER: Then what is wrong with the present situation where, along with the advantages we have in centralization, while the bankruptcy court is located in Toronto, by leave the parties can try the issues elsewhere; and they do where it is more convenient. The mere fact of the centralization of the Bankruptcy Court in Toronto does not by any means result in all legal proceedings being taken in Toronto; they are regularly taken elsewhere when it is more convenient to the parties.

Hon. Mr. CAMPBELL: I wonder where the real objection lies. The practice works very well in Quebec, I understand, where they have decentralization.

Mr. CRYSLER: I do not know, sir. I have heard, in an unorganized way, of complaints in British Columbia, where apparently some persons want centralization. My knowledge there is very very sketchy, but I do know there are at least some individuals who would like to see a Judge in Bankruptcy designated. Against that, from what the Superintendent in Bankruptcy said this morning, there does not seem to us to be any general objection in those provinces.

Hon. Mr. CAMPBELL: The specific point made is that you feel decentralization would bring about a conflict of decisions or some variation in practice?

Mr. CRYSLER: In the immediate future there would be a certain lack of uniformity of practice and probably you would never get quite such efficient practice as at the present time in the Bankruptcy Court in Toronto, where the officials, not necessarily because they are more competent than in outside points, but because they spend their whole time on the subject and specialize in bankruptcy work, become something of experts. We do not see that material advantages would be gained from decentralization, because, as I mentioned a moment ago, by leave issues can be and are tried outside of Toronto. There are seventeen official receivers throughout the province who have broad powers. Trustees operate all over the province, also with considerable powers of administration. To the best of our knowledge it is not very often that the outside points refer

anything to Toronto. They will of course have their own local solicitors present, but short of that I am told the references to Toronto courts are not at all numerous.

Mr. REILLEY: Nothing can be done outside of Toronto because the officials simply call the first meeting of creditors and report to the court elsewhere. There is no local authority. Everything goes to Toronto. Even if you want to make the simplest application it has to be made in Toronto.

Mr. CRYSLER: Well, it certainly takes courage on my part to contradict the superintendent, and I have no intention of doing so, because I realize he has much more knowledge of this than I have. Nevertheless, our trustees who have participated in this study, and they are very reputable men, have taken the position as stated in the brief. I suppose I am bound by that instruction and must just leave it rest there.

Section 189 (2). This refers to the evidential value of certain original documents in bankruptcy. It reads:

> The production of an original document relating to any bankruptcy proceeding, or a copy certified by the person making it as a true copy thereof, or by a successor in office of such person as a true copy of a document found among the records in his control or possession, shall be conclusive evidence for any purpose whatever of the contents of such documents, unless the contrary is proven.

Usually the evidential value given to documents under such circumstances is that those documents shall be prima facie evidence. We suggest that is probably as far as this subsection should go. If the document is conclusive evidence, no matter how wrong it may be, it seems to preclude showing it.

Summary administration is covered by sections 196 to 199. We think they are a very good addition to the act. However, there is one point on which we are wondering. I refer to estates with no assets. These estates are sometimes numerous, especially in large centres. We do not see any provision for doing the work of winding them up, brief as the work may be. Our suggestion, as you will see from my brief, is this: As official receivers have not a staff to administer these estates, it is recommended that they be authorized to appoint trustees to administer them, and that trustees be paid at the public expense.

There may be some other way of meeting the financial cost of complying with this summary administration. That is merely our suggestion.

Fraudulent bankruptcy offences—section 200 (1) (*s*). It is true that this section is kept under the control of the court before charges can be laid, but there is a feature of it which we think should be adjusted. It says:—

> If he has within two years prior to his bankruptcy materially contributed to or increased the extent of his insolvency by improvident and riotous living, by gambling or by rash or hazardous speculation not connected with his trade or business—

You will notice the wording there, "materially contributed to or increased." This is not based on the riotous living and so on being the cause of the bankruptcy. There has been some talk of this situation. A man goes to the horse races or he buys stocks—something which many men do. Some time thereafter he becomes insolvent for other reasons. Then, strictly applying this subsection, the fact that his losses at the races or on the stock market aggravated the situation, there is the possibility that some court might allow him to be prosecuted. We think we know what is in the mind of the draftsman there, and we suggest that the subsection should be revised accordingly.

The CHAIRMAN: They are permitted to play, but they are not permitted to lose.

Mr. CRYSLER: Of course, obviously the draftsman of the subsection had in mind the man who runs completely amuck, as the result of which he goes bankrupt. Let us say it more directly that way.

Hon. Mr. CAMPBELL: It is copied from the former section.

Mr. CRYSLER: Criminal Proceedings—section 206 (4). We think it is a good thing to bring the Crown Attorney into the picture. Usually a bankruptcy offence is within the Criminal Code, and, as I have said, we think it is a good move to bring the Crown Attorney more into the picture.

Now, gentlemen, I will read to you two short paragraphs from the brief and then I shall be through.

CONCLUSION

The present act has been found satisfactory in most respects but some amendments are necessary as suggested in this memorandum.

I should like to emphasize that we have not come down here to find fault with the present act or its administration. We are very well satisfied with that.

> The sections of the present act have been construed by the courts over a long period of years, and the law and the practice have become fairly well settled. If the wording of the sections of the act is changed unnecessarily, it would mean the discarding of all the established jurisprudence and case law, and would open the door to fresh litigation.
>
> Many of the sections of Bill A-5 envisage increases in the powers of the Superintendent and greater centralization in the Superintendent's department. If these sections are enacted the department will become larger and more costly. This will be reflected in levies on estates. The debtor and ordinary creditor classes are the groups principally interested in bankruptcy and so far as is known no organizations of them have asked for any such development. Until conditions are in existence leading them to do so, it is submitted there should not be any broad movement toward increasing the Superintendent's powers and centralization of bankruptcy work in his department.

Mr. CHAIRMAN: I wish to thank you very much for the opportunity of appearing before you and presenting our brief.

The CHAIRMAN: We must thank you ourselves. We have undertaken rather a big job and are glad to have your assistance.

The committee adjourned until to-morrow morning at 11 o'clock.

APPENDIX

BRIEF FILED BY THE BOARD OF TRADE OF THE CITY OF TORONTO

The Honourable Elie Beauregard, K.C., Chairman,
and Members of the Senate Standing Committee
on Banking and Commerce,
Ottawa, Canada.

Honourable Sirs:—

Senate Bill A-5

An Act Respecting Bankruptcy

The Board of Trade of the City of Toronto is primarily a trade association incorporated by Special Act of the Parliament of Canada originally dated February 10, 1845. Its present membership comprises over four thousand business and professional men engaged in all branches of commerce, industry and finance, and in various professions, many of whom operate nationally and internationally. A substantial number of these members are accordingly interested in legislation respecting Bankruptcy. The Board, therefore, appreciates the opportunity afforded by the Senate Standing Committee on Banking and Commerce of placing before the Committee, on behalf of its interested members, its considered views with regard to Senate Bill A-5 respecting Bankruptcy.

Bill A-5 has been studied in detail by a Committee comprised of representatives of both local and national organizations of unsecured creditors and secured creditors and, in addition, well known licensed trustees. The conclusions of this Committee were subsequently approved by the Council which is the governing body of the Board.

While this Board speaks only for itself, it is desired to advise the Senate Committee that its recommendations are the reconciled and considered opinions of responsible members of the three main groups interested in bankruptcy and competent to speak on this subject matter by virtue of their knowledge and experience.

The Board respectfully submits for your consideration the following comments and recommendations respecting the various clauses of Bill A-5, named:—

Interpretation

Special Resolution—Section 2 (gg)

The basis of voting approval on a special resolution in Section 2 (*gg*) should be as recommended below under Section 15.

Transaction—Section 2 (jj)

A definition of the word "transaction" has been introduced in Section 2 (*jj*) to eliminate unnecessary verbiage and repetition of words. While it has this advantage, it also has the disadvantage of losing a large body of settled law in the Court's interpretations of the meaning of the words which no longer will be used. It is to be expected that for a period of time there will be uncertainties under the new definition until doubtful points are again settled by the Courts. Accordingly, the wording of the proposed clause should receive the most careful legal scrutiny with a view to reducing possible doubtful points to the minimum.

ACTS OF BANKRUPTCY

Other Conveyance or Transfer—Section 3 (d)

Section 3 (d) is changed and makes the following an act of bankruptcy:—

> If in Canada or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon, which would have the effect of defrauding, delaying or defeating his creditors or any of them.

This subsection in its present form seems so broad that it would cast a cloud over legitimate transactions. It should receive careful legal scrutiny and not be enacted in a form which would have such effect.

Bulk Sale—Section 3 (i)

Section 3 (i) is new and makes the following an act of bankruptcy:—

> If he makes any bulk sale of his goods *under* the provisions of any Bulk Sales Act applicable to such goods in force in the province within which he carries on business or within which such goods are at the time of such bulk sale wherein the sale price will not be sufficient to pay his creditors in full.

Sales of departments by solvent firms are not taken into account. Also the subsection would prevent the present frequent practice of creditors effecting a quick and inexpensive liquidation through a bulk sale. The Bankruptcy Act should be left as at present wherein bulk sales only become an act of bankruptcy when they are carried out "without complying with" a provincial Bulk Sales Act.

Ceasing to Meet Liabilities—Section 3 (L)

Section 3 (L) is changed and makes the following an act of bankruptcy:—

> If he ceases to meet his liabilities generally as they become due *or fails to pay any particular debt or debts after repeated demands for payment.*

The italicized words are new fail to recognize disputed claims or set-offs. Their effect is to found an act of bankruptcy on an unproven claim. They should be deleted. Failure to pay a particular debt should not be made an act of bankruptcy.

PETITION AND RECEIVING ORDER

Petition by Shareholder—Section 4 (3)

Section 4 (3), which enables a shareholder of a corporation to file a petition against the corporation, should be deleted. Sub-paragraphs (*b*) to (*f*) refer to grounds other than insolvency, and the constitutional power of the Dominion Parliament to legislate concerning petitions on these grounds is questioned respecting solvent corporations incorporated under provincial laws. While sub-paragraph (*a*) is based on insolvency or an act of bankruptcy, such a clause would expose corporations to serious embarrassment at the hands of one or more disgruntled shareholders. Whether or not a shareholder succeeded on a petition, the mere charge of insolvency and publicity therefrom would gravely impair the credit of a corporation.

Appointment of Trustee—Section 4 (11)

The effect of Section 4 (11) is to eliminate the custodian. This change is approved as it will avoid delay, save expense and encourage the trustee to proceed with administration as soon as possible. Reference to shareholders should be deleted from this subsection and also Section 4 (15).

Administration of Estates of Deceased Persons—Section 5

Section 5 which provides for filing petitions against the estates of deceased persons is approved in principle. Some revision in wording, however, is required to make it clear that the section refers to only estates, having insufficient assets to satisfy creditor claims.

Interim Receivers

Powers of Interim Receiver—Section 7 (2)

The clarification of the powers of the Interim Receiver contained in Section 7 (2) is approved.

Assignments

Assignments by Corporations Other than for Debts—Section 9 (2)

Sub-paragraphs (*b*) to (*e*) of Section 9 (2) deal with grounds other than insolvency or bankruptcy. The power of the Dominion Parliament to legislate respecting assignments on these grounds is questioned in the case of solvent corporations incorporated under Provincial Laws.

Sworn Statement—Section 9 (3)

Section 9 (3) requires that the assignment shall be accompanied by, among other things, "in the case of a corporation also a list of the shareholders showing the number of shares of stock subscribed for by each shareholder and the amount of capital paid up by each such shareholder". It is impractical to require the information mentioned in the time available at this stage, particularly in the case of large corporations. Often this information is not readily available and/or it is voluminous and requires a considerable time for preparation. Lines 30-33 should be repealed.

Effect Thereof, Appointment of Trustee—Section 9 (5)

In conformity with the recommendation under Section 4 (3) the reference to shareholders should be deleted.

Application of Summary Provisions of Act to Assignments—Section (10)

The application, under Section 10, of the summary provisions of the Act to assignments, when a licensed trustee willing to act cannot be found, was approved.

Composition, Extension or Scheme of Arrangement

New Features

Sections 11 to 24 deal with Compositions, Extensions and Schemes of Arrangement. They involve the introduction of two important features. Provision is made for Compositions, etc., without bankruptcy and there appears to be an intention to bring under the Bankruptcy Act all forms of insolvencies, reorganizations, liquidations and winding-up proceedings.

Section 19 (6) makes compositions otherwise than under the Bankruptcy Act voidable. The effect of this subsection would be to create such a doubt concerning sales and informal settlements, under which small trading estates are often settled inexpensively and expeditiously, that they would in all likelihood be prevented. There would be the same effect on proceedings under such legislation as The Companies' Creditors Arrangement Act. The Farmers' Creditors Arrangement Act, the various provincial Bulk Sales Acts and Companies' Acts and the Winding-Up Act.

Omnibus Feature Unworkable

The apparent proposal to bring all insolvencies, reorganizations, liquidations and winding-up proceedings under the Bankruptcy Act does not take account of the fact that each of the Acts mentioned is a highly specialized instrument carefully and specifically devised to serve entirely different purposes. They simply cannot be lumped together in one omnibus scheme and remain effective in accomplishing their objects.

For instance as regards the Companies' Creditors Arrangement Act, Section 23 would enable the Court to impose a composition, etc., on a class of creditors where the proposal would not carry the votes of a majority of the class. If such a provision were enacted, it would have a detrimental effect on the sale of securities and might well raise the question of whether Canadian securities could be marketed in the United States where even majority clauses are not permitted in trustee deeds. Section 23 violates the fundamental principle of the Companies' Creditors Arrangement Act, namely, that holders of securities shall enjoy the protection of normal laws and not be coerced into accepting as a class a settlement to which the majority of the class does not assent.

Again, in connection with the Companies' Creditors Arrangement Act, Section 104 of Bill A-5 would require, for the purpose of voting, secured creditors to surrender and value their securities and be entitled to vote only in respect of the balance (if any) due after deducting the value of the securities. Obviously, this would create an impossible situation from the point of view of a security holder. Reference is also made to Section 98 which separates classes of creditors for voting purposes and provides for intervention by the Court.

So far as winding-up proceedings are concerned, the proposed clauses fail to take into account decisions of the Privy Council to the effect that the Dominion Parliament has not constitutional power to legislate respecting the winding-up of solvent companies incorporated otherwise than under Dominion legislation.

Further examples of the unworkability of the omnibus scheme could be cited but possibly those mentioned above will suffice.

Proper Scope of Bankruptcy Act

Each of the Acts mentioned should be left as a separate instrument to accomplish its particular purpose. The Bankruptcy Act is an efficient instrument for enabling traders to realize claims on trade debtors. It should be left to serve that purpose and no effort be made to include under it other fields.

Compositions, etc., Without Bankruptcy

However, there would be a decided advantage in expanding the present composition sections of the Bankruptcy Act, which only operate after bankruptcy, to enable compositions before bankruptcy within the Act's proper field as indicated. Often trade estates suffer loss in goodwill on becoming bankrupt and lose valuable contracts cancellable on bankruptcy because compositions cannot be carried out without bankruptcy under the Act. Provision for compositions without bankruptcy were formerly in the Act and were repealed because of abuses which grew up. This was before the office of Superintendent of Bankruptcy was established and trustees were licensed. It is considered that the administration of the Superintendent and the control over trustees will prevent a recurrence of the former abuses.

All of sections 11 to 24, not necessary for compositions without bankruptcy within the scope described above, should be eliminated. As to certain sections which may remain, the following observations are submitted:—

Comments on Sections Which May Remain—Proceedings by Debtor, Documents to be Filed—Section 11(2)(d)

Section 11(2)(*d*) requires at the commencement of proceedings the filing of a verified, correct statement showing the financial position of the debtor at the date of the proposal. Such a requirement is impractical at this stage, especially in the case of large corporations and often time would not be available for compliance. It is proposed that the subsection provide for a "statement showing as closely as is reasonably possible the financial position of the debtor at the date of the proposal".

Proposals Not to be Withdrawn—Section 11 (3)

The subsection provides for only two days' notice of variations in proposals to sureties. This time is inadequate and should be at least seven days.

Documents to be Sent to Shareholders, Bondholders, etc.—Section 12 (2)

Under Section 12 (2) the trustee is required to send, on request, to each shareholder, bondholder and debenture holder a list of share, bond and debenture holders showing in the case of shareholders the number of shares of stock subscribed for by each shareholder with the unpaid balance, if any, due therein, and in the case of bond or debenture holders the serial number of the bonds or debentures held by each of them with the amount of principal and interest to be shown separately due thereon.

This proposal is too drastic. It will involve trustees in much unnecessary work and estates in heavy costs for the preparation and mailing of this material, particularly in the case of large corporations where it would be voluminous. Moreover, it would not be possible to comply effectively in the case of holders of bearer bonds and share warrants. It would be sufficient to publish notice of a time and place where these records can be inspected.

When Proposal Deemed to be Accepted—Section 15

The wording of Section 15 should be clarified to place the basis of acceptance of proposals on a majority in number of all the creditors holding proven claims of $25.00 and over present in person or by proxy and voting and 75 per cent in amount of those present in person or by proxy and voting.

Creditors May Provide for Supervision of Debtors' Affairs—Section 16

The provision in Section 16 for including in proposals terms respecting supervision of the affairs of the debtor during the composition, extension or scheme is approved.

Companies' Creditors Arrangement Act

The Companies' Creditors Arrangement Act was passed to enable the reorganization of corporations where classes of securities are involved. It has proved a valuable instrument for realization by investors and it is most important that it be retained for that purpose.

However, the provisions of the Companies' Creditors Arrangement Act were wide enough to permit ordinary trading compositions, extensions and schemes of arrangement under it and, in the years before the war, when insolvencies were more numerous than now, certain defects, principally of a procedural character, did become apparent from the point of view of unsecured creditors in proceedings taken by purely trading debtors under that Act.

It is necessary that the Act be amended to guard against a recurrence of these defects and prevent its use for all practical purposes where trade creditors' interests are primarily involved. It is understood secured creditor interests are preparing suggested amendments to accomplish this purpose.

ADMINISTRATIVE OFFICIALS

Duties of Superintendent—Section 39 (4) (g)

The provision in Section 39, (4) (*g*) for the Superintendent of Bankruptcy auditing and examining trustees' accounts of receipts and disbursements and final statements and granting releases to trustees should be deleted and these functions left with the Court where they now rest. Oral explanation is often necessary in passing accounts, especially in large estates and the Courts are more accessible and provide more facility for oral explanations than the Superintendent in Ottawa acting for the whole of Canada. Moreover, while these proceedings are in the Court, creditors can intervene as the trustee must give them notice. Also, no provision is made for creditors and trustees appealing from the decision of the Superintendent, except in Section 91 (8).

No Trustee Bound to Act—Section 40 (3)

As the trustee is to be appointed in the first instance, he has not sufficient opportunity to investigate before appointment. Under Section 40 (3) he should not be bound to act until following his acceptance he has been confirmed at the first meeting of creditors.

DUTIES AND POWERS OF TRUSTEE

Insurance—Section 44 (1)

The trustee should not be required to take out theft insurance as is required by Section 44 (1). Frequently burglary insurance on the assets of a bankrupt estate cannot be obtained. Also assets are frequently of such nature that burglary insurance is not required and its cost would be an unnecessary burden on the estate.

Moneys to be Deposited in Bank—Section 44 (3)

It is impractical to limit all payments to cheques drawn on the estate account as is provided in Section 44 (3). Moreover, cheques are not legal tender.

Books and Records—Section 44 (5), (6) (7)

With regard to the books to be kept by the Trustee, Section 44 (5) is too detailed. It would require trustees with other good systems to conform to the particular method laid down. Also there is considerable doubt whether certain of the records mentioned should be kept separate for each estate. There are strong arguments in favour of their being kept in a general minute book of the trustee. Section 55 of the present Act is adequate and should be retained as the proposed subsection would be impractical in large and operating estates.

It would not be fair to require a trustee to surrender the records mentioned in ss. (6) and (7) to a new trustee or the Superintendent. Once the records were gone, the original trustee would be without the means of answering enquiries or protecting himself.

Persons Claiming Property in Possession of the Bankrupt—Section 53 (1)

The new provision in Section 53 (1) that the trustee may waive the filing of a proof of claim if satisfied a claimant is legally entitled to property, should be struck out as it is likely to lead to loose practice. A proof of claim should always be required.

How Filed Claim Disposed of—Section 53 (2)

The periods allowed the trustee in Section 53 (2) to admit or dispute claims and allowed the claimant to appeal should each be increased from 15 to 30 days. The trustee should have 30 days normally to complete investigations before being required to admit or dispute claims and, where necessary, a longer time

in the discretion of the Court. The claimant should have the longer peirod as various conditions such as being away may result in delay in appeal as the Act provides that if an appeal is not lodged within the time set a claimant will be deemed to have abandoned his claim.

Trustee Not Liable for Costs or Damages—Section 53 (5)

The provision in Section 53 (5) relieving the estate of liability for the costs of establishing a claim or of an appeal is too broad. The Court should have discretionary power to award costs to a claimant where it is clear he has been unnecessarily put to the expense of proceedings to establish his claim.

Appeals From Decision of Trustee

Proceedings by Creditor When Trustee Refuses to Act—Section 63 (1)

Section 63(1) would enable a creditor to act in his own name in proceedings when the trustee refuses or neglects to act. While this would overcome difficulties which sometimes arise when trustees require indemnity for costs, it is noted that before a creditor could carry on proceedings in his own name, the right of action would have to be transferred from the trustee to the creditor and there is insufficient protection provided other creditors for sharing in any funds recovered. For these reasons the present provisions contained in Section 69 of the Act should be retained.

Settlements and Preferences

Avoidance of Preferences—Section 68

Section 68 is a redraft of the provisions respecting settlements and preferences. There has been much litigation on the section now in the Act and there is a considerable body of settled case law. In order to retain the benefit of this settled law and avoid the contentious feature concerning "concurrent intent", it is suggested that Section 64 of the present Act be retained and a subsection added providing that it is not necessary for the trustee or creditor attacking the alleged preference to show concurrent intent.

Protected Transactions—Section 69(2)

Section 69(2) concerning protected transactions places the onus of proof on the person supporting the validity of the transaction. It seems unfair to so leave the onus of proof on transactions more than three months old as in the course of time records necessary to proof are often mislaid or lost. In the case of the older transactions the onus should lie on the person attacking the validity of a transaction. As the new section gives no advantage and seems to confuse, it is considered the section now in the Act, Section 65, should be retained.

Dividends

When Complete Realization Delayed—Section 78 (1)

The Superintendent should not, as proposed in Section 78 (3), be given power to direct preparation of an interim statement and to pay an interim dividend. This should be left to the discretion of the inspectors.

No Action for Dividend—Section 78(4)

Following the recommendation in the preceding paragraph, the reference to the Superintendent should be deleted from Section 78(4).

Statements of Receipts and Disbursements—Section 82

The proposal in Section 82 that the trustee's statement of receipts and disbursements should be passed by the Superintendent should be deleted and the

passing of these statements left to the Courts as at present which is the case with accounts of trustees, liquidators, receivers, executors, administrators and Committees of lunacy, etc.

Notice of Final Dividend—Section 83 (1) (c)

The last three lines of Section 83(1)(c) should be deleted respecting the trustee's application to the Superintendent for his release.

Shareholder Deemed to be a Creditor for Distribution—Section 87

Section 87 should be deleted. If assets remain after satisfaction of creditors' claims, such assets should not be distributed to shareholders but returned to the corporation.

Distribution of Surplus Corporation Funds—Section 88 (2)

Once creditors' claims have been met in full, the trustee has no further interest in any assets remaining and should return such assets to the corporation. Subsection 88(2) should be deleted.

REMUNERATION OF TRUSTEE

Fixed by Superintendent—Section 90(6)

Section 90(6), which provides that in certain circumstances the Superintendent should fix the remuneration of the trustee without right of appeal, should be deleted and this function be left to the Court as at present.

RELEASE OF TRUSTEES

Release of Trustee—Section 91

Section 91 provides for trustees applying to the Superintendent for discharge, there being no right of appeal except in Section 91(8). This matter should be left to the Court as at present where all interested parties may appear, where argument may be heard and there are the usual rights to appeal.

Vesting of Undisposed Property—Section 92(1)

Section 92(1) would result in undisposed of equities in real property automatically vesting in mortgagees. This should not be the case as often real estate which cannot be sold at the time of the bankruptcy later increases in value. This subsection should be struck out.

Disposal of Unrealizable Assets—Section 92(2)

Section 92(2) automatically vests in the bankrupt property unrealized at the time of the trustee's release. There should be no property revested in the bankrupt except under compositions with the approval of the Court.

Disposal of Documents of Title and Records—Section 92(3)

Documents of title should not be returned to those entitled by the trustee as provided in Section 92(3), but should be held by him subject to the Rules and direction of the Court.

Final Disposition of Property or Documents—Section 92(5)

When the trustee is unable to dispose of property or documents their disposition should not be under the direction of the Superintendent as proposed in Section 92(5) but as directed by the Court.

CREDITORS

First Meetings of Creditors—Section 93(1)

The provision added at the end of Section 93(1) authorizing the Official Receiver to authorize meetings at the office of another Official Receiver seems

by implication to prevent an Official Receiver from designating a room other than his own office as the place of meeting in his own locality. As often the Official Receiver's Office is not a suitable place for the meeting, it should be made clear he can designate another place.

Procedure at Meetings

Chairman Shall Have Casting Vote—Section 96 (3)

Section 96(3) gives Chairman of meetings a casting vote. This could prove very embarrassing to a Chairman of a meeting, who sometimes is the Official Receiver, in the appointment or removal of trustees. To avoid this, it is suggested the following words be added to the subsection:— "In the case of a tie vote on the appointment or removal of a trustee, the Chairman shall not have a casting vote and the trustee presently appointed shall continue in office".

Right of Creditors to Vote—Section 100(1)

Section 100(1) gives a creditor the right to vote if he has lodged his proof with the trustee before or at the meeting before voting. This does not give the trustee a reasonable opportunity to check claims. Proofs should be filed before the meeting.

Persons Not Entitled to Vote—Section 105 (3) (1)

Section 105(3) (1) states that among others "any person associated with the Bankrupt 'may not vote'." The term "associated" is too loose and the intention behind it should be stated in more specific terms.

Who May be Inspectors—Section 108 (2)

Shareholders should not have the right to vote for inspectors as is provided in section 108(2). The body of shareholders constitutes the debtor and it is the settled principle of the Bankruptcy Act that control should be by the creditors.

Trustee or Inspector May Call Meetings—Section 108(7)

An inspector should not be able to block the calling of a meeting with less than three days' notice as is provided for in Section (108)7. Nor should an inspector be permitted to call a meeting which is provided for in the same subsection.

Inspectors' Fees—Section 108(14)

The scale of inspectors' fees in Section 108(14) is inadequate and should be doubled. Also fees for special services should be approved by the Court and not by the Superintendent as is proposed.

Proof of Claims

Proof by Post or Delivery—Section 110(2)
Sanction of Proven Claims—Section 110(7)

Section 110(2) (7) does not require proof of claims to be sworn to. The present requirement that proof of claim be sworn should not be dropped.

Shall State Whether Secured—Section 110(5)

Section 110 (5) requiring the proof of claim to state whether or not the claim is secured or preferred should not make the claim unsecured in the absence of such a statement. The words "otherwise, etc." to the end of the subsection should be deleted, and the words "and, if so, to what extent" be substituted therefor.

Proof by Secured Creditors

No Creditor to Receive More than 100 Cents on the Dollar—Section 118

It should be made clear under Section 118 that as well as receiving 100 cents on the dollar secured creditors may recover the costs of realizing their security.

Restricted Creditors

Postponement of Wage Claims of Relatives—Section 121

Section 121 concerning postponement of the wage claims of relatives refers to relatives to the third degree. In many cases this will not be understood. The provisions now in Section 117 of the Act detail the relatives affected. They are much more easily understood and the section now in the Act should be retained.

Admission and Disallowance

Proofs of Claim Before Courts

Trustee Shall Examine Proofs—Section 125(1)

The provision in Section 125(1) requiring a trustee to notify all creditors whose claims have been admitted should be deleted. Notification of admission of claims in all cases is unnecessary and would involve a great deal of trouble and postage and other expense. Also the trustee should not be put in the position in the early stage of a bankruptcy before he has had adequate opportunity to investigate, of having to generally admit claims or dispute them and force issues.

Trustee May Require Creditor to Prove Claim Before the Court—Section 125 (2)
Creditor May Require Trustee to Admit Claim—Section 125 (3)

Section 125 (2) and (3) and following subsections enabling the trustee, without taking a position, to call on claimants to prove their claims, is approved.

Scheme of Distribution

Priority of Claims—Section 126

Section 126 clarifying and revising priority of claims is approved.

Bankrupts

Duties of Bankrupts—Section 133

The statement of the bankrupt's duties in Section 133 is approved with the exception of the provision for the Official Receiver authorizing assistance to the bankrupt in preparing statements of affairs, when the affairs of the bankrupt are complicated or involved. In practice the trustees regularly perform this work.

Examination of Bankrupts and Others

Examination of Bankrupts at Meetings—Section 137 (4)

The provision in Section 137 (4) for the evidence of the bankrupt being taken down in shorthand is impractical. A competent stenographer is by no means always available.

Questions Must Be Answered—Section 143

The provision in Section 143 that evidence taken on examinations may be given in evidence in subsequent proceedings should be limited to evidence given at the formal examination mentioned in Sections 138, 139 and 142 (but not including examinations before the Official Receiver), of the Bill. It would be unfair to give in evidence, evidence taken at an informal examination.

Discharge of Bankrupt

Bankruptcy to Operate as Application for Discharge—Section 146 (1)
Appointment to be Obtained by Trustees—Section 146 (2)

Section 146 (1) and (2) introduces what might be termed an automatic discharge principle and places on the trustee the onus of obtaining an appointment for hearing the application for discharge within six months of the bankruptcy. It is understood that a similar provision is in United States bankruptcy legislation and that there is dissatisfaction with its operation. In any event, the six months' time limit is impractical as so often the trustee will be unable to complete and submit the required report by that time. Also the estate should not bear the cost of the application. Section 146 should be eliminated and the Act left in its present state wherein the bankrupt is responsible for applying for his discharge.

Notice to Creditors—Section 146 (4)

Section 146 (4) requires the trustee to give notice of the application for discharge to every creditor of whom he has knowledge, whether or not his debt has been proven. The notice should only be required to be given creditors who have proven as it is a deep-seated principle of bankruptcy that creditors who have not proven have no status.

Procedure When Trustee Not Available—Section 146 (5)

Section 146 (5) empowers the Court to authorize some other person to act in applying for the bankrupt's discharge when the trustee is not available. It is difficult to understand how this proposal can operate satisfactorily as if the trustee is not available necessary records will not be either. Also, the clause regarding creditors reporting adverse facts would result in an accumulation of unreliable statements which would require too much work to check.

Evidence at Hearing—Section 147 (9)
Rights of Bankrupt to Oppose Statements in Report—Section 147 (11)

Section 147 (9) and (11) are impractical. The bankrupt is not given any right to dispute the Superintendent's report, and if he were it would not be feasible for the Superintendent to appear for evidence and examination whenever a bankrupt opposed his report.

Courts and Procedure

Courts Vested with Jurisdiction—Section 159 (1) (a)

Section 159 (1) (a) states that the jurisdiction of the Bankruptcy Court is "to hear and determine all matters in dispute arising out of the administration of an estate or in which any interest of the estate is involved or to which the trustee is a party, or in which the trustee is a claimant against any other person."

The wording is so wide that it would bring into the Bankruptcy Court matters other than those purely bankruptcy matters which the Bankruptcy Court was set up to handle. The subsection should be revised to limit the Bankruptcy Court to proper bankruptcy matters.

Establishment of Judicial Districts of Courts for Bankruptcy Purposes—Section 160

So far as Ontario is concerned, Section 160 would split up the Bankruptcy Court, now centralized at Toronto, into 47 Bankruptcy Courts in the Registry Officers of the Supreme Court of Ontario. This is most undesirable as it would result in dispersion of bankruptcy records and lack of uniformity of practice.

It is also undesirable that the local Registrars of the Supreme Court, all of whom are inexperienced in bankruptcy matters, should be vested with the Registrar's judicial power as local Registrars. Further, action on petitions in outside Districts would be delayed until the arrival of Judges on circuits.

The present system has important advantages which should be retained. One Judge hearing all bankruptcy matters promotes uniformity in decisions. One office of record enables a complete search to be made in one place where all records are concentrated. Where there is only one Bankruptcy Court sitting, the confusion of simultaneous petitions at different points is avoided.

It may also be observed that centralization of the Bankruptcy Court in Toronto does not prevent much bankruptcy work being done outside the City where that is more convenient for the parties. Voluntary assignments can be made to 16 Official Receivers throughout the Province and leave may be given to try issues outside of the city. Also the local Official Receivers and Trustees have sufficiently wide powers to carry on administration that frequent reference to the Bankruptcy Court in Toronto is not necessary.

Supplemental Provisions

Documentary Evidence as Proof—Section 189 (2)

Section 189 (2) states that original or certified true copies of documents relating to bankruptcy proceedings shall be conclusive evidence of their contents. It is questioned whether they should be more than prima facie evidence of their contents.

Summary Administration

Section 196 which sets up a procedure for summary administration of bankrupt states without assets is approved generally. However, no provision is made for the cost of such administration. As official receivers have not a staff to administer these estates, it is recommended that they be authorized to appoint trustees to administer them, and that trustees be paid at the public expense.

In conformity with earlier recommendations, references to obtaining approval or permission from the Superintendent should be deleted and these matters left to the Court.

Bankruptcy Offences

Fraudulent Bankrupts—Section 200 (1) (s)

Section 200 (1) (s) makes riotous living, gambling and cash speculation and offence if it materially contributed to or increased the extent of the insolvency. It is noted that the section is not based on them being the cause of the bankruptcy. Hence in the case of bankruptcies caused otherwise and later a person might be guilty of a bankruptcy offence because he had speculated on the stock exchange or gone to the horse races or done some other possibly foolish but all too human thing. The subsection should be revised accordingly.

Criminal Proceedings—Sections 206 (4) and following

Sections 206 (4) and following which place certain responsibilities on the Crown Attorney in initiating criminal proceedings respecting bankruptcy proceedings is approved.

Failure to Observe Provisions of the Act—Section 208 (d)

The reference to the Superintendent should be deleted from Section 208 (d). While a trustee may properly be considered guilty of an indictable offence if he fails to carry out a Court Order he should not be so guilty on failure to carry out an order of the Superintendent.

Conclusion

The present Act has been found satisfactory in most respects but some amendments are necessary as suggested in this memorandum.

The sections of the present Act have been construed by the Courts over a long period of years, and the law and practice have become fairly well settled. If the wording of the sections of the Act is changed unnecessarily, it would mean the discarding of all the established jurisprudence and case law, and would open the door to fresh litigation.

Many of the Sections of Bill A-5 envisage increases in the powers of the Superintendent and greater centralization in the Superintendent's department. If these sections are enacted the department will become larger and more costly. This will be reflected in levies on estates. The debtor and ordinary creditor classes are the groups principally interested in bankruptcy and so far as is known no organizations of them have asked for any such development. Until conditions are in existence leading them to do so, it is submitted there should not be any broad movement toward increasing the Superintendent's powers and centralization of bankruptcy work in his department.

Respectfully submitted,

(Sgd.) H. M. TURNER,
President.

(Sgd. F. D. TOLCHARD,
General Manager.

1946

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING COMMITTEE ON BANKING AND COMMERCE

to whom was referred the Bill A-5, intituled:
"An Act respecting Bankruptcy."

No. 5

WEDNESDAY, JULY 24, 1946

CHAIRMAN

The Honourable Elie Beauregard, K.C.

WITNESSES:

Mr. J. G. McEntyre, Legal Assistant, Department of National Revenue (Taxation.)

Mr. W. J. Reilley, K.C., Superintendent of Bankruptcy.

OTTAWA
EDMOND CLOUTIER, B.A., L.Ph., C.M.G.,
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
CONTROLLER OF STATIONERY
1946

ORDER OF REFERENCE

EXTRACT from the Minutes of Proceedings of the Senate for 13th May, 1946.

Pursuant to the Order of the Day, the Honourable Senator Robertson moved that the Bill (A-5), intituled: "An Act respecting Bankruptcy", be now read a second time.

After debate, and—

The question being put on the said motion.

It was resolved in the affirmative.

Ordered, That the said Bill be referred to the Standing Committee on Banking and Commerce.

L. C. MOYER,
Clerk of the Senate.

STANDING COMMITTEE ON BANKING AND COMMERCE

The Honourable ELIE BEAUREGARD, K.C., *Chairman*

The Honourable Senators

Aseltine	Euler	Marcotte
Aylesworth, Sir Allen	Fallis	McGuire
Ballantyne	Farris	Michener
Beaubien (*Montarville*)	Foster	Molloy
Beauregard	Gershaw	Moraud
Buchanan	Gouin	Murdock
Burchill	Haig	Nicol
Campbell	Hardy	Paterson
Copp	Hayden	Quinn
Crerar	Howard	Raymond
Daigle	Hugessen	Riley
David	Jones	Robertson
Dessureault	Kinley	Sinclair
Donnelly	Lambert	White
Duff	Leger	Wilson—(47).
DuTremblay	Macdonald (*Cardigan*)	

MINUTES OF PROCEEDINGS

WEDNESDAY, July 24, 1946.

Pursuant to adjournment and notice the Standing Committee on Banking and Commerce met this day at 10.30 a.m.

Present: The Honourable Senators Campbell, Acting Chairman; Aseltine, Copp, Dessureault, Donnelly, Euler, Gershaw, Gouin, Howard, Hugessen, Jones, Leger, Macdonald (*Cardigan*), McGuire, Quinn, Robertson, Sinclair, White.—18.

In the absence of the Chairman, the Hon. Senator Campbell was appointed Acting Chairman.

Bill A-5, an Act respecting Bankruptcy, was again considered.

The official reporters of the Senate were in attendance.

Mr. J. G. McEntyre, Legal Assistant, Department of National Revenue (Taxation), submitted a brief on behalf of the Department, and was heard by the Committee.

Mr. W. J. Reilley, K.C. Superintendent of Bankruptcy, was heard in explanation of certain clauses of the Bill.

Further consideration of the Bill was postponed.

Attest:

R. LAROSE,
Clerk of the Committee.

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MINUTES OF EVIDENCE

THE SENATE,

OTTAWA, Wednesday, July 24, 1946.

The Standing Committee on Banking and Commerce to whom was referred Bill A-5, an Act respecting Bankruptcy, met this day at 10.30 a.m.

Hon. Mr. CAMPBELL (Acting Chairman) in the Chair.

The ACTING CHAIRMAN: Gentlemen, Mr. McEntyre of the Department of National Revenue is here to make some representations with respect to the Bankruptcy Bill, and I will call upon him now.

Mr. J. G. McEntyre, Legal Assistant, Department of National Revenue (Taxation): Mr. Chairman, Honourable Senators, in the administration of the income tax we have occasion to study the Bankruptcy Act and procedure, and when this bill was introduced in the Senate we considered it and found in it two provisions which we think conflict with provisions in the Income War Tax Act. I prepared one memorandum dealing with each of the provisions which we think conflict. Copies of these memoranda were sent to the Minister of Justice, the Minister of Finance, the Secretary of the Committee and Mr. Reilley, the Superintendent of Bankruptcy. I think perhaps the simplest procedure would be for me to read the memoranda. The first one deals with section 126 of the bill, with respect to priority of claims. Our particular interest in that is the claim for tax deductions made at the source by an employer from the salaries and wages paid to his employees.

Under section 126 of the bill the claim for income taxes deducted at source would appear to rank with the last of the prior claims at paragraph (*j*) of subsection (1).

Section 92, subsection (2) of the Income War Tax Act requires employers to make deductions from the salaries and wages paid to their employees and remit these moneys to the Receiver General of Canada. In the determination of the employees' income tax liability at the end of the year, credit is given for the amounts so deducted. In this way the employer becomes the fiduciary agent of the Crown in the collection of income tax on a "pay as you earn" basis.

In order to protect the Crown against the event that the employer should fail to remit the amount of taxes deducted at source, it is provided at section 92, subsection (7A):

> Every person who deducts or withholds an amount under this section is liable to pay to His Majesty on the day fixed by or pursuant to subsection two of this section an amount equal to the amount so deducted or withheld and such liability shall constitute a first charge on the assets of such person and shall, notwithstanding the Bank Act, the Bankruptcy Act or any other statute or law, rank for payment in priority to all other claims, either of His Majesty in right of a province of Canada or any other person, of whatsoever kind heretofore or hereafter arising, save and except only the judicial costs, fees and lawful expenses of an assignee or other public officer charged with the administration or distribution of such assets.

Hon. Mr. LEGER: I do not think the draftsman meant that those taxes would be a claim of the Crown. They are property of the Crown.

67827—2½

Mr. McENTYRE: Perhaps I should clarify that a little bit. Under ordinary circumstances where the tax is deducted at the source, if the employee's pay is, say, $20, the employer simply holds back $2, which he sends to the Department.

Hon. Mr. LEGER: That is property of the Crown.

Mr. McENTYRE: Yes. But what happens if the employer gets into financial difficulties? He figures that at the end of the week he will owe that employee $20, but that $2 of it belongs to the Crown; so he borrows from the bank or collects from his creditors and provides only the $18, which he gives to the employee, and he says to the employee, "Two dollars of that belongs to the income tax." If the employer goes into bankruptcy soon after that, the amount that belongs to the Crown, the $2, never existed.

Hon. Mr. LEGER: In other words, you mean that money was found among his assets. That is the only place you could find it.

Mr. McENTYRE: The two dollars as a sum of money or as a trust fund is never there.

Hon. Mr. LEGER: I do not know whether a "claim" is defined, but surely that two dollars you speak of would not be a claim of the Crown; it would be its property.

Mr. McENTYRE: Yes, sir; provided we could find it.

Hon. Mr. EULER: Could you not recover that from the employee?

Mr. McENTYRE: The position is, we have obliged the employee to take a reduced amount of his salary in full payment.

Hon. Mr. EULER: You are really the debtor, instead of the employee being the debtor.

Mr. McENTYRE: We have appointed the employer as our agent to collect this money.

Hon. Mr. EULER: If he fails to discharge his duty as agent, have you any claim left against the employee?

Mr. McENTYRE: We have submitted that to the Department of Justice. They say our Act is not clear on that point, and they suggest we should hesitate to pursue the employee for the recovery of that amount.

Hon. Mr. EULER: You have never done that?

Mr. McENTYRE: No sir, we have never done that.

Hon. Mr. LEGER: If you think that should be classified as a claim of the Crown, surely that subsection should be amended.

Hon. Mr. COPP: Does the employer report every week?

Mr. McENTYRE: Yes, sir.

Hon. Mr. COPP: And remit anything held back?

Mr. McENTYRE: Yes, sir.

Hon. Mr. COPP: So you would have only one week held back at any time.

Mr. McENTYRE: In the administration of the Income War Tax Act we find it impossible to keep tab on every employer every week. Occasionally when bankruptcy occurs we find there may be three or four weeks of arrears of tax deduction at source that have not been remitted.

The ACTING CHAIRMAN: You are speaking of tax deduction at source only?

Mr. McENTYRE: Yes.

The ACTING CHAIRMAN: Your submission is that the employer is the agent of the Crown, and therefore those funds are in the nature of trust funds in his hands; or, as Senator Leger comments, they are really the property of the Crown in the hands of your agent.

Mr. McENTYRE: That is correct.

The ACTING CHAIRMAN: You feel you may have a claim against them for those funds, and under this section of the Act you would specifically rank pari passu with other Crown claims.

Mr. MCENTYRE: Yes.

Hon. Mr. LEGER: My point was, whether it would be a claim or whether the Crown would simply walk in and take its property.

The ACTING CHAIRMAN: I think very likely it could if the employer is the agent of the Crown. It might be made clear if you have a suggested amendment.

Mr. MCENTYRE: The rest of my memorandum is rather short.

Hon. Mr. LEGER: I am sorry I interrupted, but I just wanted an explanation.

Mr. MCENTYRE: The priority for payment quoted therefore gives the Crown a right of preference greater than that contemplated in section 126 of the bill. It is recommended that the bill should provide for the payment of taxes deducted at source in a manner consistent with the Income War Tax Act.

Under section 121 of the present Bankruptcy Act the claim for taxes deducted at source would rank second after the costs and expenses of the custodian and the fees and expenses of the trustee. To be consistent with the provisions of the section of the Income War Tax Act quoted above, it is submitted that the bill should provide for the payment of this claim immediately after item (*c*) in section 125, subsection (1).

Paragraph (*c*) is the levy payable under section 132. I understand that is one-half of one per cent which the Superintendent in Bankruptcy receives.

Hon. Mr. LEGER: You just want to advance the priority, that is all?

Mr. MCENTYRE: Yes, sir.

In this way it would rank ahead of claims for arrears of wages. This is reasonable because employees are in a favourable position to insist on the payment of their salaries and wages as they become due, and, in the case of a corporation, they can assert their claim against the directors personally according to the various provisions in the different Companies' Acts. Furthermore, the tax deduction claim is in effect a claim for arrears of wages because it is a claim for that part of the employee's wage which is to be placed to his credit against his eventual liability for Income Tax. Ranking the tax deduction claim ahead of the employee's claim would be in accord with the common-law principle that the Crown is to be preferred to other claimants of equal rank.

It is therefore recommended that the following item (*d*) be inserted after item (*c*) of section 126, subsection (1) of the bill and that the subsequent items (*d*), (*e*), (*f*), (*g*), (*h*), (*i*) and (*j*) become items (*e*), (*f*), (*g*), (*h*), (*i*), (*j*) and (*k*) respectively:—

> (*d*) The claim of the Crown in the right of the Dominion of Canada for the amount of the deductions made from salaries and wages pursuant to the Income War Tax Act.

This is an incomplete memorandum prepared to introduce the subject and there are other important reasons which can be given in support of the submission made.

The ACTING CHAIRMAN: Do you not think (*j*) should be amended also? "All claims of the Crown in the right of Canada or of any province thereof pari passu notwithstanding any statutory preference to the contrary . . . " other than claims provided for under subsection (*d*).

Mr. MCENTYRE: Perhaps that is so, but I wonder whether it is necessary. The draftsman does not seem to have thought so, because under (*h*) there would be claims of the Crown.

The ACTING CHAIRMAN: That will be considered, anyway.

Mr. McENTYRE: I may just add that Section 92, subsection 7 (A) of the Income War Tax Act was only enacted at the last session of parliament, and came into force in December, 1945.

The other point which I have to make relates to the Bill at Section 43, subsection 13.

Mr. REILLEY: Mr. Chairman, as Mr. McEntyre is dealing with his representation in two memoranda, one relating to income tax and the other to other features of the bill, may I be permitted to make my reply to his representations on this point, at this time?

The ACTING CHAIRMAN: Yes.

Mr. REILLEY: I hesitate to interrupt the witness in this way, but for the benefit of the Committee I think it better that all should be heard on this point when it is right before you.

In the first place, this question of priorities is one of the thorniest that a trustee in bankruptcy has to deal with. I would refer you to page 84 of the bill where you will see listed the various priorities that have been established by the Crown. It has reached such a stage that it is absolutely impossible for any trustee to draft a dividend sheet and say what are the priorities of the Crown. In this memorandum you will see there are some twenty-one priorities established by the Crown in the right of the provinces and of the Dominion. The object of section 126 is to provide a scheme of distribution that a trustee can follow without having to go to twenty-five other Acts scattered all through the statutes of the dominion and the provinces.

Hon. Mr. McGUIRE: Are all these claims prior to those of the trustee?

Mr. REILLEY: Some are. It is hard to say where a great many do belong. After the Bankruptcy Act was passed the Crown in the right of the provinces and of the dominion found its claims were not being paid with the priority that it thought they should get, and in the past twenty-odd years it has become the ordinary practise of the Crown in the right of the dominion and of the provinces every time it might have a debt owing to pass legislation that the claim of the Crown shall have priority over everything else. As a result you see these twenty-odd types of claims, some of one class, some of another, and it has become impossible for any trustee to set up a dividend sheet on a proper basis.

Hon. Mr. LEGER: Are you sure you have them all there in the twenty-one priorities?

Mr. REILLEY: I will take my chance on that.

You spoke, Senator, of the deduction at source payments. The statute says that every person who deducts tax at source is liable to pay it to His Majesty. So immediately that deduction is made it sets up a debt, it is not a trust fund at all. It is merely a debt that is owed to His Majesty.

Hon. Mr. McGUIRE: The employer owes a debt.

Hon. Mr. COPP: It is not a trust fund.

Mr. REILLEY: It is not a trust fund at all. As a matter of fact, the year before last the income tax department had inserted a clause which set it up as a trust fund, and said that it must be paid into the bank and kept separate; it would then belong to the Crown. But they found out that when bankruptcy occurred there was no trust fund in the bank, and consequently there were no funds belonging to it. In an attempt to get a priority that section setting up a trust fund was deleted, and it was made a debt due by the employer to the Crown.

Hon. Mr. LEGER: If the word "pay" was changed to "remit", would that not make it a trust fund?

Mr. REILLEY: I do not know whether it would or not.

Hon. Mr. LEGER: I am just asking the question. I am not sure myself.

Mr. REILLEY: The point is, Senator, if there is a trust fund and there is no money in that fund then it is only a debt.

Hon. Mr. LEGER: It would be a trust fund which has been mingled with the assets.

Mr. REILLEY: Unless it can be traced in its identical fund it becomes only an ordinary debt. The principle is that it must be traceable.

Hon. Mr. LEGER: If it has been deducted it would be traceable.

Mr. REILLEY: Not necessarily. The basis of all trust funds in a situation of this kind is that it must be traceable. Under the other legislation there was no trust fund they could find or trace, and consequently they deleted it and put in this section making it a debt to the Crown.

Mr. MCENTYRE: Will you excuse me Mr. Reilley? I think you will find the tax provisions are still there. The part that was deleted was simply a priority division which was previously there and found not to hold in the courts. We put in a stronger provision, which is subsection (7A). Subsection 6 reads:—

> Any person who, pursuant to subsections one or two of this section, deducts or withholds any amount from any payment which he is liable to make to any person shall be deemed to hold the amount so deducted or withheld in trust for His Majesty.

Subsection (7) reads:—

> All amounts deducted or withheld by any person under subsections one and two of this section shall be kept separate and apart from the moneys of the person so deducting and in the event of any liquidation, assignment or bankruptcy of the person who made such deductions the said amounts so deducted shall remain apart and form no part of the estate of such person in liquidation, assignment or bankruptcy.

Then subsection (7A) reads:—

> Every person who deducts or withholds an amount under this section is liable to pay to His Majesty on the day fixed by or pursuant to subsection two of this section an amount equal to the amount so deducted or withheld and such liability shall constitute a first charge on the assets of such person and shall, notwithstanding the Bank Act, the Bankruptcy Act or any other statute or law, rank for payment in priority to all other claims, either of His Majesty in right of a province of Canada or any other person, of whatsoever kind heretofore or hereafter arising, save and except only the judicial costs, fees and lawful expenses of an assignee or other public officer charged with the administration or distribution of such assets.

Hon. Mr. LEGER: Would you not be in a stronger position, if that last subsection were not enacted?

Mr. MCENTYRE: We found that we met two sets of circumstances. We first said the employer would provide the full amount of his payroll, and he would allocate the part for payment to employees and the part to be sent to the Department of National Revenue; that part for the Department of National Revenue would be segregated into a trust fund. In those circumstances we found that the trust fund does not form part of the bankrupt estate; it belongs to the Crown, and should not come under the control of the trustee but should be paid over directly. That was one step. The other thing that happened was when an employer became in financial difficulties instead of providing his full payroll he would calculate his net payroll after tax deduction, and he would provide only that which he had distributed to his employees, but as for the part that went to the Department of National Revenue, it did not exist.

Hon. Mr. LEGER: He would be financing with money belonging to the Crown, to a certain extent.

Mr. MCENTYRE: I would say that would be the result.

Hon. Mr. LEGER: And the money would still belong to the Crown whether he financed with it or not.

Mr. MCENTYRE: Very often he would never provide it at all; frequently to get his payroll he would have to go to the bank and borrow. Instead of borrowing the full amount of his payroll he would borrow only the net amount, so that the money due the National Revenue Department would never exist.

Hon. Mr. MCGUIRE: In subsection (7A) you accept the costs of the assignee. Why do you not also accept the costs and expenses of the trustee in bankruptcy?

Mr. MCENTYRE: I would interpret that section to include the costs of the trustee in bankruptcy. It reads in part:—

> —except only the judicial costs, fees and lawful expenses of an assignee or other public officer charged with the administration or distribution of such assets.

I think that would be wide enough to include the trustee in bankruptcy.

Hon. Mr. MCGUIRE: The trustee in bankruptcy would be a public officer.

Mr. MCENTYRE: That is correct, sir. I am sorry to have interrupted you, Mr. Reilley.

Mr. REILLEY: Now is the time to do it.

Hon. Mr. MCGUIRE: Mr. Reilley, what happens in a case where the trustee in looking over the assets for priority finds perhaps that there is half enough to pay the priorities and nothing to pay him? What is his attitude then?

Mr. REILLEY: Well, to say the least, it is a very unhappy situation.

Hon. Mr. MCGUIRE: Does he proceed to sell what he can under the priorities and get nothing himself?

Mr. REILLEY: He gets nothing himself.

Hon. Mr. MCGUIRE: Or does he quit?

Mr. REILLEY: There has been the trouble I have in the bankruptcy administration. When these cases arise the trustee says, "There is nothing in it for me so I am going to resign." What are we going to do then? This is only one; we have twenty-one others. This is only Ontario; I do not know how many others there are in the other provinces.

Hon. Mr. LEGER: That is why I asked the question; I felt that you had not covered them all.

Mr. REILLEY: I listed only those from Ontario. My idea was that there is no large amount involved in the question of deductions from employees when bankruptcy occurs. In any case there is no particular reason why it should be given preference over all these other matters: corporation tax, hydro electric, stock transfers and other income tax. Instead, it is simple to set up a basis on which distribution can be made by a trustee. In my opinion the only way it can be done is to set out the distribution scheme and let all comply with it. If there is some certain reason why the wage deductions should receive a priority over others, I do not know what it should be. There is nothing particularly different from the other income tax which takes its prerogative right. It must be remembered that debts owing to the Crown always have a prerogative right which takes precedence over unsecured creditors. The other claims which are given precedence are: costs of administration, municipal taxes, rents, workmen's compensation—surely workmen's compensation is entitled to an equal priority with deductions for income tax. Then there are claims of the Crown generally. If it is suggested that they should be given any priority, I

would very respectfully submit that they should not be given a greater priority than the wage earners who earned this income. If it is to be given a priority I would say that it must go in there and be coupled with the wage earners, because it is rather unreasonable to think that those who earned these wages do not get an equal priority with the funds that they never saw or received.

Hon. Mr. FOSTER: In other words, you contend that these are of equal importance with the Crown's claim for income tax?

Mr. REILLEY: Yes; there is no particular difference.

Hon. Mr. LEGER: The Crown can afford to lose it but the wage earners cannot?

Mr. REILLEY: That is quite right. I am in sympathy with that proposition.

The ACTING CHAIRMAN: Does there not appear to be a conflict between the Income War Tax provisions and this statute? It is purported to give them a priority irrespective of the provisions of the Income War Tax Act.

Hon. Mr. LEGER: There would be a conflict if legislation was enacted the way it is now drafted.

Mr. REILLEY: That is so. That is the difficulty we have had to contend with during the last number of years as between the bankruptcy administration and the war revenue department.

Hon. Mr. MCGUIRE: Do you think, Mr. Reilley, that you have drawn up a plan for dealing with all priorities?

Mr. REILLEY: I have a plan for dealing with all priorities, which takes in the provinces and everybody; and I think it puts them in as general a category as can be found.

Hon. Mr. MCGUIRE: They are all claiming in the right of the Crown?

Mr. REILLEY: They are all claiming in the right of the Crown. Everyone listed following page 84 are in the right of the Crown. In this new draft bill I am trying to set up a workable scheme so that the trustee can turn to his Bankruptcy Act and say, "Here is how I have to prepare my dividend sheet." A great many of my trustees are laymen, farmers and bankers located in different places. They cannot be expected to know all the intricacies involved in these different priorities. In a great many cases they communicate with me and ask what they should do. It is not really my business to instruct them, but I try to assist them. I confess, gentlemen, that at the present time I cannot instruct any trustee as to what the proper system of priority is in the dividend sheet under the Dominion and Provincial legislation as it now exists.

Hon. Mr. MCGUIRE: You could do so under this proposed bill?

Mr. REILLEY: I could do so under this bill. This is a system of priorities that I think is fair. That is what is done under the Australian act. I have that act with me and I can read it to you to show how the distribution sheet is set up. The same applies to the United States. The federal and state claims are given the same precedence as they are here.

I have other comments that I could make on this, if necessary, in regard to the difficulties that are presented. For instance, in a case where a man borrowed money to pay his employees the net amount of their wages, the court held that he was presumed to have borrowed from the bank enough more to pay the Crown. That is a new proposition to me, as a lawyer. The result is that if collection is insisted on and if those funds are paid to the department, it is quite possible and almost certain that in the final analysis those deductions will have to go back to the employee. They are only deducted; they are not assessed and claimable by the Crown. And, as you know, these things sometimes stand over for years. Is a trustee going to keep an estate open for years in the expectation that certain of these funds will be turned back to the trustee? If his priority is given, those funds might be payable to some other person

instead of the wage earner. Such a confused situation is created in the administration of an estate and drawing up of a dividend sheet that it is practically impossible for the trustee to get on with it.

Hon. Mr. COPP: Suppose a bankrupt owes $1,000 that he has retained from his employee's wages. I understand Mr. McEntyre's suggestion to be that that amount should be made a preferred claim against the bankrupt. Is that your suggestion, Mr. McEntyre?

Mr. MCENTYRE: I have no particular brief as to whether that should be a preferred claim. I am simply here to point out that if the bankruptcy bill were enacted in its present form there would be a conflict between the two laws, and that conflict would make it very difficult for the income tax administration to know exactly where it stood.

Hon. Mr. MCGUIRE: Would there not be a conflict with respect to many of these other things which are also made a first claim by statute?

Mr. MCENTYRE: I imagine there would be in some cases. The point here is that this particular provision of the Income War Tax Act was enacted by the Dominion Parliament as recently as last September, and it would seem rather extraordinary to have another enactment so soon afterwards which conflicted with it. I certainly appreciate what Mr. Reilley said as to the difficulty in preparing a dividend sheet, in the face of the large number of conflicting priorities in dominion and provincial statutes. I am certainly in favour of Mr. Reilley's suggestion that the matter be cleared up in the Bankruptcy Act, which would be a central place.

Hon. Mr. LEGER: Mr. Reilley may have drafted his bill prior to your enactment.

Hon. Mr. MCGUIRE: Your amendment is to make your claim a preferred claim on the funds in the hands of the trustee. In addition, under your act you have a claim against the employer, making him a debtor to your department. So if you did not get the money out of the funds you would still have a claim against the employer. You also say he is your agent. Therefore he would owe you the money personally and you could pursue him apart from any funds that might be in the hands of the trustee.

Mr. MCENTYRE: I think that is correct, sir. We have taken two positions: we have said, first of all, "If you have the money you are the trustee and the funds belong to us," and then, "if you have not the money, we have a claim against you for the money."

Hon. Mr. MCGUIRE: He owes it to you as a debtor, and he owes it to you as your agent, and you are claiming it through the trustee in bankruptcy. You have about three claims against him for the money, so you should get it in some way.

Mr. MCENTYRE: The purpose of our department is to get the money.

Hon. Mr. MCGUIRE: I do not think the trustee in bankruptcy should be in the position of not knowing to whom he has to pay the money. I do not see how any trustee, after looking at all these statutes of the provinces and the dominion, could finish with any estate, or how he could know whether he himself was going to be a defaulter. I think we should provide him with a system whereby he can come to some conclusion in the matter, and it seems to me that is what this bill provides.

The ACTING CHAIRMAN: Are there any other questions on this particular point? If not, will you proceed with the other point, Mr. McEntyre?

Hon. Mr. LEGER: Mr. Chairman, we will deal with the suggestion Mr. McEntyre has made when we come to consider the bill later.

Mr. McENTYRE: The second point I would like to make refers to section 43, subsection (13), which restricts the duties of the trustee. The Income War Tax Act imposes upon the trustee the obligation to file income tax returns. Section 37 of the Income War Tax Act provides as follows:

> Every trustee in bankruptcy, assignee, liquidator, curator, receiver, administrator, heir, executor and such other like person or legal representative administering, managing, winding-up, controlling, or otherwise dealing with the property, business or estate of any person who has not made a return for any taxable period or for any portion of a taxable period for which such person was required to make a return in accordance with the provisions of this Act shall make such return.

The Taxation Division has experienced some difficulty in obliging the trustees to prepare and file statements of profit and loss, returns showing salaries and wages paid and the tax deductions therefrom and other information returns in the case of debtors in bankruptcy. The trustees explain that to provide this information and to make up the necessary returns entails considerable time and expense which they are not permitted to charge against the assets of the estate. The argument is that the obligation to file these returns is personal to the debtor and that the creditors should not be obliged to suffer the expenses of having this work done. On the other hand, the books of account are all in the hands of the trustee and even if they are available to the debtor he may not have the necessary capacity to compile the information. Naturally the debtor who is in bankruptcy has not the means to employ qualified persons to make up the returns for him. In virtue of the semi-official capacity of the trustee in bankruptcy, the Taxation Division have refrained from taking legal action against trustees who have refused to comply with section 37 quoted above.

It would seem to be an opportune time when the Bankruptcy Act is being re-drafted to make some provision, either by a provision in the Bankruptcy Act or by an administrative ruling of the Superintendent of Bankruptcy, to assist the Taxation Division in obtaining compliance with section 37 of the Income War Tax Act by permitting the trustee to charge a reasonable fee for his time in completing the income tax returns which are required of the bankrupt debtor.

In this connection reference should be made to section 43, subsection (13) of the bill, which reads as follows:

> The trustee shall be required to perform only the duties specifically imposed on him under this Act or the Rules or a court order made thereunder notwithstanding any Act or Statute to the contrary.

The explanatory note with respect to this section is:

> In many cases attempts have been made to impose duties on a trustee in no way related to the administration of the estate, such as filing returns of one type or other which the bankrupt failed to do. It is a perversion of justice to try to make a trustee responsible for the misdeeds of others.

In view of the fact that section 37 of the Income War Tax Act is particularly directed to trustees in bankruptcy, it would appear to be extraordinary for the same legislative body to purposely contradict itself in two Statutes. In order to make the Bankruptcy Act consistent with the Income War Tax Act, it is suggested that section 43, subsection (13) be made to read as follows:

> The trustee shall be required to perform only the duties specifically imposed on him under this Act or the Rules or a court order made thereunder or the Income War Tax Act notwithstanding any Act or Statute to the contrary.

Hon. Mr. McGUIRE: You refer to the Income War Tax Act as a whole. That would make the trustee a trustee under that act as well as under the Bankruptcy Act.

Mr. McENTYRE: The thought there was that the debtor is under certain obligations—to file returns and to furnish information—in addition to the obligation to pay his tax when assessed. Those are the same obligations that all taxpayers are under. As the trustee takes over the property of the debtor he represents the debtor, and therefore it seems correct that part of his duties should be to fulfil the obligations of the debtor, both as to completing the returns and filing them, and as to paying the tax in accordance with whatever the proceeds of the estate realize.

The ACTING CHAIRMAN: Suppose the debtor is four years in arrears, would the trustee be under obligation to make returns for the four years?

Mr. McENTYRE: Yes.

The ACTING CHAIRMAN: It might be impossible to do so.

Mr. McENTYRE: Well, the trustee is naturally a responsible person who is licensed and so on, and we would expect him to do the best he could.

Hon. Mr. GERSHAW: Would this not hold up the work of the trustee almost indefinitely? In some cases the income tax is not assessed for four or five years.

Mr. McENTYRE: I imagine it would cause delay.

Hon. Mr. McGUIRE: According to your proposed wording a trustee under the Bankruptcy Act would also be a trustee under the Income War Tax Act. Could you cover your point by naming a couple of sections of the Income War Tax Act specifically instead of referring to the whole Act? If a trustee has to read through the whole Act he will have difficulty in knowing just what his duties are. The whole thing would be simplified very much if he could refer to a couple of specific sections.

Mr. McENTYRE: Yes

The ACTING CHAIRMAN: Is not section 37 the only section of the Income War Tax Act imposing a duty upon a trustee?

Mr. McENTYRE: No, sir; there are other sections.

Mr. REILLEY: Sections 50 and 51.

Mr. McENTYRE: Section 50 says:—

> Every person who is required by section thirty-seven of this Act to make a return of income shall pay any tax and interest and penalties assessed and levied with respect to such income before making any distribution of the property, business or estate which he is administering, managing, winding-up or otherwise controlling or dealing with.
>
> Section 51:—(1) Every trustee in bankruptcy, assignee, administrator, executor and other like person, before distributing any assets under his control shall obtain a certificate from the Minister certifying that no unpaid assessment of income tax, interest and penalties properly chargeable against the person, property, business or estate, as the case may be, remains outstanding.
>
> (2) Distribution without such certificate shall render the trustee in bankruptcy, assignee, administrator, executor and other like person personally liable for the tax, interest and penalties.

Hon. Mr. HUGESSEN: May I ask Mr. Reilley a question on this subsection (13), Mr. Chairman?

The ACTING CHAIRMAN: Certainly.

Hon. Mr. HUGESSEN: Suppose a trustee is administering the estate—in some cases bankruptcy lasts for years—and continuing the operation of the business, whatever it may be, does this subsection mean that during that period the trustee shall not be required to make returns to the dominion and provincial authorities?

Mr. REILLEY: If the subsection could be interpreted that way.

Hon. Mr. HUGESSEN: That is what I am asking.

Mr. REILLEY: The trustee must naturally bring himself within any laws which apply to the carrying on of the business.

Hon. Mr. HUGESSEN: It may be that in other parts of the bill you do define the duties of the trustee.

Mr. REILLEY: I do not.

Hon. Mr. HUGESSEN: Then I think you have to reconsider that subsection.

Mr. REILLEY: I would be quite agreeable to do so.

It might be well to say a few words in regard to this section. I want to assure the committee as an official of one department of the government I would not want to do anything that would affect another department from carrying out its duties; for instance, the Revenue Department from collecting every cent coming to it in income tax. But you can see the arbitrary nature of this section. It may be that the section is ultra vires. A trustee in bankruptcy is not the legal personal representative of any person. He is an entity created by statute in whom is vested certain assets which at one time belonged to some other person. In other words, he is not the legal personal representative of the debtor in any other respects except as the owner of the vested rights or assets that formerly belonged to the debtor. He is in exactly the same position as a corporation which takes over the assets of a company or individual and issues stock; the corporation is not in any way responsible for anything that the former owner may have done personally.

Hon. Mr. LEGER: Except he would be liable if made so liable by statute.

Mr. REILLEY: Yes.

Hon. Mr. LEGER: The Income War Tax Act makes him liable if it is intra vires.

Mr. REILLEY: I am going to carry the argument a little further. He is in exactly the same position as if a third person came along and bought those assets and paid for them. Those assets are vested in him by operation of law. Is it reasonable to say that parliament could make that third person responsible for supplying income tax returns of the man whose assets he bought? Legally, that is the trustee's position under the well-established principles of bankruptcy law, that he does not represent the debtor but is a legal entity created by operation of law. Consequently if that section is not ultra vires, it is at least open to a good argument that it is.

The ACTING CHAIRMAN: There is just one question on that point Mr. Reilley. I think there is a section in the Income War Tax Act which enables the department to assess for income tax irrespective of whether there is a return made or not. Supposing the department felt there was a liability for tax, but returns had not been made for it, and the department made the assessment, would not the trustee then have to make a return in order to ascertain whether or not there was a debt?

Mr. REILLEY: He could disallow that claim.

The ACTING CHAIRMAN: He could arbitrarily disallow it?

Mr. REILLEY: He could disallow it and it would have to be set up by the court.

That, gentlemen, leads me to another section of the bill dealing with the rights of the Crown, section 193 on page 115:

> Save as provided in this Act, the provisions of this Act relating to the remedies against the property of a bankrupt, the priorities of debts, the effect of a composition and the effect of a discharge, shall bind the Crown.

That section has been in the Bankruptcy Act ever since it was enacted on the 1st of July, 1920, and the courts have held that that puts the Crown in exactly the same position as any other creditor: it must prove its debt. If the trustee disallows the debt the Crown can appeal, and if it does not appeal within the proper time it has lost its rights and the trustee can make out his distribution sheet, disregarding the Crown. As you can see, this and these other sections have created an almost impossible situation. The section providing for a trustee getting a certificate is directly in conflict with this section, which says that the Crown must prove its debt just the same as any other creditor.

Hon. Mr. GOUIN: What section are you speaking of?

Mr. REILLEY: It was referred to by Mr. McEntyre—section 50 of the Income War Tax Act. Consequently the trustee here is again in a quandary as to what he should do. All he has to say to the Crown is: Prove your debt. Suppose he disregards this filing of income tax returns, and the Crown does not prove its debt, what can we do to him? I have had to advise trustees—against my will—when the issue is involved: Go ahead and make your distribution sheet, and if the department does not file its claim the courts will protect you and you will be under no liability to the department of Income Tax. Here you have these conflicting situations, which at times are hardly reasonable, and the trustee is placed in a position which is not consistent with good straightforward administration. Besides, when a trustee takes over the records of a debtor in order to ascertain what the assets and liabilities are so he can carry on the administration of the estate, he is a stranger to the debtor and is not in a position to know what the debtor knows to enable him to file an income tax return. A good deal of the information necessary to file income tax returns, particularly when you get into an involved bankrupt estate, depends on the knowledge of the debtor, and the trustee being without that information simply cannot file any returns.

Hon. Mr. HUGESSEN: Surely he should file income tax returns where he carries on the business for some years?

Mr. REILLEY: Yes. If he carries on the business as a trustee naturally he must be subject to the same requirements as other people, and he would have to file his income tax returns; and if there is any tax payable he would have to pay it.

Hon. Mr. FOSTER: You mean up to the time the trustee takes charge?

Mr. REILLEY: Yes.

Hon. Mr. GOUIN: But, Mr. Reilley, if up to the time the trustee takes charge there is what we call in law a privilege, it affects the estate of the bankrupt, and any third party applying must be satisfied that the privilege of the Crown, for instance, for income tax is duly taken care of. That is why we are always careful to obtain a clearance from the income tax department.

Mr. REILLEY: No, Senator, there is no privilege.

Hon. Mr. GOUIN: But in the province of Quebec, as I look at the matter from the point of view of the civil code, the privilege of the Crown ranks first; for instance, its priority for certain taxes. Therefore I do not understand you when you say bluntly, "There is no privilege."

Mr. REILLEY: I was referring to income tax, Senator.

Hon. Mr. GOUIN: I am referring to privileges. I say we have always taken the position that it was up to a party to verify the privileges. Some of them, such as mechanics liens and so on, can be verified at the registry office, and others may be what I call privileges concerning the Crown, whatever those privileges may be.

Hon. Mr. LEGER: You have not covered mechanics liens?

Mr. REILLEY: This does not interfere with secured creditors. Whatever rights the secured creditors have by privilege or otherwise they are still protected in the act.

Hon. Mr. GOUIN: But are they protected under section 126? As I read that section it gives the order of rank as the paragraphs are lettered. For instance, paragraph (*a*) covers the funeral expenses. If there is nothing else the undertaker at least would be paid.

Hon. Mr. HUGESSEN: I think the answer to section 126 is that it does not dispose of the rights of a privileged creditor to realize his securities. It deals only with the assets which the trustee has realized.

Mr. REILLEY: That is right. This does not presume to interfere with secured creditors and their rights or otherwise set up in the act.

The ACTING CHAIRMAN: Mr. Reilley, the words "contractual secured creditors" are used there. Might that not cut out the creditors secured by statute? Section 126 says "subject to the rights of contractual secured creditors—"

Hon. Mr. LEGER: I think the word "contractual" would have to be struck out.

Hon. Mr. HUGESSEN: Yes.

Mr. REILLEY: When I speak of secured creditors I am thinking of mechanic liens which have been duly registered and that sort of thing. That was put in so that all Crown claims would be in this category.

Hon. Mr. HUGESSEN: Does that word "contractual" affect it Mr. Reilley? I would not think a man secured by a builder's lien would have a contractual security.

Hon. Mr. LEGER: No, that is by virtue of the statute.

Mr. REILLEY: Well, gentlemen, it is hard to think of all these things when drafting a bill.

Hon. Mr. McGUIRE: To what subsection are you referring?

Mr. REILLEY: We are referring to 126 (1). If there is anything that needs correction I should be the first to want it revealed. I had in mind contractual creditors as compared with statutory creditors, particularly the rights of the Crown which I wanted to have set up to get over this situation shown in my memorandum.

Hon. Mr. LEGER: I think Mr. McEntyre's point is that it is not so much a question of the amount of money that the Crown is to lose, but it is simply that the new statute would be conflicting.

Mr. McENTYRE: That is correct.

Mr. REILLEY: As I have said before, I am quite in agreement with Mr. McEntyre that the Crown should get all the money that is coming to it.

Hon. Mr. LEGER: But that is not his point. He is not objecting because the Crown stands to lose money but because the two statutes are in direct conflict. I think that is the point he is making.

Mr. McENTYRE: That is correct.

Hon. Mr. McGUIRE: When Mr. McEntyre was speaking he referred to section 43, subsection 13, and suggested an amendment to make the trustee carry out the sections of the Income War Tax Act. Section 43, subsection 13, reads:

> The trustee shall be required to perform only the duties specifically imposed on him under this Act or the Rules or a court order made thereunder notwithstanding any Act or Statute to the contrary.

If the trustee did not allow a claim the party in question could go to the court and get an order; in other words, the trustee is not excused in any way. Anyone who has any grievance can go to the court and get an order requiring him to acknowledge the claim. This section does not cut anybody out. I think Mr. McEntyre's suggestion was whether this section should be amended to require the trustee specifically to undertake the duties under the Income War Tax Act.

Mr. McENTYRE: That is correct, sir.

Hon. Mr. McGUIRE: Our problem is whether there should be an amendment to subsection 13 of section 43 which will make the trustee carry on under the Income War Tax Act as well as under the Bankruptcy Act.

Mr. McENTYRE: That is correct, sir.

Hon. Mr. McGUIRE: That is the problem before us at the moment.

Mr. REILLEY: But, gentlemen, what the department is interested in is getting its money. That is the purpose of its own legislation. I suggest that we can arrive at that conclusion in an entirely agreeable and amicable way without conflicting legislation and I am willing to submit a means by which it can be done. I have been trying for thirteen years to obtain co-operation along this line, but I have met with no success: Instead of imposing upon the trustee this duty, which I think is *ultra vires*, and which at least is unreasonable, it can be done simply in this way: the department must file its claims under section 93 of the act. I think there should be some co-operation to enable the Crown to achieve its purpose. Originally the trustee was required to make an examination of the books; it need not be an audit, but a casual examination of the books of the debtor to see what the situation was. And if the trustee, who is a reliable person—he must be, because trustees are answerable to me if they do not do their duty—if he finds anything in the books to indicate that income tax was not paid as it should have been, I would consider that he should advise the department, and they themselves could come and set up their own claim by going through the books. There is nothing to prevent their doing so.

Hon. Mr. McGUIRE: Under the bill the government is the same as an ordinary creditor putting in his claim before the trustee; but if we put in the amendments suggested by Mr. McEntyre then the trustee would have a duty under the act to the department, and he would have to go to the department to find out what it is.

Mr. REILLEY: Yes.

Hon. Mr. McGUIRE: It is a transfer of the duty.

Mr. REILLEY: It is a transfer of the obligation. Then, as I say, the conflict again is that the department must file their claim under the act, and section 93 so says. If they do not do so the trustee can disregard it. Here he is on the horns of a dilemma.

Hon. Mr. McGUIRE: All creditors who do not make their claims to the trustee in time are barred by section 93.

The ACTING CHAIRMAN: Are there any more questions of Mr. Reilley? Is there anything further you would like to say, Mr. McEntyre?

Mr. McENTYRE: I should like to say a word about the returns. I think in practice we do actually file proof of debt in bankruptcy. In order to do that we have to be able to assess the tax; we must know the profits. The ordinary

procedure required by the Bankruptcy Act is that the taxpayer will furnish the information on his return on which the assessment is to be based. The obligation we are imposing on the trustee in bankruptcy to furnish that return is just the same obligation that is imposed on all taxpayers, and as he takes over from the debtor it seems reasonable that he should be the man to furnish that return. He has the books and the material before him, and can easily prepare the necessary returns or advise us that there was no profit and no tax should be assessed.

Hon. Mr. McGUIRE: But you change his character altogether. The trustee is dealing only with the assets in his hands that come to him under the operation of the act; you are making him the same as the man who became bankrupt; you are giving him another character, that of debtor to the government, and requiring him to carry on as such. You have the right to pursue the debtor as an individual as long as you wish. The trustee is dealing only with the property that he received from the debtor; he should not be himself made a debtor. The next thing, you would be asking him the year after he got a court order releasing him, to make a report to your department. He is not the same as an ordinary debtor; he is just a man who has received certain assets to dispose of.

Mr. McENTYRE: But he has received the books and he takes over the assets subject to secured claims.

Hon. Mr. McGUIRE: He has received the books for a time, only until he has disposed of these assets and got an order saying he is through.

Mr. McENTYRE: As I understand it, from conversations with trustees in bankruptcy, in the old days they prepared these returns. It was only in fairly recent years that they were instructed that the expense of preparing the returns was not a proper charge on the creditors of the estate, and that they should not prepare these returns and charge a fee for doing so. If the debtor on the day before his bankruptcy had engaged an accountant to prepare his income tax returns and has spent considerable money doing so I do not think there would be any fault to be found in his having spent the money in that fashion. Then, why on the day following the bankruptcy should the trustee in bankruptcy not be permitted to incur the necessary expense and spend his time in the preparation of these forms?

Hon. Mr. McGUIRE: He does it in practice, does he not?

Mr. McENTYRE: No, in the great majority of cases, if there is any great amount involved, the trustee will not prepare the income tax returns, because he says that he cannot afford to do that as he is not entitled a fee for doing so.

The ACTING CHAIRMAN: How have you dealt with such matters during the past few years ?

Mr. McENTYRE: It has been rather unsatisfactory. In some cases the trustee will file returns; in other cases he will advise us that he has looked at the books and finds that there was very little profit made the year before, or that the assets of the estate will not be sufficient to provide anything for income tax, and we accept his word on that. Then, if there is something involved we have to send our assessors to look at the books and make a return themselves.

The ACTING CHAIRMAN: You always have that privilege?

Mr. McENTYRE: Oh, yes.

Hon. Mr. McGUIRE: You can also get an order of the court under this section as it stands.

Hon. Mr. ASELTINE: What is the difference between the liability to file an income tax return on the part of a trustee of a deceased person and a trustee in bankruptcy?

Mr. REILLEY: They are in the same position.

Hon. Mr. ASELTINE: The trustee of a deceased person's estate cannot get a discharge until he gets a release from the income tax department, and I think the trustee in bankruptcy also should not be able to get a discharge until he has a release from the income tax department.

Hon. Mr. MCGUIRE: The debtor in one case has disappeared, but in the other case he continues.

The ACTING CHAIRMAN: The bankrupt is still liable to make his returns.

Hon. Mr. ASELTINE: But he has nothing to pay to the income tax department after he has made an assignment in bankruptcy.

The ACTING CHAIRMAN: We have covered the point thoroughly, I think Are there any further questions?

Mr. REILLEY: I think this is a proper case for the two departments to get together and work out a scheme that will be satisfactory to both. I have tried to do that for many years.

Hon. Mr. COPP: Why have you not succeeded?

Mr. REILLEY: I could not get any cooperation from the Department of National Revenue. They just sat tight on this and would do nothing. I am satisfied that if they are given a strong impression from this committee or someone else that something different must be done, we can get together and work out a scheme that will be satisfactory to both of us.

Hon. Mr. MCGUIRE: The suggestion of Mr. McEntyre is to make the trustee in bankruptcy a trustee under the Income War Tax Act as well. I do not think that should be done. It seems to me it would be much more reasonable to have the trustee in bankruptcy made liable under one or two sections of the Income War Tax Act. If Mr. Reilley and Mr. McEntyre get together they can possibly work that out.

The ACTING CHAIRMAN: Are there any further questions? If not, we have concluded the evidence for to-day. We thank you for the clear statements you have made to us, Mr. McEntyre, and we will take your submissions into consideration. I think you can gather from the questions that have been asked and the comments made here that the feeling of the committee is that there is a clear conflict between the Income War Tax Act and the Bankruptcy Bill. The Income War Tax Act seeks to establish priority of claim in a bankrupt estate, whereas Mr. Reilley's Bankrupt Bill proposes to codify more or less the rights and priorities of claimants. It seems to me that it would be advisable for Mr. Reilley and someone from the Department of National Revenue to get together and see if they cannot clarify these questions, and make any further submissions they may care to make. Would that be agreeable to the committee?

Hon. MEMBERS: Agreed.

The Committee adjourned to the call of the Chair.

1946

THE SENATE OF CANADA

PROCEEDINGS

OF THE

STANDING COMMITTEE ON BANKING AND COMMERCE

to whom was referred the Bill A-5, intituled:
"An Act respecting Bankruptcy."

No. 6

WEDNESDAY, JULY 31, 1946

CHAIRMAN

The Honourable Elie Beauregard, K.C.

WITNESSES:

Mr. W. J. Reilley, K.C., Superintendent of Bankruptcy.

Mr. A. W. Rogers, K.C., Montreal, P.Q., Secretary, The Canadian Bankers' Association.

APPENDIX:

Brief filed by Mr. A. W. Rogers, K.C.

OTTAWA
EDMOND CLOUTIER, C.M.G., B.A., L.Ph.,
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
CONTROLLER OF STATIONERY
1946

ORDER OF REFERENCE

EXTRACT from the Minutes of Proceedings of the Senate for 13th May, 1946.

Pursuant to the Order of the Day, the Honourable Senator Robertson moved that the Bill (A-5), intituled: "An Act respecting Bankruptcy", be now read a second time.

After debate, and—

The question being put on the said motion.

It was resolved in the affirmative.

Ordered, That the said Bill be referred to the Standing Committee on Banking and Commerce.

L. C. MOYER,
Clerk of the Senate.

STANDING COMMITTEE ON BANKING AND COMMERCE

The Honourable ELIE BEAUREGARD, K.C., *Chairman*

The Honourable Senators

Aseltine	Euler	Marcotte
Aylesworth, Sir Allen	Fallis	McGuire
Ballantyne	Farris	Michener
Beaubien (*Montarville*)	Foster	Molloy
Beauregard	Gershaw	Moraud
Buchanan	Gouin	Murdock
Burchill	Haig	Nicol
Campbell	Hardy	Paterson
Copp	Hayden	Quinn
Crerar	Howard	Raymond
Daigle	Hugessen	Riley
David	Jones	Robertson
Dessureault	Kinley	Sinclair
Donnelly	Lambert	White
Duff	Leger	Wilson—(47).
DuTremblay	Macdonald (*Cardigan*)	

MINUTES OF PROCEEDINGS

WEDNESDAY, July 31, 1946.

Pursuant to adjournment and notice the Standing Committee on Banking and Commerce met this day at 10.30 a.m.

Present:

The Honourable Senators: Beauregard, Chairman; Asseltine, Burchill, Gershaw, Gouin, Haig, Hardy, Howard, Hugessen, Jones, Kinley, Leger, Macdonald *(Cardigan)*, McGuire, Moraud, Robertson, Sinclair, White.—18.

In attendance: Mr. J. F. MacNeil, Law Clerk and Parliamentary Counsel of the Senate.

Bill A-5, An Act respecting Bankruptcy, was further considered.

Mr. W. J. Reilley, K.C., Supt. of Bankruptcy, was again heard.

Mr. A. W. Rogers, K.C., Montreal, P.Q., Secretary, The Canadian Bankers' Association, submitted a brief and was heard.

Further consideration of the Bill was postponed.

Attest.

R. LAROSE,
Clerk of the Committee.

69415—1½

MINUTES OF EVIDENCE

THE SENATE

OTTAWA, Wednesday, July 31, 1946.

The Standing Committee on Banking and Commerce to whom was referred Bill A5, an Act respecting bankruptcy, met this day at 10.30 a.m.

Hon. Mr. BEAUREGARD in the chair.

The CHAIRMAN: Gentlemen, we are to hear from Mr. A. W. Rogers, K.C., Secretary of the Canadian Bankers' Association.

Mr. ROGERS: Mr. Chairman and honourable senators, we realize that it is very difficult for any one drafting legislation designed to remedy certain evils to cover the ground adequately without perhaps going a little too far one way or the other. The study being made by your Committee, and the opportunity afforded various interests and organizations to present what, we hope, are constructive criticisms, will, I think, help materially in making the legislation more effective. My own experience years ago in drafting legislation impressed on me that sometimes there is a tendency for the draftsman in trying to remedy an evil to cut too wide a pathway and so get into territory that he would rather not have touched. It is only when an opportunity like this is afforded to discuss the matter generally with the public before a tribunal such as yours that the pertinent points can be brought out. Any submissions we may make are intended to be not merely critical but, we hope, constructive, and we trust they will have some beneficial effect.

There are some points arising from interpretation which I think can better be dealt with in connection with some of the sections, but there is one particular definition I might mention, that of "creditor" in section 2 (o). This definition has now been amended to include a secured as well as unsecured creditor. No doubt the definition in general terms of a creditor would have sufficed, but when you specifically mention that it is to include secured creditors, it has certain effects, as will appear from consideration of certain sections of the Bill that are related to the definition. For instance, in section 19, subsection 1:—

> A composition accepted by the creditors and approved by the court shall be binding on all creditors with claims provable under this Act, but shall not release the debtor from the debts and liabilities referred to in section one hundred and fifty-four of this Act except to such an extent and under such conditions as the court expressly orders in respect of such liability.

By that broad phraseology the composition would be binding on all creditors, including secured creditors, by reason of the specific definition; whereas, it was probably the intention that it would be binding only upon the creditors who had not had an opportunity of obtaining securities for their debts.

In section 26 the same question arises with respect to a stay of proceedings. The first subsection provides generally that during the bankruptcy of a person or on the filing of a proposal of composition no creditor shall have any remedy against the person who is to be put into bankruptcy "or shall commence or continue any action, execution or other proceedings for the recovery of a debt provable in bankruptcy," unless with leave of the court. As the provision stands in the Act, subsection 2 went on to deal with the position of secured creditors and it stated that, "subject to the provisions of certain other sections, any secured creditor may realize or otherwise deal with his security as if this section had not been passed, unless the court otherwise orders." This of course is quite a proper proceeding, for it the court felt a secured creditor should not realize his security, it might on special representations make an order requiring the secured creditor not to realize.

Hon. Mr. LEGER: The only change would be the necessity of applying to the court: that is the only effect, is it not?

Mr. ROGERS: The change would be to overcome the effect of subsection 2 of the Act and require a secured creditor to get leave in every case before realizing his security. That is because of the new definition of creditor and the addition to subsection 2 of the words "and the preceding subsection." This completely nullifies the intention of subsection 2, which was to remove the secured creditor from the restrictions of subsection 1.

Hon. Mr. HUGESSEN: Your objection is to the words "and the preceding subsection"?

Mr. ROGERS: Yes. The effect is brought about by those words and also by "creditor" as now defined. The new definition of the word includes a secured creditor. So the original provision whereby a secured creditor was given certain freedom of action is offset and really nullified.

Hon. Mr. MORAUD: What was the definition before?

Mr. ROGERS: It is in the bill on the right hand side.

Hon. Mr. MORAUD: Oh, yes.

Mr. ROGERS: It was not a general definition, it was specific with relation to particular cases. But the effect of the specific amendment is perhaps dangerous, having regard to the effect of its inclusion in the Act in that way.

Hon. Mr. MORAUD: The former definition was too long, and this one is too short.

Mr. ROGERS: Then there is another point in the definition of the word "transaction". It is so general that it would be very difficult to imagine anything that would not come within the transaction. While it is quite true that it is necessary to define some words in order to prevent a lot of repetition, particularly in section 68 and others, the new definition seems to cover so wide a field that it goes beyond what is now in the Act.

Hon. Mr. LEGER: Would it be necessary to define it at all?

Mr. ROGERS: I think the court would define transaction as being a business dealing of some sort.

Hon. Mr. MORAUD: "Transaction" in our civil code has not the same meaning at all as "transaction" in this bill.

Mr. ROGERS: It is so difficult to say what might be meant by "anything done or left undone by a person which affects another person's rights and obligations out of which a course of action may arise". It is so broad that it is rather difficult to say what its effect might be. Section 64 of the Act commences,

> Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered . . .

It was in that sense fairly precise and rather limited, but the definition in this bill is very broad, and it is difficult to know just how far its effects may go. Perhaps when we come to one or two of the other sections its effects will be a little more apparent.

Section 3 covers acts of bankruptcy. The inclusion of a new act of bankruptcy in paragraph (*d*) of this section goes somewhat further than the preceding paragraph (*c*), which deals with something of that nature. It reads:—

> If in Canada or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon, which would under this Act be void as a fraudulent preference if he were adjudged bankrupt.

No one could quarrel with that.

Paragraph (*d*) covers:—

> Any conveyance or transfer of his property or any part thereof, or creates any charge thereon, which would have the effect of defrauding, delaying or defeating his creditors or any of them.

Hon. Mr. LEGER: In other words, he could not mortgage his property.

Mr. ROGERS: It is just a question whether under certain circumstances a mortgage which might be taken and given in all good faith would come within this, because undoubtedly it would have the effect of delaying or defeating his creditors or any of them. That is, one creditor might be defeated by the giving of a certain security; there might be no fraud intended, yet it would be an act of bankruptcy. Our feeling is that it goes further than should be necessary.

I turn now to page 6. Paragraph (i) of section 3 relates to bulk sales. Under the paragraph in the Act a bulk sale made without complying with the requirements of the provincial laws would be an act of bankruptcy. But the phraseology now is such that the whole purpose of the paragraph is changed, and if anyone makes a bulk sale "wherein the sale price will not be sufficient to pay his creditors in full" that sale constitutes an act of bankruptcy. The danger is that a man might make a bulk sale and the proceeds would be insufficient to pay his creditors in full, but he might have other assets, including bank deposits, from which the balance of his creditors' claims could be paid, but the definition could result in his being forced into bankruptcy regardless of his real financial position.

Hon. Mr. LEGER: That would come in conflict with our provincial Bulk Sales Act.

Mr. ROGERS: Perhaps it calls for a sale under the provincial law, but it states that an act of bankruptcy will have been committed if the sale price is not sufficient to pay all creditors in full. It ignores the fact that there might be other assets, so the sale would be perfectly sound and the man absolutely solvent. Perhaps the amended paragraph is cutting too wide a swath from that point of view.

In paragraph (i) of section 3 we find another point of difficulty. It is an act of bankruptcy if the man "ceases to meet his liabilities generally as they become due." That, of course, has always been in the Act. But the paragraph is amended to read:—

> . . . . .or fails to pay any particular debt or debts after repeated demands for payment.

If it is going to constitute an act of bankruptcy when a man fails to pay any debt after repeated demands for payment, it would constitute a very serious encroachment on the right of an individual to contest claims of debt on sound legal grounds. While there may have been some cases of uncertainty, as Mr. Reilley states, it seems to me that where a man might be stalling and too much delay might result in the loss of some assets, it is just a question whether legislation should go so far as to make it difficult for others to do business with a man, and certainly this amendment would expose the individual to threats of bankruptcy proceedings at the hands of an unscrupulous creditor unwilling to establish his claim to the debt in the civil courts. It seems to us to be going too far.

There is a small point in section 18, subsection 11 on page 18 of the Bill, which we wish to make.

The subsection provides:—

> On the filing of a proposal the property of a person not bankrupt shall be deemed to be under the custody of the court until the proposal is finally disposed of by the court and any alienation thereof except in the normal course of business shall be null and void.

We think this probably means any alienation by the debtor. But actually there might be property of the debtor on which he has given a valid security in such a way that the person who holds that security is entitled to realize on it, and normally make good title. This new subsection would throw a cloud on that title if it is going to cover alienation by anybody of the property of the debtor. We think it would be better to clarify the wording by stating "any alienation by the debtor." This is no doubt the intention of the subsection.

In section 39, subsections 11, 12, and 13, there is a small point on administration. It is quite proper that the Superintendent should have access to the bank accounts or any other information he might want. The difficulty is that banks, by reason of the contract between depositor and banker, are under an obligation of secrecy. That obligation is so strong that if a bank discloses its customer's affairs it is liable in law. So the banks before giving information would want to be sure that they were giving it to properly authorized persons. The Superintendent could not do all the work himself, and presumably he may retain accountants to do it on his behalf. We suggest therefore that the Superintendent have power to authorize a person to act on his behalf. Then if that authorized person comes to a bank to secure information the bank would be protected. That is the usual procedure under the Income War Tax Act and a number of other statutes, both Dominion and provincial, where it is necessary to have access to bank accounts.

Hon. Mr. MORAUD: Don't you think, Mr. Rogers, that that again is an invasion by an officer of the department, of the jurisdiction of our courts? If an investigation is to be made, it should be made under the direction of our courts.

Mr. ROGERS: It is certainly more desirable. But we have had to submit with the best grace possible to similar provisions in Dominion as well as provincial legislation, where an officer is clothed with certain powers, as under the Securities Act and the Income War Tax Act and the Excise Act, and can examine bank accounts. It certainly would be more desirable if all this could be done under the aegis of the courts, as the honourable senator suggests, but in view of what has already happened we could scarcely urge that. All we can ask is that there be a clear-cut delegation of authority. If that is to be the case, we shall have to submit with good grace.

Hon. Mr. MORAUD: I submit that this should be done under the direction or authority of a court of justice.

Mr. ROGERS: There is something of that, sir, in subsection 12:—

> The Superintendent or anyone in his behalf may with the leave of the court examine the private books, records and documents and bank accounts of a trustee. . . .

That brings in the principle there.

Hon. Mr. MORAUD: There is nothing of the kind in subsection 11.

Mr. ROGERS: No, there is nothing of that nature in subsection 11. It goes your way in subsection 12. But it is just as you honourable senators wish in matters of that sort. As I say, we have to submit with grace, as many others have, to requirements of that nature where investigations are conducted by representatives of the Crown without the authority of the court, but under the authority of a statute. We always insist on absolute compliance with the requirements of the order of the court or the statute, because otherwise we would be liable, and financially we cannot afford to accept that liability.

Sections 68 and 69 have given rise to a considerable amount of doubt as to their effect on banking transactions as well as others. Section 68 will be found on page 54 of the Bill. Subsection 1 provides:

> Every transaction—

which, as you have seen, is very broadly defined now.

—whether or not entered into voluntarily or under pressure by an insolvent person becoming bankrupt within three months thereafter resulting in any person or any creditor or any person in trust for such creditor or any surety or guarantor for the debt due to such creditor obtaining a preference advantage or benefit over the creditors or any of them shall be deemed fraudulent and void as against the trustee.

The danger of that broad provision, it seems to us, is that the question of intent is no longer an element. It is still a pretty general requirement in almost all criminal offences that intent is an element of the deed and, in many cases, a man is entitled to bring in evidence that his intent was honest or proper, and the intent may vary considerably the gravity of the crime. Yet here the effect alone is to be the arbiter of the situation. If there is any "advantage or benefit over the creditors or any of them"—which means any one of them—the transaction is deemed to be a preference, and the person that took part in it is tainted with fraud. That is almost as bad as being tainted with criminality, because no one wants to be put in a position of that sort. A man may have entered into a transaction in perfectly good faith and it may have resulted in advantage to him over some single creditor, yet the transaction would be fraudulent.

Hon. Mr. LEGER: What about its effect on a bank advancing money on a bill of lading?

Mr. ROGERS: That is precisely what I was coming to, sir. Banks do business in various ways with different customers. A bank frequently does business on bills receivable, with a promise by the customer to give security if the bank requires it. A situation may develop, due either to general business conditions or a change in the individual's situation, which from its experience indicates to the bank that it probably had better get security, and this it will ask for and obtain. Undoubtedly in cases of that sort there is some benefit to the bank as against other creditors or as against a single creditor. The onus now would be upon the bank to prove the transaction was a proper one. By reason of the phraseology of section 69 as now amended the onus is a very difficult one to satisfy, because it has to be shown that the transaction is for adequate and valuable consideration and without reason to suspect any insolvency. Yet by reason of the broad definition of bankruptcy it might well be—I realize this is stretching the point—that as bankruptcy would be constituted under the bill, failure to pay a particular debt, if the bank knew that it could hardly be said that it did not have some reason to suspect insolvency. You do not know how far the courts may go in that event. While it is an extreme illustration, there might be other cases where the bank could not come in and satisfy the onus, yet under the Bank Act there is a provision for banks taking additional security. For instance, a bank is not allowed to lend money on mortgage of land, but it is allowed to take such a mortgage as additional security; that is, if additional security is necessary to protect not only the bank but the depositors, because that is the important part of it, and that is why parliament has authorized those provisions. If a bank is going to be exposed to having it established that the taking of that security was a preference, it might invalidate the security and the bank might refrain from putting itself in that position. As a result the banks' security would be weakened and the credit standing of people doing business with banks would be affected. To offset this banks would have to take more security at the outset than perhaps is taken at the present time. The combined effect it seems to us is rather serious and could go a long way towards making ordinary business rather difficult.

If you look at subsection 2 of section 68 you will find it designed to enable the trustee to invoke provincial laws in order to invalidate certain transactions.

No one can have any quarrel with that, but the phraseology is so broad—it certainly was not so intended I believe—that the trustee could avail himself of any law in any province of Canada regardless of the locality of the debtor or of the property affected. There might be some extreme statute in British Columbia and the bankruptcy might have taken place in Quebec, yet as this subsection is worded the British Columbia law might be invoked in relation to the bankruptcy in Quebec, although the debtor did not reside in British Columbia nor had he any assets there. It seems to us this subsection should be redrafted to make it clear that that is not intended. As you gentlemen are aware, before the enactment of the Bankruptcy Act the provinces had certain legislation in the field of bankruptcy, such as the assignments and preferences acts. When the bankruptcy statute was enacted it was universally felt, and probably held, that the Bankruptcy Act would suspend the operation of the provincial laws. A question would now arise whether this amendment would remove that suspension. That is one of the difficulties which arises from the use of the more general phraseology such as appears here.

Before leaving subsection 1 of section 68, I may say that over all the years there have been many decisions on the effect of the provision that there should be intent established before a transaction is declared void for fraud. Those decisions will pretty well have to be abandoned under the proposed amendments, and that might be unfortunate in a number of different ways. But taking it from the point of view of bank transactions, it has been held that it would not be a preference for a bank to transfer a credit from one account of a customer to another account which was in debt. It is still a question whether under this broad phraseology that would be permitted. It would have to come before the courts again until it was declared authoritatively whether a bank could exercise its privilege of consolidating accounts, which it has always hitherto been allowed to do.

Then there are other cases where they might have difficulty. It has been held that payments in the ordinary course of business would not be regarded as constituting a preference. It might be a question whether payment on a debt which was matured and due the bank would be contrary to these provisions. In another case it has been held that payment of secured creditors should not be within the provision as it stands now in the Act. That question would have to be settled in the courts and until that had been done in an authoritative manner, the banks would not know how far to go in their ordinary day-to-day dealings with their customers. It seems to us that this amendment goes much further than may be necessary and will make it very difficult for people doing business.

In subsection 3 of section 68 there is reference to a secret transaction between the bankrupt and "any other person". It is difficult to know just what that might cover. As I have explained, there is an implied secrecy between banker and customer. Under this amendment that would be a secret transaction and might give rise to difficulties because it comes within that definition.

Subsection 5 of section 68 has already been referred to in a sense, but it does make it clear that evidence of intent on the part of either party to the transaction shall not be available as a defence to support such transaction if in fact a preference, benefit or advantage was obtained over the creditors or any of them. That is a pretty broad provision. A man would not be able to come into court and show good faith if in fact a preference, benefit or advantage was obtained. The transaction would be regarded as fraudulent and would be voided. In the Bankruptcy Act of 1910, as you gentlemen will remember, there was a provision of that sort, but in 1920 those words were transferred to subsection 2 and formed part of a prima facie presumption, which of course was susceptible of rebuttal. In other words, it might be a presumption of law from certain facts that the transaction was a benefit and improper, but evidence could be adduced to show that such was not the case. This new provision will

change that, and if any advantage or benefit or preference was obtained over any creditor the transaction will be invalidated. The effect of that would certainly be serious on ordinary business procedure.

I have a few more observations to offer with regard to section 69. As this section now stands in the Act, in order to enable a man to establish that he did not obtain a preference he must prove that the transaction was entered into in good faith before the date of the receiving order and without notice of any available act of bankruptcy. The new provision would add the following requirements: That the valuable consideration be adequate, that there be no knowledge of the insolvency or commission of an act of bankruptcy, that there be no reason to suspect insolvency or commission of an act of bankruptcy. This would really give rise to difficulties in a bank transaction. For instance, it would be very difficult in the case of a security given, particularly an additional security, where a bank felt positively that it was given for adequate and valuable consideration when it was really given for money already loaned and upon which some security had been taken, but that security perhaps had lost value in some way and the situation had developed to a point where the bank felt some additional security of real estate or something of that sort was necessary. The shifting of the onus here, which would require the bank or other person to bring itself within the protection of section 69 (1), is going to be much more difficult to comply with by reason of that and also because of the very broad definition of insolvency, "reason to suspect insolvency or commission of an act of bankruptcy." We have discussed that and have seen that the failure to pay one particular debt after repeated demands is an act of bankruptcy. As a result a bank, knowing the man's failure to pay the debt was for a perfectly good reason, might be regarded as having knowledge that he had committed an available act of bankruptcy, and therefore could not bring himself within the protection, and the transaction would be invalid. There are so many uncertainties arising from the proposed provisions that our feeling—which I think is common with that of other members of the commercial community—is that it would be better to adhere to the existing provisions and the body of law built up under them, over a period of twenty-five years, than cut loose from them altogether and throw the whole situation in the air so that no one would know just where he stood.

I should like now to make a rather broad jump to section 110 at page 72 of the Bill. It deals with proof of claims. Subsection 1 reads:—

> Every creditor shall prove his debt as soon as may be after the filing of a proposal for a composition or after the bankruptcy—

Then there is this penalty added:—

> —otherwise he shall not be entitled to share in any distribution that may be made.

It is quite proper to impose a penalty if a man does not prove his debt, but how soon is, "as soon as may be"? It seems to me there ought to be some precise method of ascertaining when a debt should be proved within some time limit. One court might hold a month was the time; another, that two years was not out of the way. Without some clear-cut definition it is very difficult to know where you are.

Hon. Mr. HAIG: What would you suggest, six months, one month?

Mr. ROGERS: I really would not make a sound suggestion because I think it could come better from the Superintendent of Bankruptcy himself, who has had wide experience in bankruptcy.

The CHAIRMAN: That is just a suggestion you are making?

Mr. ROGERS: Yes. He suggests "as soon as may be." But I think when he appreciates the difficulty of imposing a penalty for failing to prove a debt within a definite time, he will realize that it would be wise to set a time limit. There are other time limits in the Act, six months, three months and so forth, but I should think a fair time limit could be set. I really have not had enough practical experience of bankruptcy matters to make a sound suggestion. So I would rather leave it to those who have greater knowledge, and wider experience. I am sorry, but I am afraid that is as far as I can go.

Now, section 124. As the explanatory note indicates, this is new and purports to do away with the law of set-off, which is said to differ in important respects in the several provinces. It is difficult to know just what is meant by "mutual dealings." The banks have the right of set-off, that is, the right of setting-off one debt against another, or one debt against a credit, and that sort of thing. Whether this section is intended to prevent that being done we do not know, but we feel that it might be looked at with more care to see what the effect might be. It might go further than was intended. We should not think that the ordinary rights of setting one account off against another would be intended to be interfered with, but the language and the explanation would indicate that the law of set-off is not to be observed except in accordance with section 124.

There is a little point in section 125, subsection 7:—

> The trustee shall not be liable for the costs of a creditor proving any claim if in the opinion of the court the trustee acted in good faith or was justified in requiring the claim to be proved before the court otherwise the costs of proving a claim shall be in the discretion of the court.

Our feeling is that if the trustee be given carte blanche he might go the length of contesting every claim and putting everybody to the proof, and the way the onus provisions have been changed it is going to be very difficult to sustain the validity of any transaction. The result would be the trustee would not be liable for any costs, and the effect might not be good. It seems to us that there ought to be something which would leave the trustee clearly in the hands of the court, and the court's discretion should govern the question of costs in all cases; otherwise the effect might be too sweeping. True, he is not going to be liable if the court feels he acted in good faith and was justified. We submit that the question of liability for costs should be left entirely in the discretion of the court, particularly if the onus is shifted as proposed in section 69 (2).

Section 126 deals with scheme of distribution. Subsection 1 provides:—

> Subject to the rights of contractual secured creditors the proceeds realized from the property of a bankrupt shall be applied in priority of payments as follows:—

It is realized of course that there has been a great deal of difficulty in establishing priority of claims, and there ought to be some such section as this, but the difficulty is the use of the words "contractual secured creditors" ignores certain statutory situations. For instance, under the Bank Act a bank is given a statutory lien on the shares of its shareholders. That certainly is not contractual and would not be covered by this section. Then there is a banker's lien at common law on the property of a debtor which may be in the bank's hands, such as securities, which perhaps may not have been hypothecated, but the bank has certain rights there just as the solicitor has at common law. Neither of these is contractual. It seems to us that the word "contractual" should go out. To make it doubly clear probably there should be a clarification with regard to the proceeds realized by the trustee. Certainly it is not intended, we think, to cover proceeds realized by secured creditors, because naturally those proceeds go to meet their claims, although of course if there is any surplus that must be paid

over to the trustee to be held in trust by him. It seems to us that as worded there it leaves the matter open to doubt, that the section covers all proceeds realized whether by secured creditors or otherwise.

Hon. Mr. HAIG: Would you say therefore that a debtor who had left papers with his solicitor, on which the solicitor had done a certain amount of work and had at common law a lien on them, would come under that provision?

Mr. ROGERS: The subsection reads:—

> Subject to the rights of contractual secured creditors the proceeds realized from the property of the bankrupt shall be applied in priority of payment.

You would not be a contractual secured creditor.

Hon. Mr. HAIG: I promise to look closely into that section.

Mr. ROGERS: I think it was not intended to go that far, but it has that effect.

Hon. Mr. HAIG: As far as I am concerned, I promise to see that it does not go that far. That is the only security we lawyers have.

Hon. Mr. MORAUD: In our province we have two sections in the code under which certain creditors are not contractual.

Hon. Mr. HAIG: We have woodsmen's liens and other liens of that nature in our province.

Mr. ROGERS: Yes, there are many common-law liens.

Hon. Mr. HAIG: In Manitoba we may have gone too far in giving liens to workmen under certain conditions. For instance, we have given liens on wood in the bush, and all that kind of thing.

Hon. Mr. LEGER: We have done the same in New Brunswick.

Mr. ROGERS: Their name is legion throughout the west particularly, and they would have to be considered.

I wish to thank you, gentlemen, for the privilege of making these representations. I have tried not to be carpingly critical, but rather to make constructive suggestions. We realize the difficulty faced by the draftsman and his great ability and wide range of knowledge with respect to the law of bankruptcy. We feel that after sifting the representations we have made and the suggestions you have received from other quarters it will be possible to develop a better Bankruptcy Act than the present one. Certainly no one would wish otherwise.

APPENDIX

BRIEF FILED BY MR. ROGERS, SECRETARY OF THE CANADIAN BANKERS' ASSOCIATION

The Honourable Elie Beauregard, Chairman,
and Members, of the Senate Standing Committee
on Banking and Commerce:

Senate Bill A-5—An Act Respecting Bankruptcy

In the presentation of these observations concerning the above Bill, on behalf of the chartered banks of Canada, it is not intended to deal with the provisions of the Bill as they affect the public generally. Representations along particular lines have already been made to your Committee by various organizations so it is felt that we would be more helpful to the Committee and to the law officers of the Crown responsible for the drafting of the Bill if these comments and suggestions were confined as far as possible to the provisions of the Bill as they appear to affect the chartered banks in their ordinary course of business.

Interpretation

There are a number of provisions in the interpretation section of the Bill which, viewed in the light of their use in subsequent specific sections, give rise to objections which will be discussed in more detail under such sections. Brief reference only will therefore be given to certain paragraphs of the interpretation section.

Section 2 (*b*)—"adequate valuable consideration"

While the definition corresponds quite closely to that of the present 65(2), its operation under the proposed shifting of the onus of proof in the proposed section 69(2) might be serious, as will be explained later.

Section 2(*o*)—"creditor"

This definition goes beyond the present one to include a secured creditor although the latter term is separately defined in 2(*ee*). The inclusion of secured creditor in the definition of creditor would be confusing as will be apparent in the consideration of subsequent provisions.

Section 2(*jj*)—"transactions"

It is appreciated that this new definition has been inserted in order to remove certain detailed phraseology from the present section 64 which commences "Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered . . ." A comparison of these words with the new definition indicates that "transaction" defined as proposed goes much further than the present provision and covers not only positive acts but includes instances of inaction, and even omission. It is difficult to anticipate the effects of so broad a definition. It would seem advisable to have a tighter definition at the outset, more in keeping with the provisions of the present statute.

PART I

Acts of Bankruptcy

Section 3(*d*)—"other conveyance or transfer"

This includes any conveyance or transfer of property or charge thereon, which would have the effect of defrauding, delaying or defeating any creditor, and goes considerably further than (*c*), which would only include such transactions if they would be void under the Act as fraudulent preferences if a debtor

were adjudged bankrupt. The new provision would include the giving of any security to a bank under section 88 of The Bank Act or by way of additional security. The giving of such security could be treated as an act of bankruptcy if any creditor other than the bank asserted that it would delay or defeat him in his efforts to collect an alleged debt. It would be opening the door very wide if a man giving security to his bank in the usual course of business could be thrown into bankruptcy by a creditor although the transaction was an ordinary banking one which took place in complete good faith on both sides. Banks make advances to customers frequently and take only a promise to give security on goods to be purchased with the money and a promise to give additional security if required. The giving of either type of security for which provision is made in the Bank Act should not constitute an act of bankruptcy. Again, a bank, noticing changes in general market developments or in the customer's business, might deem it advisable to obtain more specific security as an added safeguard. The taking of additional security in such cases should not expose the customer to bankruptcy proceedings. The effect of so broad a change would tend to make it more difficult for certain types of businessmen to obtain credit.

Section 3(i)—"bulk sale"

This would be an act of bankruptcy differing altogether from the corresponding present one, which constituted the making of a bulk sale without complying with the relative provincial Bulk Sales Statute. The new provision would make any bulk sale under provincial legislation an act of bankruptcy if the sale price proved insufficient to pay all creditors in full, and in view of the broad definition of "creditor" already referred to this would include secured as well as unsecured creditors. The definition ignores the possibility that the bulk seller may have outside assets, including bank deposits, from which the balance of his creditors' claims could be paid, but the definition could result in a man being forced into bankruptcy regardless of his real financial position.

Section 3 (1)—"ceasing to meet liabilities"

The enlargement of this definition from "ceasing to meet liabilities generally as they become due" to the inclusion of failure to pay any particular debt after repeated demands for payment, would constitute a very serious encroachment on the right of an individual to contest claims of debt on sound legal grounds. It would expose him to threats of bankruptcy proceedings at the hands of an unscrupulous creditor unwilling to establish his claim to the debt in the civil courts. The banks would not like to have their customers subjected to unjustifiable bankruptcy proceedings for the collection of such a debt.

PART II

Composition, Extension or Scheme of Arrangement

Section 18(11)—"pending disposition of proposal, property of debtor under custody of court"

As this new subsection stands it would be too broad for it purports to nullify any alienation of a non-bankrupt person's property pending the disposition of the proposal. As worded it is wide enough to cover any disposition of property by a creditor such as a bank which has been given security thereon. While the exception of an alienation in the ordinary course of business might suffice it would probably be better to clarify the wording by stating "any alienation by the debtor", to cary out the true intention of the provision.

Section 19(1)—"approval binding on creditors but does not release debtor from liabilities mentioned in section 154"

In view of the definition of "creditor" to include secured creditors, in section 2(*o*), and the broad phraseology "shall be binding on all the creditors with

claims provable under this Act", this provision would be too broad in its effect. Restriction of the definition of "creditor" to exclude unsecured creditors would cure this difficulty.

PART III

General

Section 26(1)—"stay of proceedings"

Here again the definition of "creditor" in section 2(*o*) to include a secured creditor would make impossible for the latter without leave of the court to realize upon his security or avail himself of any remedy in respect of the property covered thereby. This would be contrary to all previous practice and would constitute a complete reversal of the settled law that property of the bankrupt covered by security given to a secured creditor need not be affected by the bankruptcy.

Section 26(2)—"secured creditors"

As the corresponding provision stands in the present Act, it is intended to authorize the secured creditor to realize upon his security "unless the court otherwise orders". The effect, however, of making this right subject to the provisions of the preceding subsection would completely change its effect and as already stated would make it necessary for the secured creditor to obtain leave of the court before availing himself of his legal remedies in respect of the security. It will be readily appreciated that such a requirement would impose a considerable expense upon a bank which was seeking a speedy realization of its security and the delays which would almost certainly ensue in obtaining leave might result in serious depreciation of perishable goods upon which security had been given and consequent loss to the bank. The provision would be completely unworkable and would constitute an unjustifiable fettering of the rights of secured creditors.

PART IV

Administration of Assets

Section 39(11)—(13)—"Administrative officials, Superintendent may examine bank accounts . . . private records and documents, outside investigations"

These provisions do not expressly empower the superintendent to authorize accountants and others to act on his behalf in these examinations and investigations. The banks by reason of the banker-customer relationship are obliged to maintain secrecy concerning their customers' affairs and are liable for any unauthorized disclosure. It is necessary therefore that any legislative authorization to any government official to obtain information from the bank concerning a customer's affairs be clear cut and explicit and if any examination or investigation is to be conducted by anyone other than the superintendent he should be expressly empowered to authorize in writing such person to act on his behalf.

Section 68(1)—Avoidance of preference in certain cases.

The combined effect of this provision and of section 69(2), which thrusts the onus of proof on the person asserting the validity of the transaction, is that no transaction during three months prior to bankruptcy, within the meaning of the broad definition in section 2(*jj*), could stand unless the creditor could maintain the onus of proof thrust upon him by section 69(2). All creditors would have to proceed on the tenuous footing that every transaction was bad until proven to have been good.

The new test of voidability would be whether the transaction resulted in any person, creditor, etc., obtaining a preference, advantage or benefit over the

creditors or any one of them. It is proposed to discard the present basis where intent to prefer is the test, and all jurisprudence based thereon during the years since the statute was first enacted.

It will be recalled that in the Act of 1919, chapter 36, section 31(1), an alternative test of voidability was expressed in the words "or which has the effect of giving such creditor preference over the other creditors". In 1920, however, Parliament saw fit to transfer these words to the prima facie presumption provision in subsection 2 of the section. Such a presumption can be rebutted by evidence to the contrary.

In the proposed Bill the words "advantage or benefit" are added, making the test so broad that it would be difficult to imagine any transaction which would not result in one creditor obtaining some advantage or some benefit over the others or any one of them. As already stated in another connection, this could have serious results with respect to security validly given to a bank pursuant to the provisions of the Bank Act in consequence of a promise given by the creditor to the bank to give that security when required.

A decision under the present Act that the transfer by a bank of a credit from one account of a customer to an account in which there was a debit balance was not a conveyance, transfer or payment within the section might be held inapplicable under the proposed Act and might even be held to constitute a transaction which resulted in the bank obtaining a benefit over any one of the other creditors and be declared void. Such a decision might have a serious effect on ordinary banking procedure recognized by law under which a bank is entitled to consolidate its customer's accounts.

Under the present statute it has been held that payment of amounts due in the ordinary course of business would not be regarded as done with a view to prefer. The proposed revision would do away with that legislation and might be held to invalidate payments in the ordinary course by a customer to his bank of his obligations as they mature. It has also been held that a payment to a secured creditor was not within the provision but the new legislation might throw doubt upon the validity of such payments.

Section 68 (2)—Application of Provincial Enactments

It is probably not the intention that this provision would enable a trustee in bankruptcy, say in the Province of Quebec, to invoke any law of any other province in order to invalidate a transaction by a creditor in that province, yet the language is broad enough to permit the law of any other part of Canada to be invoked without regard to the locality of the debtor or of the property affected.

Some limitation should be added to the provision so the only provincial laws which could be invoked would be those of the province in which the bankruptcy took place, or in which assets of the bankrupt were situated at the time of the bankruptcy, or the province in which a transaction took place affecting property of the bankrupt.

A further question arises from this provision, namely whether it would have the effect of reviving certain provincial legislation relating to assignments and preferences which had been held valid prior to the enactment of bankruptcy legislation by Parliament but which since the passing of the Bankruptcy Act in 1919 has been deemed to be suspended.

Section 68 (3)—"secret transactions deemed unlawful"

It might be well to clarify the words "other person" in line 2 by the phrase "knowing him to be a bankrupt", in order to protect innocent transactions. In view also of the specific inclusion in section 68 (4) of the words "after the bankruptcy of any person", to have them inserted in line 1, subsection 3. Otherwise their omission from the one and inclusion in the other might give

rise to an interpretation that subsection 3 would cover any secret transaction prior to the bankruptcy. That might even be alleged to affect ordinary banking transactions between a bank and its customer as these are necessarily secret by implication of law.

Section 68 (5)—"admissibility of evidence of intent in disputed transactions"

This makes it clear that the effect of a transaction is to be the test regardless of intent. The proof of intent is still an essential factor under the criminal law. Should a man have the taint of fraud cast upon him if his intentions were honest? This proposed provision would constitute complete reversal of the present law and goes much further than seems necessary to resolve any confusion in existing decisions, a solution which might better be left to the mature consideration of the Supreme Court of Canada.

Section 69 (1)—"protected transactions"

It is submitted that this provision goes far beyond a simplified redraft of present section 65. The proviso to the present section 65 will protect certain transactions from avoidance if made (*a*) in good faith, (*b*) before the date of the receiving order or authorized assignment, and (*c*) without notice of any available act of bankruptcy. The proposed new provision would add the following requirements:—

(*d*) that the valuable consideration be adequate

(*e*) that there be no knowledge of the insolvency or commission of an act of bankruptcy

(*f*) that there be no reason to suspect insolvency or commission of an act of bankruptcy.

Moreover, the new provision may have left a gap between the filing of a petition of bankruptcy and the date of the receiving order or authorized assignment. Section 27 (4) of the Bill relates the bankruptcy back to the date of the filing of the petition. The new provision covers transactions before the bankruptcy and therefore could not save the validity of a transaction taking place between the filing of the petition and the date of the order.

Section 69(2)—"onus of proof"

The shifting of the onus in the manner proposed is so serious that it would be almost impossible to bring a transaction under the protection of the section. Every transaction would have to be carefully studied from the point of view of actual notice, available knowledge or reasons for suspicion, and unless a bank could be sure that it could positively establish that these were lacking and that good faith was therefore established, it could not afford to enter into the transaction.

In addition the question of adequacy of valuable consideration would arise, particularly with regard to security given either on goods or by way of additional or collateral security of any kind. It would be difficult to establish, for instance, that there was adequate consideration within the definition of section 2(*b*) for additional security given for a debt already incurred. In consequence a bank might refrain from taking additional security at a time when experience had indicated the desirability of such a course. It would follow that bank losses could be more serious than would otherwise be the case and the safety of the banking system would to some extent be jeopardized, all because the taking of additional security sanctioned by Parliament under the Bank Act for the purpose of protecting the depositors and the bank was made practically impossible by the provisions of bankruptcy legislation.

With all respect to the Superintendent of Bankruptcy, his knowledge and draftsmanship, it would seem that sections 68 and 69 should be replaced by the corresponding provisions of the present statute.

PART V

CREDITORS

Proof of Claims

Section 110(1)—"creditors shall prove claims"

The expression "as soon as may be" is rather indefinite, particularly as the new principle of the provision is that unless the creditor proves his debt "as soon as may be after the filing of the proposal . . . or after the bankruptcy he shall not be entitled to share in any distribution . . ." This is too drastic a penalty for a late filing, particularly when it is difficult to determine the last day for proof of debt. The expression "as soon as may be" is used in the present section 105(1) but it is not coupled with a penalty and the phrase does not seem to have received clear judicial definition.

Section 124—"mutual credits, debts or other dealings"

In the light of the expanded definition of "act of bankruptcy" in section 3 the last part of section 124 might interfere with a bank's exercise of its right of set-off.

Section 125(7)—"Trustee not liable for costs"

It is submitted that the question of liability for costs should be left entirely in the discretion of the court, particularly if the onus is shifted as proposed in section 69(2).

Section 126(1)—"priority of claims"

The subsection commences

> Subject to the rights of contractual secured creditors . . .

There need not be any reference to secured creditors, whether contractual or otherwise, because the section purports to deal only with the application of the proceeds realized from the property of a bankrupt, and has nothing to do with a creditor's security.

In any event, the word "contractual" should be deleted because it would not include

(*a*) any security the bank may have by way of banker's lien at common law, and

(*b*) a bank's statutory lien upon the shares of its shareholders for unpaid debts or liabilities under section 76 of the Bank Act.

Neither of these is contractual. There does not appear to be any need to mention secured creditors. The trustee is not dealing with their property. Their freedom of action to realize should, as hitherto, be unhampered. If the wording were changed to read "the proceeds realized *by the trustee* from the property of a bankrupt" there would be less objection to saying "subject to the rights of secured creditors" if the purpose is to accept such rights clearly from the provisions of section 126.

The foregoing suggestions are submitted, not in any spirit of adverse criticism, but with a keen appreciation of the difficulties encountered by the draftsmen of the Bill and in a genuine effort to present possible effects of the proposed Bill upon the banks, with some constructive proposals for overcoming the objections.

Respectfully submitted,

A. W. ROGERS,
of Counsel
for The Canadian Bankers' Association.

MONTREAL, July 31, 1946.