ization relative to matters of agriculture. The International Labor Organization is constituted under Part XIII of the Treaty of Versailles and giving an advisory opinion here enabled the Organization to proceed with its work assured that its competence extended to the regulation of agricultural matters.[35] To have acquired such assurance by means of a hostile action would have caused much needless delay, inconvenience and expense.

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A POINT OF BANKRUPTCY LAW.

A recent decision of the Appellate Division of the Supreme Court of Ontario *In re Sternberg*,[1] seems to call for some comment both on the question of law and practice involved therein. The facts appear to be as follows: The trustee in Bankruptcy made an application under Bankruptcy Rule 120 to compel a firm of Treifus & Stripp to pay and deliver to him certain moneys and certain diamonds alleged to have been paid and transferred to Treifus & Stripp by the debtor by way of preference in fraud of his other creditors. On the application coming on to be heard an issue was ordered to be tried between the Trustee and Treifus & Stripp. On the trial of this issue one Ellis was called as a witness and his evidence established to the satisfaction of the learned bankruptcy Judge that the diamonds in question were Ellis's property. But at this time Ellis was no party to the proceedings.—The Judge thereupon gave judgment dismissing the trustee's claim to the diamonds as against Treifus & Stripp, and suggested that Ellis should be made a party and the question of ownership as between the trustee and Ellis should also be adjudicated.—Ellis was therefore made a party and as his evidence was given before he was a party in order to make it applicable to the application against him, the Judge directed that he should be treated as added not from the date he was served, but from a prior date when the evidence as to ownership had been given: and by a judgment bearing date when the case was adjudicated against Treifus

[35] See Report of Fourth Session of the International Labor Conference (1922) Vol. II. pp. 204-5.

[1] 27 O.W.N. 212.

& Stripp and also the date when it was adjudicated as to Ellis. The claim of the Trustee to the diamonds both as to Treifus & Stripp and Ellis was dismissed. Now this appears to be a very simple and common sense way of disposing of the question. It would seem to be obvious to anyone that the trustee's right to recover the diamonds in question depended on whether or not they were, or were not, the debtor's property. If they were not in fact the debtor's property, then, we think no beneficial interest in them ever passed to the trustee, and he could have no right to recover them. Now to avoid conflicting decisions and multiplicity of proceedings, it is submitted, is as much the duty of a Judge in Bankruptcy as it is that of a Judge exercising the ordinary jurisdiction of the Court, and a motion under Bankruptcy Rule 120 is an "action" within section 2 of the Judicature Act; at least we submit that is the legitimate result of Bankruptcy Rule 152. And in the trial of such applications the Judge must (subject to any limitations of his jurisdiction in Bankruptcy) deal with them upon the same principles as he would with any ordinary action; and if he should find that some other person or persons other than those before the Court is or are interested in the subject matter of the action, he is surely within his rights in requiring such person or persons, to be notified. So far as the diamonds were concerned, the evidence adduced seems to have satisfied the learned Judge in Bankruptcy that it established that no fraud upon the debtor's creditors had been proved, but a fraud upon Ellis, which, it is submitted, gave the Trustee no claim to relief.

The question of the true ownership of the diamonds was the fundamental question. If they were in fact the debtor's then the trustee had a right to recover them from Treifus & Stripp. If not he had no right to them, and in order that that question might be set at rest, it seems eminently right and proper that it should be determined as between the Trustee and both claimants.

It is therefore we think somewhat astonishing to find that the Appellate Division held that notwithstanding the apparently uncontradicted evidence, that Ellis was the rightful owner of the diamonds, that the Trustee was nevertheless adjudged entitled to recover them from Treifus & Stripp; thus, in effect, holding as a matter of law, that a debtor can make a transfer of property not his own, by way of fraudulent preference, which seems a rather startling proposition. In this case Ellis's evidence showed that the diamonds had been delivered by him to the debtor on approbation and, while so on approbation, had been transferred to Treifus & Stripp. That certainly, as we have said, was proof of a fraud on Ellis, but how it was a fraud on

the debtor's creditors or gave the trustee of the debtor any right to recover the diamonds, the Appellate Court did not vouchsafe to explain and it is somewhat hard to reconcile its decision that the Trustee was entitled to them with either law or equity, or anything to be found in the Bankruptcy Act.

The Bankruptcy Act, as is well known, provides that the claim of a Trustee to set aside fraudulent transfer or to obtain the declaration of his rights may be obtained on motion; Bankruptcy Rule 120. He is therefore not put to the necessity of issuing a writ of summons or delivering pleadings, but he may simply serve a notice of motion claiming the desired relief, and the disposition of such motions wherever facts are disputed, must be upon oral evidence; so that, in the result, a notice of motion comes on to be tried like any ordinary action, and under the definition of "action" in the Judicature Act, vol. 2, the proceedings are in fact "an action."

Now let us suppose that such an action had come on to be tried before any one of the learned Judges who sat on the appeal, and it had appeared by the evidence adduced in the case against Treifus & Stripp that the diamonds were in the hands of the debtor, not as owner, but as the trustee for Ellis; can it be believed that he would nevertheless have disregarded that evidence and proceeded to give judgment in favour of the Trustee, notwithstanding that the effect of the evidence was to establish that the diamonds in question were trust property, in which the debtor had no beneficial and therefore under section 25 of the Bankruptcy Act could not be applicable to the payment of the debtor's creditors; and consequently that the transfer of them to Treifus & Stripp was no fraud on the debtor's creditors; but a fraudulent breach of trust as against Ellis. We hardly think that anyone of these learned Judges would ignore this evidence, and deal with the action without requiring Ellis to be made a party.

We doubt whether, even before the days of the amalgamation of law and equity (in Ontario) such a result could have been arrived at: see *Gadsden* v. *Barrow*,[2] but since that amalgamation has taken place, and since the Judicature Act has required that all parties interested in the subject of litigation should be made parties, Ontario Judicature Rule 134, such a result seems extremely improbable; and we think that what each of the learned Judges would do in such a state of circumstances would be precisely what the learned Judge in bankruptcy did, viz., they would say "this action must stand over in order that Ellis may be made party, so that I may adjudicate the rights of the Trustee as against both Ellis and Treifus & Stripp." If the action

[2] 9 Ex. 514.

had been one within the ordinary jurisdiction of the Court, Ellis might have claimed and got relief against his co-defendant Steinberg, whereas in Bankruptcy, while the Judge would have no jurisdiction to give relief to Ellis against Treifus & Stripp, because possibly as between them such relief could not be obtained in Bankruptcy proceedings—yet he clearly had jurisdiction to determine the rights of the Trustee as against both Treifus & Stripp and Ellis — and it seems almost incredible that the Appellate Division should have thought that such procedure was erroneous. It would surely be undesirable that he should dismiss the claim against Treifus & Stripp on the ground that the diamonds were Ellis's; and that then on some future litigation it should be possibly held as between the Trustee and Ellis, that Ellis had really no claim to them. If the learned Judge should be wrong in regard to Ellis's rights then on an appeal, his claim against Treifus & Stripp could be granted.

As it is the Appellate Division has determined that the diamonds are the Trustees, and has saved the rights, if any, of Ellis; and if Ellis claims them from the Trustee, the Court will have virtually to overrule the decision of the Appellate Court awarding them to the Trustee.

The Appellate Division reached its conclusion by erroneously acceding to the contention of the learned counsel for Treifus & Stripp, that the evidence of Ellis as to his ownership was irrelevant to the issue between the Trustee and Treifus & Stripp; which was certainly a strange position for the learned counsel to take seeing that it was on that evidence that the Judge in Bankruptcy had dismissed the claim of the Trustee to the diamonds as against Treifus & Stripp; and striking out that evidence, then the only evidence before the Court showed that the debtor being the ostensible owner had dealt with the diamonds in a way that was fraudulent as against the Trustee. But the case of *Gadsden* v. *Barrow, supra,* we think shows that the evidence of Ellis was strictly relevant to the issue between the Trustee and Treifus & Stripp, and the Court erred in holding it to be irrelevant. *Gadsden* v. *Barrow* (*supra*) was an interpleader issue between a claimant to goods seized under execution, and the execution creditor. The claimant claimed under a chattel mortgage made prior to the execution, and the execution creditor tendered evidence to show that prior to the claimant's mortgage the debtor had conveyed the goods to someone else, and therefore that nothing passed under the claimant's mortgage, and it was held that this evidence was admissible. And if in such a case the evidence of a *jus tertii* was admissible, it seems equally to have been so in *re Sternberg,* where the question of the debtors' ownership was vital to the claim of the

Trustee to recover. In fact the Trustee by adducing that evidence practically put himself out of Court as far as the diamonds were concerned.

So much for the law—now a word as to the practice which the Appellate Division found to be at fault—and as to this point we may draw attention to the following statement in the judgment: "There is no provision in the Bankruptcy Act which enables the trustee in respect of Ellis's claim to resort to the procedure provided by sec. 53 for the disallowance of creditor's claims," from which it would appear that the Appellate Division imagined that the Trustee was proceeding against Ellis under section 53, which was not the case; and upon this statement as to section 53 is based the Court's objection to the procedure actually adopted for bringing in Ellis. The proceedings under section 53, it is quite true, were inapplicable and had nothing to do with the case and so far as can be seen no one pretended it had. But Bankruptcy Rule 120 enables a trustee to apply to the Court on motion *inter alia* "to declare for or against the title of the trustee to any property adversely claimed," and that, in substance, was what the Trustee did when he notified Ellis. The only way that Ellis could be made a party to the proceedings was by serving him with a notice of motion under Rule 120; and it was quite competent for the Judge to hear that application along with that against Treifus & Stripp, and to make an order dealing with both applications. If there were any technical defects in the way, the proceedings were carried out, Bankruptcy Rule 84 shows how they should be dealt with. Substantially they appear to have been correct—and the variations made by the Appellate Division in the judgment appealed from, it is respectfully submitted are open to the charge of being both bad law and bad practice.

It may be well to notice that the decision seems plainly to conflict with divers provisions of the Bankruptcy Act and Rules.

Section 25 provides that the property of a debtor divisible among his creditors *shall not comprise inter alia* "Property held by the debtor in trust for any other person." In the case in hand, the property appeared to have been held by the debtor in trust for Ellis, and was therefore not divisible among the debtor's creditors. The Appellate Court has, in effect, held that notwithstanding the diamonds are not applicable for the benefit of creditors, yet nevertheless, they are recoverable by the trustee. It has been generally supposed that the effect of section 25 was to prevent property held by a debtor in trust from passing to the Trustee in Bankruptcy; see Duncan, p. 280. Whether the Appellate Court intends to decide that, notwithstanding section 25,

property held by a debtor in trust does pass to the Trustee, it is hard to say. But the decision seems to go the length of saying that property held by a debtor in trust may be the subject of a fraudulent preference—as against his ordinary creditors.

Then Rule 152 of the Bankruptcy Act, in effect, says that in Bankruptcy proceedings the ordinary rules and practice of the Court are to apply, except where expressly altered by the Bankruptcy Act and Rules. But the Appellate Division seem to say that they do not apply; because Rule 139 of the Judicature Act expressly authorizes the Court to require the bringing in of parties appearing to have an interest in the subject of litigation; and the Appellate Division virtually says the Judge in Bankruptcy ought not to do so.

Rule 120 expressly authorizes a Trustee to apply for a declaration of his title to property adversely claimed, and the Appellate Division seems in this case to say he cannot.

We respectfully submit that the fundamental error of the decision, is the holding that the evidence of Ellis' ownership was inadmissible or irrelevant as between Treifus & Stripp and the Trustee.

The sequel of the case is to be found in *Ellis* v. *Sternberg*,[3] where in an action brought by Ellis against the Trustee the diamonds were declared to be the property of Ellis; a proceeding which would, of course, have been wholly avoided but for the action of the Appellate Division—and would have saved the anomaly of the Appellate Division declaring the diamonds to be the property of the Trustee, and of Mr. Justice Riddell declaring them to be the property of Ellis.

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A BARD IN LAW.

Would it be fair to call Lord Neaves the Nineteenth Century Justice Darling?—fair to either, I mean. These notes may form the best answer—or at any rate some sort of an answer. The curious may probe deeper if he can come upon a little brown cloth volume published in Edinburgh in 1875 and long since out of print. It bears no author's name or initials, but it was written by Lord Neaves, and its title is "Songs and Verses, Social and Scientific, by an old Contributor to *Maga*." Most were written 80 years or more ago.

[3] 27 O. W. N. 493.