WHY?

In the course of my attempts to expound or discuss the Bankruptcy Act at the Osgoode Hall Law School, several questions have forced themselves upon my attention. Perhaps a statement of some of them will be useful to readers of the CANADIAN BAR REVIEW in drawing their attention to some problems raised by the Bankruptcy Act as it now stands. It is to be hoped that the Act will not be re-enacted in the forthcoming Revised Statutes of Canada without a serious effort first being made to improve its drafting and arrangement.

1. Why, in section 2, which is intended merely to define the meaning of words and expressions used in the Act, is an important substantive provision as to the application of the Winding-up Act tacked on to the definition of "debtor," instead of occupying its proper place in some later part of the Act?

2. Why is the subject of authorized assignments (ss. 9 and 10) put under the heading "assignments and compositions," or in other words, why are the provisions as to compositions, etc. (sec. 13) put in Part II along with assignments, in view of the fact that these provisions apply to cases of receiving orders as well as assignments?

3. Why are general provisions applicable to assignments and receiving orders alike, such as ss. 8A, 8B, 11 and 12, put, some in Part I under receiving orders, and others in Part II under assignments and compositions?

4. Why should a section like s. 8b be drawn with a main provision only six lines long, followed by an "unless," then by a "provided," then by another "unless," and finally by another "provided" — the first "provided" being subject to the provisions of another section, the second "provided" being followed by two exceptions, and the second exception being qualified by another "unless" and an "except"—the various subsidiary and qualifying clauses extending to 30 lines? It is a maze which rivals the celebrated labyrinth of Crete, and it is perhaps hardly worth while pointing out that in each of the two exceptions to the second proviso the words "such date" occur, which grammatically refer to the date of the receiving order or authorized assignment, but which, to give sense to the exceptions, one is probably obliged to say refer to a "due date," not

expressly mentioned. We are less fortunate than Theseus. Ariadne gave him a clue which enabled him to find his way out of the labyrinth. No fair guide comes to our assistance.

5. Why, upon the making of a receiving order, is the property of the debtor deemed to be "in the custody" of the court (s. 6), whereas, upon the acceptance of an assignment by the Official Receiver, the property of the debtor is deemed to be "under the authority" of the court? What is the meaning of these two expressions or either of them? If, prior to the appointment of a trustee, it is necessary to dispose of any part of the debtor's property, how can a good title be given, in cases other than provided for by s. 8A?

6. Why, in the case of an assignment, when a trustee is afterwards appointed and his name has been certified on the assignment by the Official Receiver, is it provided by s. 9 that the property of the debtor is "thereupon" vested in the trustee "as of the date of the acceptance and filing of the said assignment" (thus, in effect, making the vesting relate back to an earlier date), whereas the corresponding provision in the case of a receiving order, namely, s. 6, says that upon the appointment of a trustee, the property shall "forthwith pass to and vest in such trustee" (thus omitting any reference to the relation back of the bankruptcy to the time of the presentation of the petition, as provided by s. 4, that is, the time of the filing of the petition as provided by rule 76)?

7. Why does s. 25 provide that the property of the debtor divisible among his creditors shall comprise all such property as may belong to or be vested in the debtor "at the date of the presentation of any bankruptcy petition or at the date of the execution of an authorized assignment" — the latter date being obviously wrong, because under s. 9 the property vests in the trustee as of the date of the acceptance and filing of the assignment, not as of the date of the execution of the assignment — and the former date being right only on the assumption that s. 6 means what it does not say, namely, that the property vests as of the date of the presentation of the petition?

8. Why does s. 25 mention still another date, namely, "the date of said petition or assignment" (which may be different from any of the dates already mentioned), as the date for vesting in the trustee the debtor's former capacity to exercise powers over property, and why is a distinction made between a receiving order and an assignment by the concluding words of the section: "or, in the case of such bankrupt, before his discharge"?

9. Why does s. 11 by sub-s. 1 give precedence to a receiving order

or assignment (that is, presumably, as of the date of presentation of the petition or the acceptance and filing of the assignment, respectively) over all executions and attachments not fully executed by payment, and then by sub-s. 10 give precedence to the receiving order or assignment over executions and attachments against land only as of the time of registration of the receiving order or assignment?

10. Why does s. 11(1)(b) make an excepton of the rights of a secured creditor under s. 6 of the Act (that is, in the case of a receiving order), and make no corresponding exception of the rights of a secured creditor under s. 9 (that is, in the case of an assignment)?

11. Why does. s. 11, by the obscurity of its provisions, make the lot of the purchaser in good faith of land harder? Read in the light of ss. 6 and 9, the result of s. 11 seems to be that during the period from the presentation of a petition until the expiration of three months after the "making" of a receiving order, or from the acceptance and filing of an assignment until the expiration of three months after the "making" of the assignment, a purchaser of a parcel of land from the debtor, or from a person whose supposed title is derived through the debtor, gets no title, and if the receiving order or assignment is not registered against the parcel in question during this period, the purchaser's only safeguard against the danger of paying his money for nothing is to inform himself, as best he may, as to possible assignments, receiving orders, or petitions for receiving orders relating to all persons having title to the land within the period in question. After the expiration of the three-month period, if the assignment or receiving order has not been registered against the parcel in question, the purchaser who takes and registers his conveyance without actual notice of a petition, receiving order or assignment, is apparently protected, at least in the case of land registered under the Ontario Registry Act, and it is immaterial whether he has made any search in the Canada Gazette or in the alphabetical list kept by the registrar or elsewhere. If the foregoing statement is right, why should the matter not be more clearly stated in the Act? If the foregoing statement is not right, what does the section mean?

12. Why are the words "or insolvent" allowed to remain, or why were they ever inserted, in s. 29, which provides in effect that in certain circumstances a settlement shall be absolutely void or shall be *prima facie* void (subject to the proof of certain things by the beneficiary) according as "the settlor becomes bankrupt or insolvent or makes an authorized assignment" within one year or within five years, respectively, after the date of the settlement. The time of a

declaration of bankruptcy or the presentation of a petition or the making of an assignment may be ascertained with reasonable certainty, but it passes my comprehension how a one-year period or a five-year period is to be calculated from the time of the settlor's becoming "insolvent," as defined by s. 2. Again, a settlor may become insolvent within one year after the date of the settlement, and be declared a bankrupt eighteen months after the date of the settlement, and the case would seem to fall under both branches of the section, so that the settlement is both absolutely void and only *prima facie* void. *Mirabile dictu!*

13. Why is s. 32 left in its present state of obscurity? That it is obscure is evidenced by the fact that some courts have regarded it as qualifying s. 31 in the sense that a transaction *prima facie* void under s. 31 might be supported by proof of facts bringing the case within s. 32. This construction of s. 32 is, however, excluded by the opening words "subject to the foregoing provisions of this Act with respect to the avoidance of certain settlements and preferences." Another construction suggested in the cases is that the section is applicable only to transactions occurring between the presentation of a petition and the making of a receiving order, so as to relieve persons dealing with the debtor in good faith and for value from the hardship resulting from the strict application of the rule that upon the making of a receiving order the bankruptcy relates back to the time of presentation of the petition. If this is the true construction then all the references to an "assignor" and an "authorized assignment" should be struck out as meaningless.

14. Why should a bank, paying cheques of its customers (necessarily without conducting a minute enquiry, every time that a cheque is presented, to ascertain whether a petition has been presented or a receiving order or assignment has been made which may affect the customer's credit balance), receive only the meagre and uncertain protection of s. 34? Sub-s. 2 obliges the bank, if it has ascertained that the customer is an undischarged bankrupt or has made an assignment, to notify the trustee and to cease making payments out of the account, but does not in terms excuse the bank if it makes payments in ignorance of the bankruptcy or assignment. As to after acquired property the bank may get some protection under sub-s. 1 of s. 34, but (in view of the terms of the second part of sub-s. 1 of s. 34), it is doubtful if the payment of a customer's cheque would be a transaction within the protection of s. 32, and outside of these sections there seems to be nothing in the Act which would

prevent the application of the vesting clauses of ss. 6, 9 and 25. Therefore, if a receiving order is made against a customer of a bank, his credit balance at the bank is vested in the trustee as of the date of the presentation of the petition, and it would seem to follow that payments made by the bank out of the account after the presentation of the petition could not be set off by the bank against the trustee's claim.

15. Why does s. 51 provide for the payment, secondly, of the costs of the execution creditor coming within s. 11(1) and (10), and say nothing about the costs of a garnishing, attachment or judgment creditor? Why is s. 51(6) expressed in such obscure terms?

16. Why is a provision as to the ranking of claims against a debtor who "owes or owed debts both individually and as a member of one or more different co-partnerships" tacked on to a provision as to the law of set-off, in s. 28, and substantially repeated in different language in s. 51(3)? Other provisions on the same subject are to be found in ss. 37(4) and 47.

17. Why should so little attention be paid in the Act to the chronological order of events? Why, for example, should the provisions as to dividends (s. 37) precede those as to the proof of claims (s. 45), or why should the provisions as to creditors' meetings (including provisions as to the first meeting, the appointment of a trustee and the appointment of inspectors) (ss. 42, 43), be separated so far from other provisions as to the appointment of a custodian, the appointment and removal of a trustee (s. 14, 15), and why should provisions as to the compositions, extensions and schemes of arrangement (s. 13) occupy a place so early in the Act, thus disturbing any attempt at an orderly statement of the initial proceedings under the Act?[1]

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[1] NOTE.—In the Book of The Proverbs we read:

"There be three things which are too wonderful for me,
Yea, four which I know not:
The way of an eagle in the air;
The way of a serpent upon a rock;
The way of a ship in the midst of the sea;
And the way of a man with a maid."

If the author of this saying had had the opportunity of reading the Bankruptcy Act, he might have enlarged his list of things 'too wonderful' for him.