IMPORTANT JUDGMENT IN SUPREME COURT

Delivered By Chief Justice Mathieson On April 8th.

THE SUPREME COURT IN BANKRUPTCY.

In the Matter of J. Stanley Wedlock Ltd., a Bankrupt.

The Royal Bank of Canada opposed a motion for the discharge of the Eastern Trust Co., as trustee of the estate of the above named bankrupt on the ground that certain charges were excessive.

The Chief Justice delivered the following judgment on April 8th instant, this application came on to be heard before me on the 24th day of January last, 1925.

Mr. Duffy, K. C., on behalf of The Royal Bank of Canada, opposed the application on specified grounds hereafter set forth.

The Petition in Bankruptcy herein was presented by the Bank of Nova Scotia, a creditor, on the 27th July, 1923, and on the same day an order was made appointing the Eastern Trust Company, being an Authorized Trustee in this Province under "The Bankruptcy Act," Interim Receiver of the property of the Bankrupt.

On the 8th day of August, 1923, the said J. Stanley Wedlock Limited was adjudged bankrupt and the said Interim Receiver was constituted Receiver of the estate of the bankrupt and the property of the bankrupt was thereby vested in the Trustee.

On the 12th day of September, 1923 a "statement of affairs" of the bankrupt was filed showing total assets $34,205.45
Total liabilities 33,385.65

Surplus of assets ..... $ 819.80

The Chief Justice after copying the minutes of the meeting of Creditors held on the 22nd day of August, 1923, continues as follows:—

No other meeting of creditors was held, notwithstanding the fact that only 8 out of the 59 creditors who ultimately proved claims were present in person or by proxy at this meeting.

Though it was not proved before me that the minutes were signed at the meeting, I shall for the present assume that they were so signed by the chairman and that consequently the presumption of validity set up in Sec. 77 of the Canada Bankruptcy Act apply to that meeting. To determine this point the Trustee will require to file an affidavit showing the date of signature.

I shall also for the present assume the validity of such resolutions (with the competency of the meeting) as appear by the minutes to have been passed; though it appears that persons not qalified as voters took part in the meeting, even moving and seconding material resolutions, and at one at least appointed to be an Inspector was a non-resident of this Province.

I also note a discrepancy of over $3,000 between the amount of the claim of a creditor appearing in the minutes as having been proven, and the amount on which the dividend was paid. This would materially affect the voting power of that creditor and should be explained by affidavit.

It was not competent to the meeting to appoint a solicitor—that power was vested in the trustee with the consent in writing of the Inspectors.

The meeting could not appoint a person to act as representative of an Inspector—the office of inspector cannot be delegated. The effect of this and other apparent irregularities upon the validity of the acts of the Inspectors will be reserved for further consideration.

On the 15th day of March, 1924, the Trustee made an order disallowing the claim of The Royal Bank of Canada and on the 24th day of March, 1924, the Bank appealed against the order to the Judge in Bankruptcy. On the 7th day of May, 1924, the appeal was allowed and the order of the trustee set aside with costs. (4 C. B. R. 647).

Against this decision an appeal was taken by the trustee to the Court of Appeal in Bankruptcy for this Province and on the 14th day of July, 1924, the appeal was dismissed with costs. (5 C. B. R. 103).

Afterwards the trustee applied to the Supreme Court of Canada for leave to appeal against the decision of the Appeal Court here, but leave was refused. (5 C. B. R. 105).

The trustees' account contains no charges for costs except in respect of the first appeal.

On this application the trustee produced his statement of receipts and disbursements and a dividend sheet showing that a first, and what purported to be a final dividend of approximately 7½ cents on the dollar had been paid to the creditors. It appeared, however, by the oral statement of the trustees' agent at the close of the hearing that this dividend had not then in fact been paid.

The Royal Bank of Canada on the 16th day of January, 1925, gave notice of opposition to the application of the trustee on the following grounds:

1. That the sum of $165.11 was improperly paid to J. Stanley Wedlock as a witness on the appeal of The Royal Bank of Canada from the order of the trustee in Bankruptcy disallowing its claim.

That the sum of $300 was improperly paid to G. Jardine as witness fees and expenses in the same case.

3. That the sum of $175.20 was improperly paid W. E. Bentley, solicitor for trustee.

4. That those amounts are not properly payable under the Bankruptcy Act.

5. That the Trustee's charge for commission, viz., the sum of $1471.07 being 5 per cent on the total estate, is excessive in view of separate charges being made for services which should be included under the allowance for Commission.

The total cost of administration of this estate is such as to challenge the attention of the Court.

The title to the real estate appears from the bankrupt's statement of affairs to have stood in the name of The Eastern Trust Company (the trustee) at the time of the bankruptcy and to have been subject to a large encumbrance.

It apepars in the trustee's account as a "receipt" for $16,700 though from what the accounts disclose it may have realized little (if anything) above the encumbrance.

The trustee's commission on this item at 5 per cent amounts to $835 as if the whole price were a "cash receipt." The personal property realized $12,721.38, of which the greater part was disposed of by tender.

The costs of administration total approximately $4500 of which $1489.74 is charged for legal expenses and $1471.07 for trustee's commission, leaving only 7½ cents on the dollar for creditors. If proof is needed to show the necessity for strict supervision over the cost of administering bankrupt estates this case supplies it.

The first question I have to decide is the extent of the Judge's power to supervise the administration and rectify errors in the circumstances which this case discloses.

Sub-section (4) of s. 40 of the Canadian Bankruptcy Act provides: "The disbursements of a trustee shall in all cases be taxed by the prescribed authority unless such taxation is waived either by creditors at a general meeting called prior to the declaration of the final dividend or by the inspectors."

The "prescribed authority" in this Province is the Registrar of the Court.

There was no waiver of taxation by a general meeting of creditors nor was there any express waiver shown to have been made by the Inspectors acting as a Board.

The notice of this application sent out to the creditors was accompanied by a "final statement of affairs" bearing the following subscription: "Examined and approved by Inspectors of above estate," and purporting to be signed by four inspectors.

The statement put in evidence subscribed with the above signature does not contain the words "examined and approved by inspectors" but instead thereof the letters "O. K."

The variance might be material and would require to be explained if any weight were to be placed upon it as an implied waiver of taxation and disbursements.

In the view I take of the matter however, the certificate of the Inspectors in either form would not effect a waiver. It would require at least to be shown that the Inspectors by resolution passed at an Inspectors' meeting had waived the taxation of the trustees' disbursements. They can in such a case only function as a body. The certificate therefore has no effect unless to inform the proper taxing officer that individually the subscribing inspectors had no objections to offer to the account. The subsequent submission of the account of disbursements to the Registrar for taxation clearly negatives any intention to waive taxation.

The accounts of disbursements presented to me show a certificate of taxation by the Registrar.

If this were an ordinary case and the Registrar had gone into the accounts item by item and had examined them critically I would hesitate to interfere with his decision, but upon reference to the Registrar as to what action he took in regard to the accounts he has reported to me that he treated the certificate of the inspectors attached to the accounts as an implied waiver of taxation of the disbursements and considered that he had no jurisdiction to question the same or any of them, that his taxation was intended only to fix the amount to be reserved by the trustee to close the estate.

It thus happens that the accounts of disbursements have not been sanctioned by any of the competent authorities nor subjected to that thorough scrutiny which the law contemplates.

The next question to be decided is: Has the objecting creditor shown sufficient grounds for re-opening the taxation?

The first three items objected to relate to one subject—the costs of opposing the first appeal against the order of the trustee disallowing the claim of The Royal Bank of Canada. viz.,

1. J. S. Wedlock, witness $165.11.
2. G. Jardine, witness expenses $300.
3. W. E. Bentley, Solicitor for Trustee, $175.20.

(This last is part of a larger item charged for solicitor's costs).

J. S. Wedlock was the managing director of the bankrupt company and owner of practically all its stock. He was examined on behalf of the trustee on the appeal against the said disallowance but it was not shown on this application how the charge was made up nor that it was a necessary expenditure, in whole or in part.

Mr. G. Jardine was one of the inspectors of the estate. At the hearing he was examined as a witness on behalf of The Royal Bank of Canada. There is nothing before me to show why this or any amount should have been paid to him out of the estate.

The third item $175.20, costs of the solicitor of the trustee gives rise to a question which also involves the two former items, viz:—Was the trustee authorized to engage in this litigation? What should he have done when the question of disallowance arose upon the claim of The Royal Bank of Canada?

Sec. 53 of "The Bankruptcy Act" provides:—

(1) "The trustee shall examine every proof and the grounds of the debt and may require further evidence in support of it. If he considers the claimant is not entitled to rank on the estate or not entitled to rank for the full amount of his claim, or if directed by a resolution passed at any meeting of creditors or inspectors he may disallow the claim in whole or in part."

In practice the trustee may quite prudently act alone in disallowing a claim where it is clearly wrong. If there is doubt or difficulty he should fall back for directions upon a meeting of creditors or inspectors and in cases of special difficulty it is his right to apply to the Court for directions and have his position fortified in advance by a decision of the Court which will justify his subsequent action taken pursuant to such directions.

The question of disallowing the claim of The Royal Bank was a serious one both in amount and complexity and the trustee before entering the field of litigation would have been well advised to invoke all the protection and assistance which the law provides. The trustee might, however, act without any of those sanctions, as apepars to have been done in this case.

It disallowed the claim. In doing so it acted in a quasi judicial capacity. It was not thereby made responsible for any costs that might arise upon an appeal against its order of disallowance. Rule 118 expressly provides "that the trustee shall in no case be personally liable for costs in relation to an appeal from his decision repealing or disallowing any proof wholly or in part."

The trustee has no liability for costs in such case but it does not follow that of his own motion he may engage in a contest over the validity of his decision and take what funds he pleases out of the bankrupt estate to support such litigation.

The trustee unless specially authorized as hereinafter mentioned should have taken no part in the appeal beyond submitting rights to the protection of the Court, as was done in Re Cassidy 2 C. B. R. 459.

Sec. 20 of the Canada Bankruptcy Act defines in clear terms the powers and duties of the trustee as to engaging in litigation or employing a solicitor. It provides: Sub sec. (1) "The Trusteee may **with the permission in writing** of the inspectors ...." (c) "bring, institute or defend any action or other legal proceeding relating to the property of the debtor."

"(d) Employ a solicitor or other agent to take any proceedings or do any business which may be sanctioned by the inspectors" and by

Sub Sec. 2: "The Permission given for the purposes of this section shall not be a general permission to do all or any of the above mentioned things but shall only be a permission to do the particular thing or things or class of thing or things which the written permission specifies."

Now in the present case there is no evidence that the inspectors had sanctioned the proceedings taken by the trustee in defending against the appeal of The Royal Bank of Canada, nor that the trustee had the permission in writing of the inspectors to employ a solicitor for that purpose nor for any purpose.

In the case In Re Geiger reported (1915) 1 K. B. C. A. at p. 456 Swinfen Eady, L. J., dealing with equivalent legislation under the English Bankruptcy Act said: "In my opinion the absence of the necesssary permission to employ a solicitor is not a mere formal defect or irregularity but a matter of substance and of great importance. It is a material check and safeguard against costs being unnecessarily or improperly incurred. In my opinion it would be most inexpedient to introduce or sanction any laxity of practice in bankruptcy, or gloss over irregularities and condone them as merely "formal defects." This would be to abolish the safeguards which the Acts and Rules founded on long bankruptcy experience have set up to promote speedy and economical administration in bankruptcy."

In that case the application was by the bankrupt who after the conclusion of the bankruptcy proceedings and the payment of all costs had applied to re-open the taxation. In my view the same principles apply on the present application.

Lord Justice Swinfen Eady continued: "It is clear that neither the payment to the solicitors nor the audit of the trustees' accounts nor the annulment of the bankruptcy prevents this Court from having full jurisdiction to deal with the matter on the present application."

The latter case of In Re Yeatman reported (1916) 1 K. B. C. A. 780 is to the like effect. There the employment by the trustee of a solicitor had been duly sanctioned to transact several distinct matters of business,.... In each case limiting the costs. The solicitor made out one bill of costs without distinguishing the separate matters, in some instances exceeding the amount limited and in others falling below it, but the total amount allowed on taxation was slightly below the total of the separate amounts authorized. The costs were paid. Subsequently an application was made to re-open the taxation on the ground that the taxation had not been in accordance with the Act—that if it had been the amount would have been decreased. The Court of appeal ordered the re-opening of the taxation.

Phillmore L. J. said: "The trustee cannot of his own motion charge the estate of the bankrupt with the costs of the solicitor.. (He the trustee) has to get the sanction of the committee of inspection.....**before** he can properly employ any solicitor as the cases have very clearly decided and the penalty for employing a solicitor for which he has not authority is exacted by disallowing the costs upon the taxation."

"The objection raised by Mr. Y. is that the law has been infringed and that charges have been made which the law has prohibited. A prima facie case of infringement of the limits imposed by the Statute has been made out."

"The Court ought almost to take judicial notice of (the infraction of the Act) without any application being made to it by any party." And Lord Justice Warrington said: "It is in my opinion of the utmost importance that these provisions intended as they are to maintain an effective control over the legal expenses incurred shall be strictly observed, and I think it is a matter for regret that a solicitor should have been allowed to carry in a bill in such a form that what has happened here may readily occur."

In Re Bryant, Issard & Co., reported 4 C.B.R. 41, Fisher J. held that solicitors employed by the Bankruptcy Trustee are under a legal duty to see that the trustee has been properly authorized by the inspectors in writing to engage them, and in the case of any specific litigation that a specific authorization thereof by the inspectors is produced in conformity with Sec. 20 of the Canada Bankruptcy Act.

For the above reasons I find that the trustee had no authority to pay any one of the first three items nor any part thereof out of the funds of the Bankrupt estate.

The fourth ground of the objection is general and requires no comment.

On the fifth ground, viz., that the charge of $1471.07 being 5 per cent on the total estate is excessive in view of separate charges being made for services which should be included under the allowance for commission exception was taken to two items specifically:

Interim Receiver's fee, $100 and W. H. V. Dunbar's services before Creditors' meeting, $140.

This trustee was appointed Interim Receiver on the 27th day of July A. D. 1923 and on the 8th day of August following was appointed Receiver. When the creditors' meeting was held on the 22nd day of August, 1923, it was resolved "that the trustee be allowed a commission of 5 per cent of all cash receipts, plus expenses, **in the matter of the estate.**" The vote clearly in its terms covered the services of the trustee in both capacities.

This extra charge of $100 cannot therefore be allowed.

As to the charge of $140, no question arose upon the competency of Mr. Dunbar nor the value of his services, but solely whether the services were of such a kind that they should be paid out of the trustee's commission.

Section 40 sub sec. 3 of the Act provides that "the remuneration of the trustee **for all services** shall not under any circumstances exceed 5 per cent of the **cash receipts.**"

In the Quebec case, Re Driebund reported 3 C. B. R. 499, it was held by Panneton J. that the trustee could not be allowed for stenographers services nor for accounting services but he was allowed a disbursement for stock taking.

He is not allowed for an audit except in special circumstances. The evidence on this item given before me does not satisfy me that this charge is not included in the trustee's commission. Before coming to a final decision it is necessary that the other items of the account should be considered on a general taxation.

It has been made clear that charges have been made which the law has prohibited and that a case is made out for enquiry. A rectification of the accounts on a consideration of all the charges for disbursements can only be effected by re-opening the taxation generally.

The statement of disbursements filed by the trustee herein is referred to the Registrar of this Court for general taxation, eliminating first from the charges the several items which are hereby expressly disallowed.

In order to determine the amount of commission (if any) to which the trustee is entitled on the bankrupt's real property it will be necessary for the trustee to file with the Registrar forthwith an affidavit setting forth the description of the real property, the estate or interest which the bankrupt had therein at the time of the bankruptcy, the nature and amount of the encumbrance thereon, the gross amount realized on the sale and what disposition thereof was made.

Meantime further consideration is adjourned with leave to apply.

BRINGING UP FATHER— —By GEORGE McMANUS