[HIGH COURT OF AUSTRALIA.]

BEAR . . . . . APPELLANT;

AND

THE OFFICIAL RECEIVER AND ANOTHER . RESPONDENTS.

H. C. OF A. 1941.

SYDNEY, *Nov.* 26; *Dec.* 9.

Rich, Starke, McTiernan and Williams JJ.

Bankruptcy—Composition or scheme of arrangement under Part XI.—Summary order for sequestration—Annulment of scheme—Rejection of scheme—Parties—Notice to debtor—Validity of confirmatory resolution—Interval between meetings—"Not less than seven days"—Bankruptcy Act 1924-1933 (*No.* 37 *of* 1924—*No.* 66 *of* 1933), *secs.* 52 (*l*), 161—*Acts Interpretation Act* 1901-1941 (*No.* 2 *of* 1901—*No.* 7 *of* 1941), *sec.* 36 (1).

The power of the Court of Bankruptcy to make a summary order for sequestration under sec. 161 of the *Bankruptcy Act* 1924-1933 may be exercised where a composition or scheme of arrangement is rejected as well as where it is annulled, but only on the application of one of the persons mentioned in sub-sec. *h* of that section, and not by the court of its own motion. Where the applicant is other than the debtor, notice of the application must, except in special circumstances, be given to the debtor.

So *held* by *Rich, Starke* and *Williams* JJ., *McTiernan* J. holding that a summary order may be made only when a composition or scheme is annulled, and that rejection is ground only for a petition as being an act of bankruptcy under sec. 52 (*l*).

Held, further, by *Rich* and *Williams* JJ., that the making of a summary order for sequestration under sec. 161 is conditional upon the existence of a composition or scheme binding upon the creditors; a summary order cannot, therefore, be made when an insufficient interval elapsed between the meeting at which the composition or scheme was accepted and the meeting at which the confirmatory resolution was passed. The period of "not less than seven days" which, under sec. 161 (*b*), must elapse between the meetings is to be reckoned exclusively of the respective days of the meetings.

Decision of the Federal Court of Bankruptcy reversed.

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APPEAL from the Federal Court of Bankruptcy, District of New South Wales and the Australian Capital Territory.

At a meeting of the creditors of Benjamin David Bear, held at Sydney on 24th July 1941, the statement of his affairs showed that his liabilities amounted to the sum of £4,951 8s. 4d. and that his assets consisted of a fully paid-up one pound share in a furniture company. The creditors present or represented at the meeting unanimously agreed by way of an extraordinary resolution to accept the sum of £1,000 together with any moneys held by an accountant, Mr. C. A. Law, as trustee, in full satisfaction and discharge of all Bear's liabilities as at 24th July 1941, such sum, after payment of the trustee's proper costs, charges, expenses and commission, to be divided between the creditors *pro rata* according to the amount of their proved debts. At a meeting held on 31st July 1941, the creditors purported to confirm this extraordinary resolution.

On the same day James Wilson, one of the creditors, who was neither present nor represented at the meeting held on 24th July, filed a notice of motion in the Court of Bankruptcy for the consideration by the court of the composition or scheme of arrangement. An affidavit by Wilson's solicitor in support of the application was replied to by affidavits made by Bear and the trustee.

At the hearing of the application during the morning of 21st August 1941, Judge *Lukin* rejected the composition or scheme of arrangement on the ground that its terms were not reasonable and were not calculated to benefit the general body of creditors, and upon the matter being "brought on by the court again" during the afternoon of that day his Honour ordered that a sequestration order be made against Bear.

Bear appealed to the High Court against these orders.

Further facts and the relevant statutory provisions appear in the judgments hereunder.

Moverley, for the appellant. The appellant was not a party to the proceedings before the Judge in Bankruptcy. In the circumstances, a petition not having been filed, the judge had no power, either under sec. 161 (*i*) or any other provision of the *Bankruptcy Act* 1924-1933, to make a sequestration order against the appellant. Sub-sec. *h* of sec. 161 is available only to the persons specified therein and refers to a composition or scheme which has taken effect as a bankruptcy proceeding. Annulment and rejection are not synonymous terms. Here the composition or scheme was rejected, and therefore did not have any effect as a bankruptcy proceeding. The rejection merely created an act of bankruptcy which was available for

seven days, and only to any of the persons specified in sub-sec. *h* of sec. 161. The sequestration order against the appellant was not made upon the application of any of the persons specified in that sub-section. There were not any exceptional circumstances in favour of the making of the order (*In re Flew*; *Ex parte Flew* (1)), but the facts that the appellant was not present and had not been notified are substantial reasons why the order, affecting as it does his status, should not have been made. Statutory provisions in terms similar to sub-sec. *h* of sec. 161 were discussed in *Ex parte James*; *In re Condon* (2). That sub-section has particular reference to an operative scheme of bankruptcy, and the mere fact that someone has propounded a scheme which is not binding on anyone until it receives the approbation of the court does not where the court has rejected it give the court power to make a sequestration order forthwith and without notice (*Wadsworth* v. *Pickles* (3); *Forbes & Son* v. *Cantlon* (4)). The requirement of sub-sec. *b* of sec. 161 as to the number of days which must elapse between the meeting at which the scheme was accepted and the subsequent meeting to confirm the acceptance was not complied with; therefore there never was an effective scheme. The creditors may have desired that a sequestration order should not be made against the appellant. Such a desire would not be contrary to public policy.

Lloyd, for the respondents. As soon as a debtor calls a meeting of his creditors he becomes subservient to the provisions of the *Bankruptcy Act*. Unless the scheme put forward be approved, or disapproved, that meeting constitutes an act of bankruptcy. By reason of the notification in the Government *Gazette*, and having sworn an affidavit for the purposes thereof, the appellant must be taken to have had notice or knowledge of the proceedings. The person concerned in *R.* v. *North*; *Ex parte Oakey* (5) was not notified at all. The Act obviously contemplates and provides for the Court of Bankruptcy making a sequestration order on a rejection of a composition or scheme. Sub-secs. *h* and *i* of sec. 161 should be read together. So read they show that in order to make effective the rejection of a composition or scheme a sequestration order must be made within seven days; there is not any prohibition against that order being made forthwith. This can be done by the judge of his own motion and based entirely on the rejection (*In re Charlton*; *Ex parte Charlton* (6)). The summary action taken by the judge

(1) (1905) 1 K.B. 278, at p. 285.
(2) (1874) 9 Ch. App. 609, at p. 615.
(3) (1880) 5 Q.B.D. 470, at pp. 471 et seq.
(4) (1916) S.A.L.R. 103.
(5) (1927) 1 K.B. 491.
(6) (1877) 6 Ch. D. 45, at pp. 53-56.

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was not, in the circumstances, a denial of natural justice. The decision in *In re Flew*; *Ex parte Flew* (1) establishes a principle which is not applicable here, because it would be quite unworkable if the provisions of sub-secs. *f* and *h* of sec. 161 are to be of any effect.

Moverley, in reply, referred to *Ex parte Marland*; *In re Ashton* (2).

Cur. adv. vult.

Dec. 9.

The following written judgments were delivered :—

RICH J. This is an appeal from an order of the Judge in Bankruptcy rejecting a scheme of arrangement and making a sequestration order against the debtor (the appellant).

On 24th July 1941—the date of the first meeting of the debtor's creditors—the statement of his affairs showed that his liabilities totalled £4,951 8s. 4d. and his assets one share in the Australian Wholesale Furniture Distributors Pty. Ltd. of the nominal value of one pound. The creditors present or represented at the meeting resolved to accept the sum of £1,000 in full satisfaction and discharge of all the liabilities of the debtor. This was to be paid to C. A. Law as trustee and applied by him in accordance with the scheme. On 31st July the creditors purported to confirm the resolution passed at the first meeting. It does not appear from the evidence whether the debtor attended the meetings (sec. 160 (*b*) of the *Bankruptcy Act* 1924-1933), and the chairman's certificates are silent on the subject (sec. 161 (*ca*)). The respondent Wilson, a creditor of the debtor, did not assent to the composition, and applied to the court under sec. 161 (*d*) to consider it. It appears from the evidence before us that the practice for obtaining the court's consideration of a composition or scheme was not followed. In the first instance an application should be made to the court to appoint a day to consider the composition. When an appointment has been made notice of it should be given in the *Gazette* and in such other manner, if any, as the court directs (sec. 161 (*d*), rules 354, 355). Apparently the application to the court in this case was made without a previous appointment and without advertisement or notice. No notice on the part of any creditor was filed in opposition to the composition (sec. 161 (*e*)). At the hearing counsel for the trustee under the composition and the solicitor for the respondent Wilson were present. The debtor was neither present nor represented. The respondent's solicitor was willing to consent to the composition, but the learned

(1) (1905) 1 K.B. 278.

(2) (1875) 20 Eq. Cas. 777.

judge would not accept his consent, and rejected the composition under sec. 161 (*f*). At a later stage his Honour reopened the matter and made a sequestration order against the debtor's estate. Counsel for the trustee was present on this occasion and objected that the court had no jurisdiction to make such order. The debtor was not present and the respondent Wilson was not represented. No notice was given either in the filed application to the court to consider the composition of an intention to apply for a sequestration order or in any other manner, and no oral application was made by the registrar, any creditor, or the debtor, for such an order (sec. 161 (*h*)). But as the second meeting was held at an interval of six instead of seven clear days the confirmatory "resolution was bad"—Cf. *In re Railway Sleepers Supply Co.* (1)—and the composition was not binding on the creditors because the resolution was not duly confirmed (sec. 161 (*a*)). At most the proposal was inchoate and did not develop into a potential or operative composition.

The power to make a summary order is expressed in sub-sec. *h* of sec. 161, but sub-secs. *f*, *h* and *i* of this section are sufficiently correlated to enable the court to make such an order whether a composition is rejected under sub-sec. *f* or annulled under sub-sec. *h*. For sub-sec. *i* speaks of a composition being rejected, i.e. under sub-sec. *f*, or annulled, i.e. under sub-sec. *h*, and then states that "the order of rejection or annulment shall not take effect unless a sequestration order is made in pursuance of the last preceding paragraph, or is obtained by or against the debtor within seven days from the date of the order or within such further time as the court allows." But in the absence of a real composition the cardinal condition upon which the power is based was wanting in this case. And the act of bankruptcy committed under sec. 52 (*l*) owing to the resolution not having been duly confirmed cannot be called in aid, as it is not one of the constituent elements in sub-secs. *f* or *h* of sec. 161. In a proper case, however, there is jurisdiction to make a summary order, but the jurisdiction should be invoked on the application of the registrar, creditor or the debtor: Cf. *In re Burr*; *Ex parte Board of Trade* (2), as reported on this point in *Morrell's Bankruptcy Reports* (3). When the application is not made by the debtor himself notice should, as a rule, be given to him. Even under the English bankruptcy practice, when a bankruptcy petition has been filed and a receiving order made an immediate adjudication will only be made in most exceptional circumstances without any notice to the debtor (*In re Flew*; *Ex parte Flew* (4)). But it would not

(1) (1885) 29 Ch. D. 204, at p. 208.
(2) (1892) 2 Q.B. 467.
(3) (1892) 9 Morr. 133, at p. 146.
(4) (1905) 1 K.B., at p. 285.

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be necessary in a case when the debtor had absconded. The power to make a summary order is a discretionary power. It is not based on an act of bankruptcy but on the circumstances of the particular case. The power is conferred on the court in effect to convert the proceedings in the composition into a bankruptcy, and to enforce the rights of the parties to the composition by means of bankruptcy: Cf. *Ex parte Charlton*; *In re Charlton* (1). In that case sec. 126 of the English *Bankruptcy Act* 1869 was under consideration. The section reads: "If it appear to the court on satisfactory evidence, that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may adjudge the debtor a bankrupt, and proceedings may be had accordingly." And *Cotton* L.J. draws the distinction between proceedings under sec. 6 of that Act which must be founded on petition and proceedings under sec. 126, and says: —"But the case is entirely different under sec. 126. As I read that section, any debtor who takes the benefit of it submits himself at once of necessity to the powers given by it to the Court of Bankruptcy. There are two powers which are material. One is that the court shall be able to enforce by motion in a summary way the carrying out of the composition. But it may not be able to do this effectually, and then the section, without requiring any act of bankruptcy (for it is to be noted that the Act of Parliament itself does not require a petition to be filed admitting that the debtor cannot pay his debts), authorizes the judge, if he thinks it necessary in order to do justice between the parties, the debtor and his creditors, to adjudge him a bankrupt, and then 'proceedings may be had accordingly,' that is, all those proceedings which in the ordinary course of a bankruptcy follow an adjudication shall take place, and the man's property shall be dealt with as if he were a bankrupt" (2).

No doubt the Court of Bankruptcy is a court to whose procedure the rule that, as far as possible, mere technicalities should be brushed away, is especially applicable. And the *Bankruptcy Act* ought to be construed as far as possible to give the largest discretion to the Court of Bankruptcy, but where, as in this case, the power of the court is limited by Act of Parliament, the court must, of course, obey the Act (*In re Lord Thurlow*; *Ex parte Official Receiver* (3)). The limitation in the case is to be found in sec. 161, sub-secs. *f* and *h*, where the jurisdiction to make a summary order for sequestration is confined to the cases there specified.

For these reasons I am of opinion that the appeal should be allowed.

(1) (1877) 6 Ch. D., at pp. 54, 55. (2) (1877) 6 Ch. D., at p. 56.
(3) (1895) 1 Q.B. 724, at pp. 728, 729.

STARKE J. Appeal from an order of the Court of Bankruptcy dated 21st August 1941 which rejected a composition or scheme of arrangement made under Part XI. of the *Bankruptcy Act* 1924-1933 and sequestrated the estate of the appellant. The appeal against the rejection of the composition or scheme of arrangement was not pressed, but it was contended that the Court of Bankruptcy had no jurisdiction to make the order for sequestration, or was in error in determining that it was entitled to make the order.

The scheme was rejected pursuant to the authority conferred by sec. 161 (*f*) of the Act, and the sequestration order was made pursuant to the provisions of secs. 52 (*l*), 161 (*h*) and (*i*). By sec. 52 (*l*) of the Act, a debtor commits an act of bankruptcy if a composition or scheme under Part XI. be rejected or annulled. The act of bankruptcy is deemed to have been committed on the date of the order of rejection or annulment, provided that, where a composition or scheme has been rejected or annulled, a sequestration order is made within seven days after the date of the order of rejection or annulment. By sec. 161 (*h*), the court may in certain cases on the application of the registrar, any creditor, or of the debtor, annul the composition or scheme " and may, if it thinks fit, forthwith make a sequestration order in regard to the estate of the debtor, and proceedings may be had accordingly." Then sub-sec. *i* provides :— " If the composition or scheme is rejected or annulled, the order of rejection or annulment shall not take effect unless a sequestration order is made in pursuance of the last preceding paragraph, or is obtained by or against the debtor within seven days from the date of the order or within such further time as the court allows." In the case of the annulment of a composition or scheme of arrangement the court may make an immediate order of sequestration : the words are, " may, if it thinks fit, forthwith make a sequestration order." And notice to the debtor is not necessary to found its jurisdiction.

It is the debtor, it may be observed, who proposes the composition or arrangement, and though a creditor brings it before the court for consideration, still notice of the proceedings must be advertised and the debtor may be heard in favour of it (Act, secs. 157 (1), 161 (*d*) and (*e*)).

In my opinion, the court has a like jurisdiction if a composition or scheme be rejected. The jurisdiction is expressly given in the case of annulment by sec. 161 (*h*), but it is a necessary implication from that section and sec. 161 (*i*) that the like jurisdiction exists in the case of rejection. Neither the order for rejection or annulment is

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to take effect, which I take to mean as an act of bankruptcy, unless a sequestration order is made in pursuance of the last preceding paragraph, *h*, which predicates that such an order may accordingly be made by the court.

Still, in my opinion, the Court of Bankruptcy was not entitled in the circumstances of the present case to make a sequestration order against the appellant. Neither the registrar, a creditor, nor the debtor applied for a sequestration order, and the court acted on its own motion and without any notice whatever to the debtor. Notice to the appellant was not, I agree, necessary to found the jurisdiction of the court if any application had been made to it by any proper party. But I cannot assent to the proposition that the court can act of its own motion and without the intervention of any interested party. No-one assumed any responsibility for the sequestration order: Cf. *In re Arthur Williams & Co.*; *Ex parte Official Receiver* (1). Further, it is contrary to fundamental principles of justice that the subject should be affected in his person or his estate without being heard. And though notice to the appellant to show cause against a sequestration order was not, I think, in this case essential to jurisdiction, still the practice of the court to require notice before a subject is affected by a judicial order in person or in estate is so inveterate that only the most exceptional circumstances can justify the omission of such notice. There were no such circumstances here. The English *Bankruptcy Acts* of 1883 and 1914 are not the same as the Australian Act, but the following authorities are nevertheless in point: *In re Burr*; *Ex parte Board of Trade* (2); *In re Ponsford*; *Ex parte Ponsford* (3); *In re Pinfold*; *Ex parte Pinfold* (4); *In re Flew*; *Ex parte Flew* (5).

It is unnecessary to consider whether the Bankruptcy Court might allow further time for obtaining a sequestration order—Cf. secs. 161 (*l*), 52 (*l*) (ii)—for there is no-one who seeks such an order.

The appeal should be allowed and the order of the Court of Bankruptcy dated 21st August 1941 set aside in so far as it orders as follows:—"And a sequestration order is hereby made against the said Benjamin David Bear and Mr. Arnold Victor Richardson an official receiver of this court is hereby constituted official receiver of the estate of the said Benjamin David Bear of 93 York Street Sydney. And it is further ordered that the applicant's costs of and incidental to the application be taxed and paid out of the estate."

(1) (1913) 2 K.B. 88.
(2) (1892) 2 Q.B. 467; 66 L.T. 553.
(3) (1904) 2 K.B. 704, at p. 707.
(4) (1892) 1 Q.B. 73.
(5) (1905) 1 K.B., at p. 285.

McTIERNAN J. The appellant invoked the provisions of Part XI. of the *Bankruptcy Act* 1924-1933 in order to settle his affairs by a composition with his creditors. The making of a receiving order is not a preliminary step to the operation of this Part or to an adjudication in bankruptcy under the Act. A sequestration order was, without a petition, made in the course of the proceedings that were taken after the appellant resorted to these provisions. The order was consequent upon the rejection of the composition by the court under sec. 161 (*f*). The circumstances in which the order was made need not be repeated. When an order is made rejecting or annulling a composition the debtor is deemed to commit an act of bankruptcy at the date of the order, provided a sequestration order is made within seven days from that date (sec. 52 (*l*) (ii). Par. *f* of sec. 161 does not confer power on the court to make a sequestration order when it rejects a composition. Par. *h* of this section, which gives power to the court to annul a composition, confers a special power on the court to make a sequestration order consequent upon the order of annulment. It says that the court may, if it thinks fit, forthwith make a sequestration order in regard to the estate of the debtor. Under these provisions the court clearly has jurisdiction to make a sequestration order without a petition. The power is expressly limited to the case where the court has made an order of annulment.

Par. *i* of sec. 161 is relied upon as conferring power on the court to make the sequestration in the present case. This paragraph says: "If the composition or scheme is rejected or annulled, the order of rejection or annulment shall not take effect unless a sequestration order is made in pursuance of the last preceding paragraph" (that is, *h*), "or is obtained by or against the debtor within seven days from the date of the order or within such further time as the court allows." This paragraph does not in terms purport to confer power to make a sequestration order at all. It prescribes what is to be done in order to make an order of rejection or an order of annulment effective. The condition that a sequestration order be made pursuant to par. *h* can apply only to an order of annulment. The condition that the sequestration order be obtained by or against the debtor within the time prescribed is the only part of the paragraph which is capable of applying to an order of rejection. This condition may apply as well to an order of annulment where the court has not seen fit to exercise its discretion to make a sequestration order forthwith upon the annulment of the composition. The question then is: When the court makes an order of rejection, how is the order of sequestration to be made which is necessary to make the order of

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rejection effective? In the absence of any special provisions applying to that case the sequestration order is obtainable upon petition: See secs. 52 (*l*), 54, 55, 56.

In my opinion, whether there was a valid composition before the court or not, it had no power, not having made an order annulling the composition, to make a sequestration order except upon the petition of the debtor or of a creditor.

In my opinion the appeal should be allowed.

WILLIAMS J. A meeting of creditors of the appellant, Benjamin David Bear, called pursuant to Part XI. of the *Bankruptcy Act* 1924-1933, was held at Sydney on 24th July 1941, at which an extraordinary resolution was duly passed that the creditors agree to accept the sum of £1,000 together with any moneys held by Mr. C. A. Law as trustee in full satisfaction and discharge of all liabilities of the appellant as at 24th July 1941, such sum, after payment of the trustee's proper costs, charges, expenses and commission, to be divided between the creditors *pro rata* according to the amount of their proved debts. A subsequent meeting of the creditors held on 31st July 1941 purported to confirm this extraordinary resolution. On the last-mentioned date, before the certificates required by sec. 161 (*c*) had been filed, James Wilson, a creditor of the appellant, applied to the court by motion pursuant to sec. 161 (*d*) to appoint a day to consider the composition accepted at the meeting of creditors on 24th July and proposed to be confirmed at a further meeting to be held on 31st July. The application was therefore premature, but the court fixed 21st August 1941 at 10.30 a.m. to consider the composition. Notice of the appointment was presumably advertized in the *Gazette* by the registrar in accordance with sec. 161 (*d*). After the applicant's solicitor Mr. Edgley, Law the proposed trustee, and the appellant had filed affidavits, the motion came on for hearing before the learned judge in bankruptcy at 10.35 a.m. on 21st August. The applicant appeared by his solicitor, and Mr. Law by his counsel Mr. *Taylor*. Sec. 161 (*e*) provides that any creditor may, on filing in court, three days at least before the day appointed, a notice of his intention to oppose the composition or scheme, be heard against it; but the debtor and any creditor may, without notice, be heard in favour of it. The applicant's solicitor at first opposed the composition, although there is no evidence that he filed the necessary notice of opposition. He submitted that the subsequent meeting had not been held at an interval of "not less than seven days" after the first meeting, in breach of sec. 161 (*b*), and that the composition did not provide for the priorities directed by sec. 84. He

subsequently desired to consent to the composition, but the court refused to accept his consent. The court rejected the composition under sec. 161 (*f*) on the ground that it was not reasonable and not calculated to benefit the general body of creditors. At 2.30 p.m. the notice of motion was brought on again by the court, Mr. *Taylor* being present, and an order was made for the sequestration of the appellant's estate.

Sec. 161 (*i*) provides that if the composition or scheme is rejected or annulled, the order of rejection or annulment shall not take effect (i.e., as an act of bankruptcy) unless a sequestration order is made in pursuance of sub-sec. *h* or is obtained by or against the debtor within seven days from the date of the order or within such further time as the court allows. Sec. 161 (*h*) provides that if default is made in payment of any instalment due in pursuance of a composition or scheme, or if it appears to the court that the composition or scheme cannot, in consequence of legal difficulties or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, or that the approval of the court was obtained by fraud, the court may, on the application of the registrar, any creditor or of the debtor, annul the composition or scheme, and may, if it thinks fit, forthwith make a sequestration order in regard to the estate of the debtor, and proceedings may be had accordingly. Although the power to make a sequestration order forthwith is only specifically conferred upon the court where it annuls a composition or scheme of which it has previously approved and which is being carried out, the express reference in sub-sec. *i* not only to the annulment but also to the rejection of a composition or scheme appears to me to be a sufficient indication of the intention of the legislature to confer upon the court the right also to make a sequestration order without a petition being filed where a composition or scheme is rejected prior to its coming into operation. Sec. 52 (*l*) provides that a debtor commits an act of bankruptcy under Part XI. of the Act if at a meeting of creditors under this Part or some adjournment thereof, a resolution accepting a proposal for a composition or scheme be not duly passed or if a resolution accepting a proposal for a composition be not duly confirmed in accordance with sec. 161, or if the composition or scheme be rejected in pursuance of that section; and that an act of bankruptcy shall be deemed to have been committed by the debtor on the day of the first meeting of creditors, and also where the composition or scheme has been rejected on the day of the making of the order of rejection provided—(i) that except where the composition or scheme has been rejected a petition for sequestration is presented against the debtor within two months

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after the date of the first meeting of creditors; and (ii) that where the composition or scheme has been rejected a sequestration order is made against the debtor within seven days after the date of the order of rejection. In the present case, therefore, the appellant committed an act of bankruptcy on 24th July 1941, and also, if there was any valid composition, when it was rejected by the court on 21st August 1941. The only statutory requirement as to notice of the application to the court to consider the composition or scheme is that notice shall be given by advertisement in the *Gazette*, so that where the registrar or any creditor or the debtor applies for a sequestration order under sec. 161 (*i*) the court would have jurisdiction forthwith to make it, but where the applicant is not the debtor the court should only do so, without notice to the debtor, in very exceptional circumstances (*In re Ponsford*; *Ex parte Ponsford* (1); *In re Flew*; *Ex parte Flew* (2))—see also *R.* v. *North*; *Ex parte Oakey* (3).

In the present case it does not appear from the notes of the learned judge or from the sequestration order itself that any application was made to the court by any of the persons mentioned in sec. 161 (*h*), so that the order appears to have been made by the court of its own motion, and I agree, for the reasons given by my brother *Starke*, that a sequestration order so made should be set aside. Even if it was made on the application of the registrar, as the notice of motion did not give notice that such an order would be made if the composition was rejected and there were no special circumstances requiring the making of the order without notice to the appellant, I think the court exercised its discretion wrongly and the order should not be allowed to stand.

I am also of opinion that there was no valid composition for the court to consider and approve or reject, because the requisite period had not elapsed between the two meetings. Where an interval of "not less than" seven days must elapse, there is a sufficient indication of intention to the contrary to exclude sec. 36 (1) of the *Acts Interpretation Act* 1901-1941, so that the period which must elapse between the two meetings under sec. 161 (*b*) must be seven clear days exclusive of the respective days of the meetings (*In re Railway Sleepers Supply Co.* (4); *Ex parte McCance*; *Re Hobbs* (5); *Halsbury's Laws of England*, 2nd ed., vol. 32, pp. 141, 142). The only act of bankruptcy which the appellant had committed, therefore, was the failure to obtain a resolution duly confirming the extraordinary resolution passed on 24th July 1941 which would,

(1) (1904) 2 K.B. 704.
(2) (1905) 1 K.B. 278.
(3) (1927) 1 K.B., at p. 504.
(4) (1885) 29 Ch. D. 204.
(5) (1926) 27 S.R. (N.S.W.) 35; 44 W.N. 43.

under sec. 52 (*l*), be deemed to have been committed by the debtor on that date. This was not an act of bankruptcy which entitled the court to make a summary order for sequestration under sec. 161 (*i*). The sequestration order of 21st August 1941 should therefore be set aside on this ground also.

The appeal should be allowed.

Appeal allowed. Order dated 21st August 1941 set aside in so far as it orders as follows :—" And a sequestration order is hereby made against the said Benjamin David Bear and Mr. Arnold Victor Richardson an official receiver of this court is hereby constituted official receiver of the estate of the said Benjamin David Bear of 93 York Street, Sydney. And it is further ordered that the applicant's costs of and incidental to the application be taxed and paid out of the estate."

Solicitors for the appellant, *Owen Jones, McHutchison & Co.*

Solicitors for the respondents, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth ; *Edgley, Son & Williams.*

J. B.