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## APPOINTING A TRUSTEE: A SECOND CHANCE FOR CREDITORS?

### I. INTRODUCTION

The Bankruptcy Act of 1867<sup>1</sup> was the first bankruptcy legislation that "clearly recognized that insolvent estates are really trusts, and the creditors, as beneficiaries, [are] entitled to choose the trustees."<sup>2</sup> Nonetheless, the creditors' power to appoint a trustee in bankruptcy was not without limitations, for the judge had the power to disapprove of the creditors' choice,<sup>3</sup> to order a new election if he deemed it "needful or expedient,"<sup>4</sup> to fill vacancies in the office of trustee<sup>5</sup> which were "caused by death or otherwise,"<sup>6</sup> and to remove a trustee for failure to file bond "and appoint another in his place."<sup>7</sup>

This act, repealed in 1878,<sup>8</sup> was replaced by a new statute in 1898.<sup>9</sup> Section 44a of the new statute afforded the creditors significantly greater control over the choice of a trustee by permitting them to appoint a trustee "at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee . . . or if there is a vacancy in the office of trustee . . ." <sup>10</sup> This section further provided that, "if the creditors do not appoint a trustee . . . as herein provided, the court shall do so."<sup>11</sup> Thus, under the 1898 act, *whenever* the office of trustee was vacant, the initial right to fill it was with the creditors. Even under this act, however, the creditors' choice for trustee was subject to possible disapproval<sup>12</sup> by the referee or the judge.<sup>13</sup>

Section 44a, as amended in 1938, now reads as follows: "The creditors of a bankrupt . . . shall, at [their] . . . first meeting . . . or *after a vacancy has occurred in the office of trustee . . . appoint a trustee . . .* If the creditors do not appoint a trustee or *if the trustee so appointed fails to qualify as herein provided*, the

1. Bankruptcy Act of 1867, ch. 176, 14 Stat. 517.

2. 2 Collier, Bankruptcy ¶ 44.01[1], at 1633 (14th ed. 1964) [hereinafter cited as Collier]. (Footnote omitted.)

3. Bankruptcy Act § 13, ch. 176, 14 Stat. 522 (1867).

4. *Ibid.*

5. The 1867 act referred to a trustee as an assignee.

6. Bankruptcy Act § 18, ch. 176, 14 Stat. 525 (1867).

7. Bankruptcy Act § 13, ch. 176, 14 Stat. 522 (1867).

8. Act of June 7, 1878, ch. 160, 20 Stat. 99.

9. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544.

10. Bankruptcy Act § 44a, ch. 541, 30 Stat. 557 (1898).

11. *Ibid.*

12. General Order 13, as promulgated in 1898, stipulated that the "appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only." 11 U.S.C. App. (1964).

Although the Order was abrogated in 1939, it was incorporated by implication into § 2a(17) of the 1938 act. 52 Stat. 843 (1938), 11 U.S.C. § 11(17) (1964).

13. The term "judge" does not include the referee, but the term "court" may include both the judge and the referee. Bankruptcy Act § 1(9), 52 Stat. 841 (1938), 11 U.S.C. § 1(9) (1964).

court shall make the appointment."<sup>14</sup> Thus, under the present section, the instances in which the court might appoint a trustee are broadened to include the situation in which the creditors' appointee "fails to qualify"; and the creditors' right to choose a trustee is narrowed, so that this right no longer accrues when "there is a vacancy in the office" but only "after a vacancy has occurred in the office."

The precise scope of the "fails to qualify" phrase, and its interrelation with the vacancy phrase, is uncertain. This uncertainty stems from the fact that section 50b<sup>15</sup> provides that a trustee "shall qualify by entering into bond . . ." while section 45,<sup>16</sup> stipulating that a trustee be "competent,"<sup>17</sup> is entitled "Qualifications of . . . Trustees."<sup>18</sup> The question which arises is whether a trustee "fails to qualify" *within the meaning of section 44a* when the referee, in the exercise of his disapproval authority,<sup>19</sup> holds that the trustee does not satisfy the competency requirement of section 45, or whether the "fails to qualify" phrase is limited to the bond filing requirement of section 50. The answer will determine whether it is the creditors or the referee who has authority to choose a trustee upon the referee's disapproval of the creditors' initial choice.<sup>20</sup>

14. Bankruptcy Act § 44a, 52 Stat. 860 (1938), 11 U.S.C. § 72(a) (1964). (Emphasis added.)

15. Bankruptcy Act § 50b, 52 Stat. 863 (1938), 11 U.S.C. § 78(b) (1964).

16. Bankruptcy Act § 45, 52 Stat. 860 (1938), 11 U.S.C. § 73 (1964).

17. "Competent" within the intent of the act has a very broad meaning, equivalent to qualified . . ." In re Leader Mercantile Co., 36 F.2d 745, 746 (5th Cir.), cert. denied, 281 U.S. 760 (1929). Whether or not a candidate for trustee meets this competency requirement is, in the first instance, left to the referee's discretion. This is implied from § 2a(17) of the act, which provides that the bankruptcy court (this includes the referee, see note 13 supra) has jurisdiction to "approve the appointment of trustees by creditors . . ." 52 Stat. 843 (1938), 11 U.S.C. § 11(17) (1964). "It is submitted that the court's power to approve trustees carries with it, by necessary implication, power to disapprove the appointment of a trustee by creditors, if the court deems him to be incompetent." MacLachlan, *Bankruptcy* § 96, at 84 (1956). "[T]he court . . . is in § 2a(17) given express power of approval or disapproval over the creditors' choice." 2 Collier ¶ 44.06, at 1649. (Footnote omitted.) It should be noted that the referee's approval or disapproval must be a decision of "sound legal discretion." *Ibid.*

18. The title heads are apparently part of the act, since they are included within the quotation marks that constitute the 1938 enactment. 52 Stat. 840 (1938), 11 U.S.C. § 1 (1964).

19. See note 17 supra.

20. This question is of more than academic significance. It is obvious, simply from the great number of cases in which the matter has been litigated, that the creditors deem it of primary importance that their initial choice of trustee ultimately assume the office, even if accomplishing this requires a time-consuming appeal of the referee's disapproval. See, e.g., In the Matter of Eloise Curtis, Inc., 326 F.2d 698 (2d Cir. 1964); *Lines v. Falstaff Brewing Co.*, 233 F.2d 927 (9th Cir.), cert. denied, 352 U.S. 893 (1956); In re Hale Dist. Co., 89 F.2d 1 (2d Cir. 1937); In re DeSoto Crude Oil Purchasing Corp., 35 F. Supp. 1 (W.D. La. 1940). Presumptively, the creditors would be no less anxious to have their second choice of trustee assume the office, upon final disapproval of their first choice, rather than entirely forfeit the choice to the referee. The creditors obviously desire a trustee "in [whom] . . .

Since a trustee is certainly to be chosen either by the creditors or by the referee, the "fails to qualify" phrase—with its appended grant of authority to the referee—is necessarily interrelated with the vacancy phrase—with its appended grant of authority to the creditors. If the "fails to qualify" phrase includes a disapproval situation, then the referee has the power to appoint. But, because the "fails to qualify" phrase and the "vacancy has occurred" phrase are interrelated, it must also be shown that upon disapproval a vacancy has not "occurred." If it were otherwise, then in a disapproval situation the power of appointment would vest in the referee under one phrase and in the creditors under the other phrase, thus creating an apparent inconsistency.

## II. FAILS TO QUALIFY

The view that the scope of "fails to qualify" in section 44a refers exclusively to the situation in which a trustee fails to file bond has its only reasoned foundation in an amicus curiae brief presented to the court in a 1964 case, *In the Matter of Eloise Curtis, Inc.*<sup>21</sup> The brief, authored by W. Randolph Montgomery, stated, in part:

The provision in Section 44a with respect to the failure of the trustee appointed by the creditors "to qualify" clearly relates to the requirement of Section 50b which imposes upon a trustee-elect the duty of qualifying by filing a bond, and to Section 50k which provides that if the trustee "fails to give bond . . . he shall be deemed to have declined his appointment and such failure shall create a vacancy in his office." It is the vacancy thus created that the referee is authorized to fill. The verb "to qualify" in Section 44a is in the transitive and therefore must refer to an affirmative act on the part of the appointee. If it were otherwise and the provision related to lack of qualification under Section 45, the language would have been "if a trustee so appointed is not qualified as herein provided, the court shall make the appointment."<sup>22</sup>

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they could have confidence and [who] . . . would be under creditor supervision as to [his] . . . integrity and efficiency." Brief for New York Credit & Financial Management Ass'n as Amicus Curiae, p. 2, *In the Matter of Eloise Curtis, Inc.*, supra. Such confidence and supervision are, of course, most likely when the trustee is the creditors' choice, whether in the first or the second instance. The question presently under examination, however, is not what the creditors desire, but what the act provides. It shall be seen that the drafters apparently aimed at less creditor control when they revised § 44a in 1938. See text accompanying note 91 infra.

21. 326 F.2d 698 (2d Cir. 1964). The *Eloise Curtis* court never reached the issue here under investigation, because the case was remanded on the ground that it did "not appear that the referee exercised his discretion in the context of the facts . . . . Instead, he enunciated a general principle that an assignee for the benefit of creditors . . . is disqualified, ipso facto, from acting as trustee." *Id.* at 700.

22. Brief for New York Credit & Financial Management Ass'n as Amicus Curiae, p. 7, *In the Matter of Eloise Curtis, Inc.*, 326 F.2d 698 (2d Cir. 1964). Mr. Montgomery was a member of the National Bankruptcy Conference in 1938, and is now Chairman of the Conference.

The designation of "to qualify" as transitive, and the subsequent employment of this designation as the basis for the conclusion that an affirmative act—filing—is referred to by the "qualify" phrase, appears to be the consequence of circular reasoning. It would seem

Remington concurs with Montgomery's statement that "fails to qualify" does not encompass a situation in which the referee disapproves of the creditors' choice. It is Remington's view that "the referee has at no time the right, upon disapproval of the creditors' choice, at once and summarily to appoint a trustee himself."<sup>23</sup> But it is clear that the two writers are not in total agreement, for Remington states that, upon the trustee's failure to give bond within the time prescribed,<sup>24</sup> the creditors, and not the court, are entitled to choose a new trustee.<sup>25</sup> This conclusion undermines the logic of Remington's reasoning. If "fails to qualify" relates neither to section 45 nor to section 50, to what does it relate? Not only does Remington fail to supply an answer, he appears to be unaware of the problem. Indeed, he "supports" his view that in a disapproval situation the referee should call for a new election by referring exclusively to pre-1938 cases.<sup>26</sup> There is no doubt that, prior to 1938, the referee was required

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that whether or not "to qualify" in § 44a is transitive or intransitive depends upon the nature of the word "qualify" as it is used in the section. Specifically, if "qualify" refers only to the issue of "competence" (§ 45), then "fails to qualify" would be intransitive, just as if the section had said "fails to be competent." Conversely, if "qualify" refers only to filing (§ 50), then "fails to qualify" would be transitive, just as if the section had said "fails to qualify himself."

In addition, the grammatical subtlety of his argument suggests that Montgomery's examination of the statutory language was not undertaken objectively, but rather by "fixing [the] . . . meaning, in the first place, and then endeavouring so to *construe* the language as to make it conform to the standard previously set up." *Griswold v. Butler*, 3 Conn. 227, 239 (1820).

Montgomery further contended that § 2a(17) of the act, which provides that the courts of bankruptcy may "appoint trustees when creditors fail so to do," is additional support for his conclusion that "fails to qualify" does not include a disapproval situation. Montgomery stated that "under this provision the jurisdiction of the court does not extend to the appointment of a trustee unless the creditors fail to make the appointment." Brief for New York Credit & Financial Management Ass'n as Amicus Curiae, p. 8, *In the Matter of Eloise Curtis, Inc.*, supra. It must be presumed that Montgomery did not mean to suggest that § 2a(17) is to be interpreted as exhausting the instances in which the referee might choose a trustee; to so interpret the section would render the "fails to qualify" phrase of § 44a utterly without a referent. While it is certainly true that § 2a(17) does not affirmatively provide that the referee may choose his own trustee upon his disapproval of the creditors' choice for the office, it is equally clear that the section may not be used as a basis upon which it can be implied that the referee should be deprived of making such a choice. Thus, § 2b of the act stipulates that "nothing in this section contained shall be construed to deprive [the court] . . . of any power it would possess were certain specific powers not herein enumerated." 52 Stat. 844 (1938), 11 U.S.C. § 11(b) (1964).

23. 2 Remington, *Bankruptcy* §§ 1104-05, at 562 (5th ed. 1956) [hereinafter cited as *Remington*]. (Footnote omitted.)

24. Trustees must enter into bond "within five days after their appointment or within such further time, not to exceed five days, as the court may permit . . ." *Bankruptcy Act* § 50b, 52 Stat. 863 (1938), 11 U.S.C. § 78(b) (1964).

25. 2 Remington § 1114, at 575.

26. *Id.* §§ 1104-05, at 562 n.12.

to submit the choice of another trustee to the creditors once he disapproved of their first choice.<sup>27</sup> Whether the 1938 statute changed this procedure is a different problem, one which obviously cannot be resolved by pre-1938 holdings.<sup>28</sup>

It is noteworthy that one commentator, Asa S. Herzog, himself a referee in bankruptcy, is in complete agreement with the Montgomery conclusion that section 44a refers only to section 50,<sup>29</sup> and, in fact, reached this conclusion prior to the *Eloise Curtis* case. Referee Herzog, like Remington, however, has offered only pre-1938 cases in support of his view, and, in addition, he erroneously states that his conclusion "is the view taken by Remington."<sup>30</sup> Since Remington excluded section 45 from the purview of section 44, it was logical to anticipate that he would find that section 50 was within its purview. This would appear to explain Referee Herzog's erroneous statement regarding Remington's position.

The interpretation proffered by Collier is at odds with that of Remington, Herzog, and Montgomery. Collier interprets the change in section 44a as one altering "the rule under the Act of 1898 that if the referee disapproved the appointment made by creditors, it was his duty . . . that another meeting be held to fill the vacancy . . ."<sup>31</sup> But Collier, like Remington, seems unaware of any ambiguity, and offers no convincing support for his conclusion. Specifically, Collier refers to a Judiciary Committee Analysis<sup>32</sup> to support his contention

27. E.g., *In re Hare*, 119 Fed. 246 (N.D.N.Y. 1902); *In re Lewensohn*, 98 Fed. 576 (S.D.N.Y. 1899).

28. It should not be thought that the pre-1938 opinions that discussed § 44 are of no value in construing the present section. Rather, Remington's references to these early decisions are here criticized because he apparently referred only to the holdings in these cases, and not to the reasoning of the courts. For example, one case that he cited simply stated that "it is only where creditors fail to act that the referee may make the selection," *In re Forestier*, 222 Fed. 537, 539 (N.D. Cal. 1915), but the opinion offered no discussion on this point, no discussion having been necessary prior to 1938. But this "holding" is of no value in interpreting the present § 44a, and, consequently, Remington's reference to it would appear to be unwarranted. If pre-1938 cases are to be looked to as an interpretive aid in construing the present section, it is the reasoning in these cases, as applied to the changes in the act, that must be utilized, and not the holdings.

It is interesting to observe that the appellee in *Eloise Curtis* deemed it significant that "[appellant] . . . and the amicus are relying on the 1898 statute. All the cases cited in [appellant's] . . . brief, in the amicus brief, and in 2 Remington on Bankruptcy §§ 1104-05, pre-date the Chandler Act." Brief for Appellee, p. 44, *In the Matter of Eloise Curtis, Inc.*, 326 F.2d 698 (2d Cir. 1964). At the same time, the appellant thought it worthy of the court's attention that "not a single decided case is cited [by appellee] to support the author's opinion . . ." Brief for Appellant, p. 17, *In the Matter of Eloise Curtis, Inc.*, *supra*.

29. Herzog, *The Election of a Trustee*, 34 Ref. J. 73, 80 (1960). Although Referee Herzog is obviously referring to § 50b in his article (which section is quoted therein), the section is designated as § 55b. *Ibid.* In a subsequent article, the same author stated that "the court may appoint a trustee . . . if the trustee [chosen by creditors] fails to qualify, that is, fails to file his bond . . ." Herzog, *Bankruptcy Law—Modern Trends*, 38 Ref. J. 46 (1964).

30. Herzog, *The Election of a Trustee*, 34 Ref. J. 73, 80 (1960). (Emphasis omitted.)

31. 2 Collier ¶ 44.11, at 1660. (Footnote omitted.)

32. *Id.* ¶ 44.11, at 1661 n.14, citing National Bankruptcy Conference, *Analysis of H.R. 12889*, 74th Cong., 2d Sess. 157 (Comm. Print 1936). The portion of the Analysis relied upon by Collier was authored by Montgomery.

that the change in section 44a "is designed to avoid the expense and delay incident to the calling of another creditors' meeting . . . ." <sup>33</sup> The Analysis unequivocally indicates that avoidance of a second creditors' meeting is the purpose of the change. <sup>34</sup> However, this fact alone "fails to support Collier's interpretation that it was the intention of Congress to change the rule that if the referee disapproved the appointment made by the creditors a new election was to be held." <sup>35</sup> This is so because, under the prior law, a second creditors' meeting was necessary when the trustee failed to file bond as well as when he was disapproved of by the referee. Therefore, to state simply that the purpose of the 1938 change was to avoid a second meeting offers no indication as to which of the two situations was contemplated, or if both were. It should be equally clear, for the same reason, that the Analysis is not authority for the view that "fails to qualify" is restricted to the failure to file bond. Thus, it seems unjustified to state, simply on the strength of the Analysis, that Collier "has obviously confused the [competency] provisions of Section 45 . . . with the [filing] provisions of Section 50 b . . . ." <sup>36</sup>

The confusion among commentators is, in part, attributable to a failure on the part of the drafters to clarify their purpose in amending section 44a. The typical statement of that purpose, appearing in the Analysis, <sup>37</sup> does no more than repeat the words of the statute—the very words which are responsible for the ambiguity.

The starting point of Montgomery's transitive verb argument <sup>38</sup> is a supposition that "qualify" in section 44a refers *either* to section 45 or to section 50, but not to both. <sup>39</sup> If this basic assumption were valid, Montgomery's conclusion would certainly be justified, for there seems to be little doubt that "fails to qualify" encompasses a failure to file. <sup>40</sup> However, by making his basic assumption, he virtually precluded himself from finding that the "fails to qualify"

33. 2 Collier ¶ 44.11, at 1661.

34. See note 37 *infra*.

35. Brief for New York Credit & Financial Ass'n as Amicus Curiae, p. 7, In the Matter of Eloise Curtis, 326 F.2d 698 (2d Cir. 1964). (Italics omitted.)

36. *Ibid.* At least one other commentator relates "qualify" in § 44a to the "qualifications" requirement of § 45, but he, too, is apparently unaware of the alternative interpretation. See MacLachlan, Bankruptcy § 96 (1956).

37. "The section is amended to provide that if a trustee appointed by the creditors fails to qualify, a trustee shall be appointed by the court. Under the present law [the 1893 act], in case of the failure of the trustee to qualify, a new election must be held which results in the expense and delay of calling another meeting of creditors." National Bankruptcy Conference, Analysis of H.R. 12889, *supra* note 32, at 157. The same statement appears in the House Judiciary Committee's Report, H.R. Rep. No. 1409, 75th Cong., 1st Sess. 16 (1937). Equally unenlightening are the explanations appearing in Weinstein, *The Bankruptcy Law of 1938*, at 88-89 (1938), and in Wilde, *The Chandler Act*, 14 Ind. L.J. 93, 113 (1938).

38. See note 22 *supra* and accompanying text.

39. Montgomery contended that, if § 44a were intended to relate to § 45, it would have said not "fails to qualify as herein provided," but, rather, "is not qualified as herein provided." Brief for New York Credit & Financial Management Ass'n as Amicus Curiae, p. 7, In the Matter of Eloise Curtis, Inc., 326 F.2d 698 (2d Cir. 1964).

40. But see text accompanying notes 25 & 26 *supra*.

phrase also encompasses a disapproval situation. One obvious answer is that *both* sections 45 and 50 were contemplated by use of the word "qualify," simply because the clause "as herein provided" of section 44a is without express limitation. As stated in the appellee's brief in *Eloise Curtis*:

If "as herein provided" is not confined to § 44, then "herein" means the entire Act relating to straight bankruptcy—including . . . § 45. If the draftsman and analyst intended that "as herein provided" should mean "as provided in § 50b," it would have been simple to have said so, in the statute or the Analysis or the Report.<sup>41</sup>

It is obvious that, if "qualify" in section 44a referred only to the filing requirement of section 50b, the drafters could easily have avoided any ambiguity by substituting in section 44a the words "fails to give bond" for the words "fails to qualify." Indeed, section 50k states that a vacancy is created in the office of trustee when the "trustee shall fail to give bond as herein provided . . ." <sup>42</sup> It is unlikely that the drafters would have employed different terms in sections 44a and 50k if they had been referring to that single situation.<sup>43</sup>

As a practical matter, a trustee who fails to be approved by the referee usually does not get the opportunity to file bond.<sup>44</sup> This being so, even if "qualify" were taken in its restricted sense (*i.e.*, a synonym for filing), a disapproval situation would in fact constitute a failure to qualify. That is to say, only if the district court reversed the referee's disapproval would the trustee who was rejected actually get the chance to file bond. For this reason, section 44 would require that,

41. Brief for Appellee, p. 44, In the Matter of *Eloise Curtis, Inc.*, 326 F.2d 698 (2d Cir. 1964).

42. Bankruptcy Act § 50k, 52 Stat. 864 (1938), 11 U.S.C. § 78(k) (1964).

43. It should be noted that, if a relation between "qualify" in § 44a and "qualifications" in § 45 (see text accompanying note 18 *supra*) were not intended, it would have been an easy matter to replace the words used in § 44a with either of the alternatives suggested in the text: *i.e.*, replacing "as herein provided" with "as provided in section 50b," or replacing "fails to qualify" with "fails to enter into bond." Alternatively, simply changing the title head of § 45 to "Requirements . . . of Trustees" could have avoided the difficulty.

44. See *In re Kellar*, 192 Fed. 830 (1st Cir. 1912). 11 U.S.C. App. Form 20 (1964) (order approving appointment of trustee), the means by which the referee approves of the creditors' choice for trustee, reads, in part: "It is ordered that the appointment of . . . as trustee be, and it hereby is, approved, and the amount of his bond is fixed at . . . dollars." The form clearly implies that approval is to precede filing, for it is in the approval order that the amount of the bond to be filed is fixed. (Section 50c of the act gives authority to the referee to fix the amount of the trustee's bond. 52 Stat. 863 (1938), 11 U.S.C. § 78(c) (1964).) 11 U.S.C. App. Form 24 (1964) (order approving trustee's bond), by which the referee approves the bond of the trustee, is also a basis for concluding that approval must precede filing.

Of course, the above should not be interpreted as indicating that once the trustee's bond has been approved the referee is powerless to remove him. Section 2a(17) explicitly confers upon the referee the authority to remove a trustee for cause. 52 Stat. 843 (1938), 11 U.S.C. § 11(a)(17) (1964). The distinction between the referee's authority to remove a trustee and to disapprove a trustee-elect must always be recognized. It is clear that in a removal situation the right to choose a new trustee is with the creditors, for a vacancy will then have "occurred" within the meaning of § 44a.



upon the referee's disapproval of the creditors' choice, coupled with a refusal on the part of the creditors to choose another candidate, choice of a trustee should be held in abeyance until the referee's action is ruled upon by the district court.<sup>45</sup> If, on appeal, the trustee is held to be incompetent, and consequently precluded<sup>46</sup> from entering into bond, the referee should choose his own trustee without further consultation with the creditors. Of course, if the referee is overruled by the district court, the trustee originally chosen would be permitted to file bond and discharge the duties of his office.<sup>47</sup>

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45. Although Remington qualified his statement, that the referee may not appoint a trustee upon his disapproval of the creditors' choice, by saying that the referee may not do so "at once and summarily," 2 Remington §§ 1104-05, at 562, it seems clear that Remington employed these restrictive words to indicate his view that the referee should call another creditors' meeting, and not that the choice of a trustee should be held in abeyance. This is so in view of Remington's statement that it is "usually the proper course" for the referee, "on disapproving the creditors' choice, [to] remit the matter back to the creditors to make another choice." *Ibid.*

46. See note 44 *supra*.

47. This interpretation has the benefit of eliminating several procedural difficulties which might otherwise arise. For one, the referee might choose his own trustee immediately after he disapproves the creditors' choice, and the district court might reverse the referee and allow the creditors' original choice to become the trustee. It would then be necessary to transfer to the creditors' choice any of the bankrupt's property of which the referee's choice had already taken charge.

The most obvious criticism of the suggestion that the choice of a trustee be held in abeyance until the referee's discretion is ruled upon is that the entire liquidation process would be halted in the interim between disapproval and the decision on appeal. While this is certainly a valid practical criticism, it is evident that the situation in which the referee's disapproval is overturned creates equal difficulties if the district court reinstates the creditors' initial choice. Some courts would circumvent these difficulties by refusing to reverse a referee's disapproval once the liquidation machinery has been appreciably set into motion by the referee's trustee, on the ground that "a reversal would be an utterly futile proceeding" and that there is "no prejudice . . . which in any way affects the substantial rights of the parties." *Manhattan Shirt Co. v. Tomlinson*, 327 F.2d 449, 453 (9th Cir. 1964). (The "substantial rights" test derives from Fed. R. Civ. P. 61, which stipulates that "the court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.") It would seem that this method circumvents the difficulties at the creditors' expense, for its obvious effect is to prevent the disapproved trustee, chosen by the creditors, from ultimately assuming the office simply because of the time consumed by the appeal, or, more specifically, the liquidation activities that transpired in this time. Since it would appear that the creditors' right to choose a trustee is initially a "substantial" right, *In re Malino*, 118 Fed. 363 (S.D.N.Y. 1902), to permit this right to be usurped on the justification that no substantial right is affected displays a patent contradiction, for surely the substantial character of the right does not diminish with time. (Referee Herzog would agree with this argument, although he offered it to forward his view that a trustee chosen by the referee after a disapproval situation should always be replaced by a trustee chosen by the creditors. Herzog, *Bankruptcy Law—Modern Trends*, 38 Ref. J. 46 (1964)).

Since the entire liquidation machinery is created for the creditors' benefit, it would appear that, if they are willing to submit to a delay in the liquidation process, the courts should

In sum, an investigation of the language of the statute fails to support the contention that "fails to qualify" refers only to a failure to file bond, and not to a disapproval situation. Additionally, there are positive reasons for including the disapproval situation within the meaning of "fails to qualify." These reasons stem from a consideration of the vacancy clause found in section 44a.

### III. AFTER A VACANCY HAS OCCURRED

In enacting the 1938 amendments, Congress declared that "form, substance, and exact phraseology [of the 1898 act have been preserved] wherever possible with a view of retaining the benefits of the interpretative law on the subject . . ." and that "careful attention has been given to . . . arrangement, and phraseology."<sup>48</sup> This statement clearly indicates that the *reasoning*<sup>49</sup> presented in the pre-1938 cases may be of significant value in interpreting the present act. Of course, any pre-1938 case relating to section 44a could not have discussed the qualify clause, as that did not appear until 1938.

*In re Lewensohn*,<sup>50</sup> an 1899 case, presented one of the few comprehensive discussions of section 44a. Most subsequent cases concerning the section simply cited *Lewensohn* with approval, and offered no independent discussion of the statute.<sup>51</sup> The court in *Lewensohn* discussed the contingencies under which the 1898 act provided for an election by creditors, *viz.*, "after a vacancy has occurred" and "where there is a vacancy," and noted that the former "imports that the office was previously filled,"<sup>52</sup> and that, if the second "were not broader than the first, it would be mere surplusage."<sup>53</sup> The court concluded that

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permit them to do so. Indeed, § 39c of the act, which provides that any party aggrieved by a referee's order may subject that order to review, stipulates that, "upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the court upon such terms as will protect the rights of all parties in interest." 52 Stat. 858 (1938), 11 U.S.C. § 67(c) (1964).

In this regard, it should be noted that, if the referee improperly chooses a trustee when the creditors had authority to choose, "the . . . trustee's appointment may not, in any event, be collaterally attacked for failure of the referee to call another election. The exclusive remedy is to petition to review the referee's action." 2 Remington §§ 1104-05, at 563, citing *Scofield v. United States*, 174 Fed. 1 (6th Cir. 1909).

48. House Comm. on the Judiciary, Revision of the National Bankruptcy Act, H.R. Doc. No. 1409, 75th Cong., 1st Sess. 4 (1937).

49. See note 28 *supra*.

50. 98 Fed. 576 (S.D.N.Y. 1899).

51. E.g., *In re Zuky*, 18 F.2d 284, 285 (E.D.N.Y. 1926); *In re Mackellar*, 116 Fed. 547, 548 (M.D. Pa. 1902). Interestingly, these cases, together with *Lewensohn*, were all cited in Brief for New York Credit & Financial Management Ass'n as Amicus Curiae, p. 8, In the Matter of *Eloise Curtis, Inc.*, 326 F.2d 698 (2d Cir. 1964), as well as in 2 Remington §§ 1104-05 n.9, in support of the proposition that under the present § 44a the referee, after disapproving the creditors' choice, may not choose his own trustee. But it is clear that, if *Lewensohn* is not now good authority for this proposition (which is apparently the case, see note 82 *infra* and accompanying text), then cases relying on *Lewensohn* likewise cannot support the proposition.

52. 98 Fed. at 579.

53. *Ibid*.

there is a vacancy" . . . within the second clause of section 44 relating to vacancies, whenever the trustee chosen refuses to accept, or fails to qualify, or is disapproved<sup>54</sup> by the court, *whether the office has been previously filled or not*; and in such cases the court cannot appoint until after opportunity is afforded creditors for a new election, where that is practicable.<sup>55</sup>

In deleting the "if there is a vacancy" clause from section 44a, the 1938 act left creditors the right to choose only (as is here pertinent) at their first meeting or "after a vacancy has occurred." If the creditors' choice of a trustee, made at their first meeting, is disapproved by the referee, and the creditors refuse to make another selection,<sup>56</sup> then the relevant question is whether the office is filled ipso facto with the creditors' choice. If it is, then following *Lewensohn*, once the referee disapproves of this choice, "a vacancy has occurred" within the meaning of the present section,<sup>57</sup> and the creditors should be given the opportunity to choose another trustee. On the other hand, if the creditors' appointment, *per se*, does not fill the office of trustee, then, when the referee disapproves of this appointment, there is nothing in the present section to provide that the creditors may have another chance, and a comparison with the former section, together with an application of *Lewensohn*, indicates that the creditors should not be afforded a second choice.

*Lewensohn* affords no definitive answer to the question of whether the office of trustee is filled ipso facto with the creditors' choice. To say simply, as did *Lewensohn*, that there is a vacancy in the office of trustee upon the referee's disapproval, gives no indication as to whether approval is a condition precedent to filling the office of trustee. That is, even if approval were a condition *subsequent*, upon disapproval, the office would nonetheless be vacant.

*In re Hare*,<sup>58</sup> another early case, took issue with the *Lewensohn* notion that the office of trustee is vacant upon the referee's disapproval. *Hare* stated that, "even if we assume that there is a vacancy in the office of trustee where the

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54. This separate listing of "fails to qualify" and disapproval may not fairly be utilized to argue that the two situations are mutually exclusive under the present section. In view of the context of the court's discussion, with the vacancy terms being central, it is probable that the *Lewensohn* court was concerned solely with emphasizing that "there is a vacancy" after a failure to enter into bond as well as after disapproval, and that it was not concerned with the precise scope of the word "qualify." This is especially so in view of the fact that § 44 of the 1898 act did not contain a "fails to qualify" term; therefore, at that time, it was immaterial whether a disapproval situation included a "fails to qualify" situation. Whatever "fails to qualify" encompassed prior to 1938, the creditors clearly had the right to choose upon the occurrence of such a failure.

55. 98 Fed. at 579. (Emphasis added.) (Footnote added.)

56. The referee could afford the creditors an alternate choice. See *In re Hare*, 119 Fed. 246, 248 (N.D.N.Y. 1902), where the referee, subsequent to disapproving the creditors' first choice for trustee, suggested that they choose again. Only after the creditors declined this suggestion did the referee himself choose a trustee, clearly an improper procedure under the 1898 section. If the creditors acquiesce in the referee's disapproval and choose another trustee of whom the referee approves, there is no problem.

57. See text accompanying note 52 supra.

58. 119 Fed. 246 (N.D.N.Y. 1902).

creditors appoint and the referee disapproves (which this court denies, but see *In re Lewensohn* . . .), the act itself is plain and explicit that the creditors shall make the appointment to fill the vacancy."<sup>59</sup> *Hare's* denial of the *Lewensohn* rationale necessarily indicates that the *Hare* court deemed the office of trustee filled ipso facto with the creditors' choice of a trustee.

If *Hare* were correct, then, at least until 1938, approval was clearly not a condition precedent to filling the office of trustee. Although the basis upon which *Hare* disagreed with *Lewensohn* was not explicitly given, *Hare's* discussion centered upon General Order 13.<sup>60</sup> The *Hare* court reasoned that, since, by virtue of the Order, only the judge, and not the referee, could remove a trustee, the office should not be deemed vacant until the judge upholds the referee's disapproval, thereby effecting a removal.<sup>61</sup> Such reasoning presupposes its own conclusion, namely, that there is a trustee who may be "removed."<sup>62</sup> It is more probable that approval by the referee is a condition precedent to filling the office, and, in the case of disapproval by the referee, approval by the judge is substituted as a distinctly separate and independent condition precedent to filling the office.<sup>63</sup>

The First Circuit Court of Appeals in one case, *In re Kellar*,<sup>64</sup> explicitly rejected *Hare* in favor of *Lewensohn*. The court stated:

We cannot . . . assent to the proposition that a trustee-elect is a trustee in fact, without the approval of the referee or judge, but are of the opinion that until such approval there is still a vacancy in the office of trustee.

. . . . The [referee's] disapproval brings upon the record the failure of a condition precedent that must be met before the office of trustee is filled.<sup>65</sup>

These considerations aside, however, *Hare* certainly cannot now be considered an acceptable refutation of the *Lewensohn* theory as applied under the current act, for General Order 13, the very essence of *Hare*, has since been abrogated. Today, the referee may remove a trustee.<sup>66</sup>

While there are apparently no cases, other than *In re Kellar*, directly involving the question of whether the referee's approval is a condition precedent to filling the office of trustee, there are several indications that this is so.<sup>67</sup> One such

59. *Id.* at 248.

60. See note 12 *supra*.

61. 119 Fed. at 247-48. It is undisputed that the referee's disapproval is subject to review by the district court. Bankruptcy Act § 38, 52 Stat. 857 (1938), 11 U.S.C. § 66 (1964).

62. For the distinction between disapproval and removal, see note 44 *supra*.

63. It should be further observed that to say that the office of trustee is ipso facto filled upon the creditors' choice creates a situation in which it would be impossible for the trustee to decline his appointment—he could only resign. This is indeed an unlikely situation.

64. 192 Fed. 830 (1st Cir. 1912).

65. *Id.* at 832.

66. Bankruptcy Act § 2a(17), 52 Stat. 842 (1938), 11 U.S.C. § 11(a)(17) (1964).

67. One argument that the referee's approval is not now a condition precedent to filling the office of trustee may arise from a comparison of § 2(17) of the 1898 act, which provided that the court should appoint trustees "pursuant to the recommendation of creditors," ch. 541, 30 Stat. 545 (1898), with § 2a(17) of the present act, which states that the court shall

indication derives from an investigation of the filing requirement of section 50b.<sup>68</sup> Since "the power of the referee . . . to approve or disapprove the appointment of trustees by the creditors must be exercised before the trustee [enters into bond] . . ."<sup>69</sup> it necessarily follows that, *if* entering into bond is a condition precedent to filling the office of trustee, then approval is similarly a condition precedent. Collier remarks that, "theoretically, it would seem that the filing of a bond within the time specified is properly to be considered a condition precedent to a trustee's qualification . . ."<sup>70</sup> It is certain that by "qualification" in this context Collier is referring to filling the office of trustee. If it were otherwise, and he was referring solely to entering into bond, the statement would be meaningless, for it would suggest that entering into bond is a condition precedent to entering into bond.

Collier is reluctant to assert that filing is a condition precedent to filling the office of trustee because he interprets the case of *Sharfsin v. United States*<sup>71</sup> as indicating otherwise. Collier interprets this case as authority for the proposition that filing "*might* be considered a condition subsequent to be invoked only by the judicial declaration of a vacancy."<sup>72</sup> In the *Sharfsin* case, it appeared that a bankrupt had been charged with fraudulently concealing property of the estate from the trustee. One of the defenses was that, since the trustee had failed to file bond as required by the statute, his office remained vacant until he did file, and, since there was no trustee, there could not have been any concealment from a trustee. The court rejected this defense, stating:

Although the trustee did not give bond, and although the statute provides that the office shall be vacant upon his failure to do so . . . he nevertheless remained the de facto trustee, . . . entitled to enforce all the rights of a trustee . . . These rights . . . could only be ended by the judicial declaration of a vacancy.<sup>73</sup>

It would appear that the *Sharfsin* case misapplied the doctrine of de facto

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"approve the appointment of trustees by creditors," 52 Stat. 842 (1938), 11 U.S.C. § 11(a)(17) (1964). The change, it is arguable, suggests that the creditors' function has been altered from one of nominating, which does not fill the office, to one of appointing, which does. However, § 378(2) of the present act states that "the trustee nominated by creditors . . . shall be appointed by the court . . ." and thus provides the basis for a contrary conclusion. 52 Stat. 913 (1938), 11 U.S.C. § 778(2) (1964).

68. Bankruptcy Act § 50b, 52 Stat. 863 (1938), 11 U.S.C. § 78(b) (1964); see text accompanying note 15 *supra*.

69. *In re Judith Gap Commercial Co.*, 298 Fed. 89, 90 (9th Cir. 1924). It is certain that this statement may not be interpreted as imposing a one-way restriction (i.e., that the approval must precede filing but the filing need not be subsequent to approval and may be effected without approval), because the court went on to say that "approval must be presumed from the fact that the trustee was permitted to qualify . . ." *Ibid.* (It is evident that the word "qualify" in this context must mean "file," or the court's statement would be meaningless; it would be saying that approval is to be presumed from approval.) For the form used in approving the trustee, see note 44 *supra*.

70. 2 Collier ¶ 50.12, at 1852.

71. 265 Fed. 916 (4th Cir. 1920).

72. 2 Collier ¶ 50.12, at 1852. (Emphasis added.)

73. 265 Fed. at 918.

officers.<sup>74</sup> Whether this be so or not, however, the case does not, as Collier intimated, necessarily stand for the proposition that filing is a condition subsequent to qualification. To say, as did *Sharfsin*, that one remains a de facto trustee even though the time for filing has elapsed without his having filed, is not necessarily to say either that he was a de jure trustee prior to this time, or that the office was filled for all purposes. *Sharfsin* did not concern itself with the question of whether, upon the continued failure of the de facto trustee to file bond, a vacancy would occur in the office, or whether the court, in retrospect, would disregard the de facto fiction and deem the office to have always been vacant.<sup>75</sup>

Because *Sharfsin* involved a criminal indictment, it is possible that the court's interpretation of section 50k was motivated by a desire to avoid the alternative of allowing the bankrupt's misbehavior to go unpunished. Collier suggested as much when he indicated that *Sharfsin* is "perhaps reconcilable on a practical basis"<sup>76</sup> with the case of *Block v. United States*,<sup>77</sup> though the two are unquestionably "at doctrinal variance."<sup>78</sup> In *Block*, the criminal indictment was identical with the one in *Sharfsin*—concealment of goods from a trustee. The defendant pleaded the statute of limitations as a defense, but was unsuccessful because the court measured the statutory period not, as defendant urged, from the time of the trustee's appointment, but, rather, from the time that the trustee filed bond. In so doing, the *Block* court stated that "there can be no concealment from a trustee until there is a trustee to conceal from."<sup>79</sup> Thus, the *Block* court relied on the very theory unsuccessfully advanced by the defendant in the *Sharfsin* case. Since the *Block* court obviously considered the office of trustee vacant until the filing of bond,<sup>80</sup> it certainly would have deemed approval a condition precedent to filling the office of trustee.

It is to be noted that the act of concealment in *Block* could have been treated as a continuing offense,<sup>81</sup> and thus the present problem eliminated in that case. However, the *Sharfsin* court could not have found the defendant guilty except,

74. See Note, 7 Va. L. Rev. 218 (1920). Contra, e.g., In re Rury, 2 F.2d 331 (9th Cir. 1924).

75. In addition, even if *Sharfsin* is interpreted as indicating that the office of trustee is filled prior to the time for filing, this in no way indicates that the office is filled prior to the referee's approval. Yet, it is this latter fact which would have to be shown to support the position that the present § 44a is intended to afford creditors a second chance to choose a trustee subsequent to the referee's disapproval of their first choice, for only then would a vacancy "occur" upon disapproval.

76. 2 Collier ¶50.12, at 1852.

77. 9 F.2d 618 (2d Cir. 1925).

78. 2 Collier ¶ 50.12, at 1852.

79. 9 F.2d at 619.

80. "[I]t is not merely the appointment or election, but acceptance and giving of bond, which are required to create a trustee." *Ibid.* This holding in *Block* is cited with approval in *Spiechowicz v. United States*, 16 F.2d 1001 (6th Cir. 1927).

81. See *Kaufman v. United States*, 212 Fed. 613, 618 (2d Cir. 1914); *Johnson v. United States*, 163 Fed. 30, 33 (1st Cir. 1908). But see *United States v. Trotter*, 8 F. Supp. 275, 276 (S.D. Ala. 1934).

as it did, by adopting the de facto theory. It is suggested that this consideration renders *Block* the better reasoned interpretation of the Bankruptcy Act.

In sum, although *Block* and *Sharfsin* offer disparate views as to whether the office of trustee is filled prior to the time for filing bond, it seems safe to say that the better view is that the office remains vacant *at least* until the referee approves of the creditors' choice. *Block* directly supports this contention; *Sharfsin* in no way denies it. This being so, a contemporary application of *Lewensohn* leads to the affirmative conclusion that the referee is free to choose his own trustee when he disapproves the creditors' choice.<sup>82</sup>

#### IV. A COMPARATIVE VIEW

Section 50k states that, upon his failure to enter into bond, a trustee shall "be deemed to have declined his appointment," and this shall "create a vacancy in his office."<sup>83</sup> These two phrases are patently inconsistent.<sup>84</sup> The first, of itself, indicates that the office of trustee is not filled until bond is filed, because one cannot decline an appointment to an office that he already occupies. But the second phrase, taken alone, supports the opposite contention, *viz.*, that the office is filled before the time for filing occurs, because a vacancy cannot be "created" if it already exists. Amidst these superficial contradictions, however, one thing seems clear: Nothing in the language of section 50k supports the *Sharfsin* view that a "judicial declaration of a vacancy" is a requisite to the office becoming vacant. Indeed, the use of the words "shall create" indicates that, *even if* the office is filled prior to filing, filing would not be a condition subsequent, but, rather, to borrow a term from the law of real property, a "special limitation"<sup>85</sup>—a "vacancy would occur" *automatically* upon the failure to file.<sup>86</sup> Thus, the creditors would have the right to choose another trustee upon their first choice failing to file, because a vacancy would have occurred. But, if this analysis is accepted, "fails to qualify" must mean something other than failure to file, because section 44a explicitly says that the referee may choose when there is a failure to qualify.

A rejection of this analysis leaves the more likely alternative that the office is not filled prior to filing. Then, after a failure to file, the referee under section 44a may choose his own trustee, because "there is a vacancy" in the office, rather than a vacancy having occurred. Under this alternative—that the office is not filled prior to filing—Montgomery's conclusion is in accord *up to this*

82. This is so because a vacancy has not "occurred"—rather, there is a vacancy.

83. Bankruptcy Act § 50k, 52 Stat. 864 (1938), 11 U.S.C. § 78(k) (1964).

84. At least one commentary does not construe the two phrases as being inconsistent, and interprets the section as clearly expressing an intention that the office is vacant until bond is filed. Note, 7 Va. L. Rev. 218, 222-23 (1920).

85. In the context of real property law, the difference between a fee on special limitation and a fee on condition subsequent is that "the former automatically expires by force of the special limitation . . . when the stated contingency occurs, whereas [the latter] . . . continues despite the breach of the specified condition until it is divested . . ." Moynihan, Introduction to the Law of Real Property 36-37 (1962).

86. Remington would agree. See 2 Remington § 1114; text accompanying note 25 *supra*.

*point*,<sup>87</sup> for he too concluded that the referee should choose a trustee in a failure to file situation. But, under this alternative, it is also true that "there is a vacancy" (rather than that a vacancy has "occurred") if the referee disapproves the creditors' choice, and, consequently, the referee should choose a new trustee subsequent to his disapproval. It is this consequence that Montgomery argued against, and it is here that his argument falls. In sum, while Montgomery's analysis may support the view that a failure to qualify *encompasses* a failure to file,<sup>88</sup> it does not support the view that a failure to qualify *is* a failure to file.

## V. CONCLUSION

It has been said that the 1898 act had several unforeseen circumstances, "the most serious of [which] . . . were those resulting from the breakdown of the theory of unlimited creditor-control and from the presumption that creditors can be relied on to take proper charge of the management and enforcement of the Act."<sup>89</sup> With this in mind, and in view of the foregoing discussion<sup>90</sup> it seems reasonable to conclude that by amending section 44a in 1938

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87. Montgomery was consistent, therefore, in referring to the trustee prior to the time for filing as a "trustee-elect." See text accompanying note 22 *supra*.

88. From what has been said, it appears likely that the referee may choose his own trustee subsequent to his disapproval of the creditors' choice. If filing is deemed a condition precedent to filling the office, then upon the failure of the creditors' choice to file, no vacancy "occurs" in the office, for it was never filled, and, therefore, the creditors may not choose again. However, § 50k may be invoked to argue against giving the referee the right to appoint in this situation. Specifically, what purpose does § 50k serve, other than to define the failure to file situation as one that creates a vacancy? And of what value would this definition be if it were not related to § 44a and its use of the word "vacancy"? One solution is to interpret the language in § 50k as merely imposing a requirement upon the trustee to file bond and that, if he fails to do so, he will not be permitted to perform the duties of trustee. Then, although a failure to file creates a vacancy, no vacancy will have "occurred" within the meaning of § 44a. But see 2 Remington § 1114.

But it should be noted that the argument has been made that the words "as herein provided" in § 44a encompass both § 45 and § 50. See text accompanying note 41 *supra*.

89. Federal Legislation, 27 Geo. L.J. 194, 196 (1938). This conclusion has ample support. See House Comm. on the Judiciary, 71st Cong., 3d Sess, Donovan Report, (Comm. Print 1931), which was largely responsible for the passage of the 1938 amendatory act.

90. Just prior to the printing of this edition, the District Court for the Eastern District of New York, in *In re 4847 Merrick Road, Inc.*, No. 65 B 830, E.D.N.Y., February 18, 1966, handed down the first decision to interpret the "fails to qualify" phrase since it was added to § 44a in 1938. Printing deadlines rendered it impossible to incorporate Merrick into the text of this comment; hence, this note must suffice.

In Merrick, the referee disapproved the creditors' choice because of his failure to meet the residence requirement of § 45 (a trustee must "reside or have an office in the judicial district within which . . ." he is appointed, Bankruptcy Act § 45, 52 Stat. 860 (1938), 11 U.S.C. § 73 (1964)), and appointed his own choice, which procedure the creditors challenged. The court held that a failure to qualify is equivalent to a failure to file, a decision clearly contrary to the position taken in this comment. The court stated that Remington was of the view that the referee must hold a new election after a disqualification under § 45, and explicitly adopted this view. *In re 4847 Merrick Road, Inc.*, *supra* at 5-6. However, the



Congress decided that . . . creditors were to have only one chance to agree to elect a *qualified* trustee at their *first* meeting. By so dealing with the qualification of the elected trustee, Congress subtracted from the right of the concerted majority of general creditors to control "appointments" of trustees—a right previously unrestricted, regardless of the number of creditors' meetings, regardless of delay and expense, and regardless of the qualifications of the successively elected trustees. . . .

. . . . The Chandler Act legislated more, not less, judicial initiative to avoid fraud, expense, and delay in bankruptcy administration, especially in the earliest stages.<sup>91</sup>

Indeed, such an interpretation is not as harsh on the creditors as it might

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court's position is no stronger than Remington's theory, on which it is based, and Remington's theory is untenable. See text accompanying notes 23-28 *supra*.

Although noting that the title of § 45 uses the word "qualifications," the Merrick court apparently deemed it more significant that the text of that section, "unlike the text of Section 50(b), does not use either the phrase 'shall qualify' or the word 'qualifications.'" In re 4847 Merrick Road, Inc., *supra* at 6-7. (Footnote omitted.) The court failed to realize that the title heads are part of the act, and thus should not be relegated to position of lesser importance than the text. See note 18 *supra*.

Merrick further contended that to limit "qualify" in § 44a to filing accords with the purpose of the 1938 amendment, i.e., to avoid a second creditors' meeting. In re 4847 Merrick Road, Inc., *supra* at 7; see note 37 *supra*. The court reasoned that, when a trustee is disapproved for reasons other than a failure to file bond, such disapproval "will usually occur . . . at the first meeting of creditors, in which event the creditors can be offered another opportunity then and there to elect a trustee without the necessity of calling a subsequent meeting." In re 4847 Merrick Road, Inc., *supra* at 7-S. This statement seems to ignore the possibility, by no means uncommon, that the creditors will contest the referee's disapproval. See note 20 *supra*; note 91 and accompanying text.

The Merrick court further drew attention to the "parallel phraseology" of § 378, 52 Stat. 913 (1938), 11 U.S.C. § 778 (1964) (this section deals with arrangements), and § 50b, see note 24 *supra*. Section 378 provides that, if a trustee "fails to qualify" within five days after notice to him of the entry of an order directing that bankruptcy be proceeded with, "a trustee shall be appointed as provided in section 44 of this Act." The five-day provision of this section, taken in conjunction with the five-day filing provision in § 50b, indicated to the court that "fails to qualify" in § 378 relates only to a failure to file. The court concluded that "there is no reason to accord a different construction to the term 'fails to qualify' when it is used in Section 44(a)." In re 4847 Merrick Road, Inc., No. 65 B 330 *supra* at 9. (Footnote omitted.) The court's first conclusion, that "fails to qualify" in § 378 refers only to a failure to file, would seem to be correct. But the court's contention that there is no reason to construe "fails to qualify" differently in the two sections is questionable. Section 302 of the Arrangements Chapter provides that the straight bankruptcy provisions of the act shall apply to Chapter XI proceedings "insofar as they are not inconsistent with . . ." Chapter XI. 52 Stat. 905 (1938), 11 U.S.C. § 702 (1964). However, the court here is taking the reverse approach, namely, that the Chapter XI usage of "fails to qualify" should be employed to determine its meaning in § 50b.

The major shortcoming of the Merrick decision is the court's failure to discuss the "vacancy" phrase of § 44a, and the interrelation of this phrase with the "qualify" phrase. See pp. 496-502 *infra*. It is submitted that, had the court examined these aspects of the problem, it well might have reached an opposite conclusion.

91. Brief for Appellee, pp. 45, 46, In the Matter of Eloise Curtis, 326 F.2d 698 (2d Cir. 1964).