1941

* April 28, 29, 30.
* June 24.

IN THE MATTER OF THE FARMERS' CREDITORS ARRANGEMENT ACT, 1934, AND AMENDMENTS THERETO

AND

In re JANE McEWEN

AND

THE CHIEF COMMISSIONER AND THE COMMISSIONERS OF THE BOARD OF REVIEW FOR MANITOBA AND OTHERS..... } APPELLANTS;

AND

THE TRUST AND LOAN COMPANY OF CANADA..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Debtor and Creditor—Farmers' Creditors Arrangement Act (Dom.) 1934—Jurisdiction of Board of Review to entertain proposal—Party making proposal under the Act—Whether a "debtor"—Whether respondent is a "secured creditor"—Absence of privity—Grounds against proposal raised by way of certiorari—Jurisdiction of the Court of Appeal—Illegal transfer of property in order to bring it within reach of machinery of the Act—Abuse of statutory procedure—Certiorari—Applicability to Board of Review—Board's confirmation of proposal quashed—Devisee of mortgaged land obtaining title after May, 1935—Effect of section 19 of the Act—When a debt is "incurred" in the sense of that section—Whether creditor should not have raised grounds against proposal before County Court—Farmers' Creditors Arrangement Act (Dom.) 1934—Section 2 (2); section 2 (d) as amended by c. 47 of 1938; sections 5, 7, 12 (5) (6) and section 19 as enacted by amending statute of 1938.

In September, 1919, one John McEwen borrowed $4,000 from the respondent and executed a mortgage upon his land in favour of the latter. He died on August 26th, 1934. His will appointed his wife, Jane, executrix and devised all his real and personal estate to her. The will was admitted to probate on August 13th, 1935. At the time of John McE.'s death, the whole of the mortgage debt was owing to the respondent, as well as a large sum for accumulated interest. The respondent, acting under the powers contained in its mortgage, leased the land to Robert J. McE. for terms from November, 1934, to November, 1936, and the widow continued to live on the farm until her death in 1940. In July, 1936, a proposal under the *Farmers' Creditors Arrangement Act, 1934,* was filed by the latter, in her personal capacity and not as executrix, with the Official Receiver, the only debts disclosed being the amount due to the respondent under its mortgage and a sum of $170 for taxes. Actually, Jane McE. had never assumed payment of the mortgage debt or interest, nor had she in any way

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Hudson JJ.

obligated herself to the respondent. At the time of filing her proposal, the certificate of title to the land was held by the widow, not as owner but only as executrix. In October, 1936, she, as personal representative, purported to transfer the land to herself personally for an expressed consideration of $1, and a certificate of title was issued to her; but the estate had not yet been fully administered. Immediately upon receipt of notice of the proposal and again in November, 1936, the respondent advised the Official Receiver that it had no claim against Jane McE. and that she was not entitled to the benefit of the Act; and later, in March, 1937, the respondent's solicitors wrote to the Registrar of the Board of Review asserting lack of jurisdiction on the part of the Board. The Board of Review, in October, 1937, formulated its proposal, reducing the amount of the respondent's mortgage, and confirmed it in October, 1938. The respondent, in October, 1939, on its behalf as well as on behalf of all the creditors of the deceased, brought an action against the widow, both as executrix and in her own right, to have her required to administer the estate, to have the transfer of the land to herself as owner set aside and to have the land sold to discharge the respondent's debt. The Board's proposal was pleaded as a bar to the action, such proposal having allegedly operated to extinguish the liability of the estate. Jane McE. died in March, 1940, and probate of her will was granted to the appellants, Robert J. McE. and Edith McE. who obtained registration of the land in their names as personal representatives. On June 19th, 1940, they transferred the land to themselves in their personal capacities, and, on the same day, they both joined in a transfer to Robert J. McE. who became the registered owner. The respondent, in September, 1940, launched before the Court of Appeal for Manitoba an application for *certiorari* in order to bring the proposal before that Court and have it quashed. The Court of Appeal ordered the issue of the writ and later on made an order declaring the proposal to be beyond the powers of the Board of Review and directing that it be quashed.

Held, Davis J. dissenting, that the judgment of the Court of Appeal ([1941] 1 W.W.R. 129) should be affirmed.

Per the Chief Justice: Upon the admitted facts of this case, the land in question, before the transfer of it to herself in October, 1936, was not the property of Jane McE. in the sense of the *Farmers' Creditors Arrangement Act*. Being beneficially entitled to the residue of her husband's estate, she was entitled to have the land, subject to the rights of the mortgagee, applied in payment of the debts of the estate; and as legal personal representative, it was her duty to see that this was done. As the estate was admittedly insolvent, she had no interest in the land which could lawfully be made available to satisfy her personal debts if she had any. Under such circumstances she could not properly transfer the land to herself. The purpose of such transfer was evidently prompted by the supposition that it might enable her to bring the land and the mortgage debt within reach of the machinery of the Act. With such facts before them, the Board of Review ought to have declined to act on the proposal made by Jane McE. on the ground that they were confronted by a manifest abuse of the statutory procedure; and, if the question had been raised by an application to the Court, it must inevitably have been held that by such devices the creditors of the estate could not

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be deprived of their rights.—Moreover, even assuming that, the title to the farm being vested in Jane McE. in virtue of the certificate of title or of the transfer to her in October, 1936, it was her property in the sense of the *Farmers' Creditors Arrangement Act, 1934,* and that the mortgage debt could be deemed to be her debt for the purposes of the Act, the amendments of 1938 to that Act which, it was contended, brought her into privity of contract with the mortgagee, had no application, for the reason that section 19 of that Act, added thereto by statute of 1935, c. 20, provides that the "Act shall not, without the concurrence of the creditor, apply in the case of any debt incurred after May 1, 1935": the essential condition being that the property affected by the security shall have been the property of the debtor in the sense of the amending statute, consequently, the mortgage debt in this case never became (constructively) the debt of Jane McE. until long after that date.—A "debt" (if it be a mortgage debt) cannot be "incurred" in the sense of section 19 before the property or interest on which it is charged has become the "property" of the debtor within the contemplation of section 2 (*d*) of the statute.

Per Rinfret, Crocket and Hudson JJ.—Under the circumstances of the case, Jane McE. was not entitled to file a proposal under *The Farmers' Creditors Arrangement Act,* for the reasons that she was not the owner of the land and that there was no privity of contract between her and the respondent company. She was in no way the "debtor" of the respondent within the requirements of the Act, even after the introduction of the amendment of 1938 to section 2 (*d*). The only debt appearing in the proposal formulated by the Board of Review was the respondent's mortgage account; that was not her debt, so much so that the respondent could not have sued her for it; it was not a "debt provable in bankruptcy" against her, or against her estate in bankruptcy: the sole object of the procedure being to obtain a reduction on the debt owing to the respondent by the estate. Therefore, under the circumstances of this case, the Board of Review had no jurisdiction to deal with the respondent's mortgage debt and more particularly to reduce the rate of interest on that mortgage; and the Board could not, consistently with the provisions of the Act, deal with Jane McE.'s request, or formulate a proposal, in complete disregard of the position and interest of the respondent.—Also, the provisions of section 2 (*d*) of the Act, as amended by c. 47 of 1938, defining the word "creditor" did not confer any greater jurisdiction upon the Board in the present case; the object of the amended definition has apparently enlarged the class of "creditors", but did not alter the status of the "debtor". —Moreover, section 19 of the Act, above referred to, finds application in this case: "the debt incurred," referred to in that section, is necessarily a debt personally incurred by an applicant and does not concern a debt which, though at present owing by the applicant farmer towards the creditor, had been incurred by a previous debtor (who may not have been a farmer) and at a date prior to the first day of May, 1935, as it is in the present case.—Therefore the proposals formulated by the Board of Review were made without authority and jurisdiction and were invalid. It should also be *held* that the Court of Appeal had power to deal with the matter in controversy in this case on an application for *certiorari* by the respondent; that the preliminary questions raised by the respondent were of such a nature that, in an ordinary case, they would properly give rise to

an inquiry on *certiorari* by a superior court and that, for the purposes of that inquiry, the facts bearing on the question of jurisdiction could be put before that Court by means of affidavits.

Per Davis J. dissenting—In view of all the facts and circumstances of this case, on one hand, the conduct of the respondent throughout has been such as to disentitle it to relief in *certiorari* proceedings and, on the other hand, allowance of the appeal would put the appellants the Board of Review, the Registrar, the executors of Mrs. Jane McE. and her son R. J. McE. to the burden of excessive and unnecessary costs of litigation.—The effect of the lodging by Mrs. Jane McE. with the Official Receiver of a composition, extension or scheme of arrangement, on July 31st, 1936, was to put the subject-matter of the proposal into the exclusive jurisdiction, subject to appeal, of the County Court of Dauphin, which was the judicial district where Mrs. McE. resided and the farm was located; such district being designated by section 5 (1) of *The Farmers' Creditors Arrangement Act*. And the Act moreover gave to the Board of Review a right to work out a proposal which might involve secured creditors, even in the absence of their concurrence. Although the respondent had the right at its own risk to deliberately ignore the proceedings under the Act, on the alleged grounds that Mrs. Jane McE. was not its debtor and that it was not a secured creditor, a very convenient and speedy remedy was available to the respondent when it got notice of Mrs. Jane McE.'s application with the Official Receiver, by moving at once in the County Court to have the proposal set aside upon any of the grounds alleged by the respondent in its present proceeding by way of *certiorari*. The county judge would have certainly entertained any such application and would have dealt with the matter at the time in a speedy and inexpensive manner; and, moreover, a statutory right to appeal from any decision so rendered would have been available to the respondent.

APPEAL, by leave of appeal granted by the Court of Appeal for Manitoba from the judgment of that Court (1), allowing a motion in *certiorari* proceedings to quash an order by the Board of Review for Manitoba under *The Farmers' Creditors Arrangement Act, 1934*, confirming a proposal thereunder.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

H. A. Bergman K.C. for the appellants, the Board of Review and the Registrar.

A. T. Warnock for the appellants R. J. and I. E. McEwen.

W. C. Hamilton K.C. for the respondent.

H. A. Bergman K.C. and *D. W. Mundell* for the Attorney-General of Canada.

(1) [1941] 1 W.W.R. 129; [1941] 2 D.L.R. 54; 22 C.B.R. 183.

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Duff C.J.

THE CHIEF JUSTICE.—Jane McEwen's right to avail herself of the enactments of *The Farmers' Creditors Arrangement Act* as amended in 1938 necessarily rested upon two propositions:

first, that the farm which she as the legal personal representative of her husband had transferred to herself and for which she had procured a certificate of title to be issued to herself personally was her "property" within the meaning of sec. 2 (*d*) of the statute as amended in 1938;

and second, that the respondent company was a "secured creditor" within the meaning of the amending enactments of 1938.

On the admitted facts it is not open to dispute that before the transfer of it to herself in October, 1936, the land was not her property in the sense of the statute. Being beneficially entitled to the residue of her husband's estate, she was of course entitled to have the land, subject to the rights of the mortgagees, applied in payment of the debts of the estate; and as legal personal representative it was her plain duty to see that this was done. As the estate was admittedly insolvent, the assets being insufficient to meet the mortgage debt, she had, of course, no interest in the land which could lawfully be made available to satisfy her personal debts if she had any. She ought to have been advised that in the circumstances she could not properly transfer the land to herself. The purpose of this transfer is plain; it was prompted by the supposition that it might enable her to bring the land and the mortgage debt within reach of the machinery of the Act. With the facts before them, the Board of Review ought to have declined to act on Mrs. McEwen's proposal (of the 31st July, 1936) on the ground that they were confronted by a manifest abuse of the statutory procedure. Had the question been raised by an application to the Court, it must inevitably have been held that by such devices the creditors of the estate could not be deprived of their rights.

This alone would be a sufficient ground for dismissing the appeal; because the Court of Appeal having held that the remedy by *certiorari* is properly applicable, I think with the greatest respect that we are not required, in such a palpable case of abuse of statutory procedure, to hold that their exercise of discretion is vitiated by reason of the grounds relied upon by Mr. Bergman.

This appeal, however, may be considered on the assumption that the title to the farm being vested in Mrs. McEwen in virtue of the certificate of title of the 20th October, 1936, or of the transfer to her of the 14th October, 1936, it was her property in the sense of *The Farmers' Creditors Arrangement Act,* and that it was (from this point of view) sufficient that it should be so at the date when the Board of Review formulated their proposal, in order to give the Board jurisdiction in that behalf. Under the provisions of the amending statute of 1938 the respondent company is to be deemed by construction of law to have been at the date when the proposal was formulated by the Board of Review a secured creditor of Mrs. McEwen and the mortgage debt is deemed to be her debt, for the purposes of the Act.

As Mr. Bergman said in argument, the mortgage debt was, by force of the Act, her debt for the purposes of the Act. It would appear that the amending Statute of 1938 takes effect retrospectively at the date of the formulation of the proposal by the Board (if a proposal has been formulated) otherwise at the filing of the proposal of the debtor. But the essential condition is that the property affected by the security shall have been the property of the debtor in the sense of the amending statute; and consequently the mortgage debt in question here never became (constructively) the debt of Mrs. McEwen until long after the 1st of May, 1935.

Within the intendment of sec. 19 the debt is "incurred" when it is "incurred" by the debtor; the mortgage debt in question was "incurred" in that sense, constructively, by force of the amending Statute (the only sense in which it was ever "incurred"), when that Statute came into force in 1938, and, by relation, at a date not earlier than the date of the certificate of title of the 20th October, 1936, or than that of the transfer of October 14th, 1936.

Debts so constructively "incurred" (in virtue of the amending statute) are in my opinion within the intendment of sec. 19; and, I repeat, such a "debt" (if it be a mortgage debt) cannot be "incurred" in the sense of that section before the property or interest on which it is charged has become the "property" of the debtor within the contemplation of sec. 2 (*d*) of the statute. On this point, as to the application of sec. 19, I respectfully concur with Mr. Justice Trueman.

The appeal should be dismissed with costs.

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Rinfret J.

The judgment of Rinfret, Crocket and Hudson JJ. was delivered by

RINFRET J.—The facts of this case are complicated.

In September, 1919, one John McEwen, then of Dauphin, Manitoba, now deceased, borrowed four thousand dollars ($4,000) from the respondent and executed a mortgage upon his land in favour of the latter. The mortgage provided for repayment instalments of $250 on November 1st in each of the years 1921 to 1923 inclusive, and of the balance on November 1st, 1924, with interest at seven per cent per annum, payable annually.

John McEwen died on August 26th, 1934. Probate of his will was granted to his widow, Jane McEwen, on August 13th, 1935. By the will, the deceased after directing payment of his debts, devised and bequeathed all his real and personal estate to his widow.

At the time of John McEwen's death, the whole of the mortgage debt was owing to the respondent, as well as a large sum for accumulated interest thereon.

The respondent, acting under the powers contained in its mortgage, leased the land to Robert James McEwen for a term from November 7th, 1934, to November 1st, 1935, and for a further term from February 3rd to November 1st, 1936.

On or about July 31st, 1936, Jane McEwen, in her personal capacity, and not as executrix, filed with the Official Receiver of the Dauphin Judicial District a proposal purporting to be made under *The Farmers' Creditors Arrangement Act, 1934*. The only debts disclosed by the proposal were the amount owing to the respondent under its mortgage, there placed at $6,000, and the further sum of $170 payable to the Rural Municipality of Dauphin in respect of taxes.

Actually, Jane McEwen had never assumed payment of the mortgage debt or interest, nor had she in any way obligated herself to the respondent.

At the time of filing her proposal, Jane McEwen was not the owner of the land, although afterwards, on October 20th, 1936, she, as personal representative, purported to transfer the land to herself in her personal capacity for an expressed consideration of $1.

By the proposal, Jane McEwen asked that the respondent's debt be reduced to $2,500, with interest at 6 per cent, spread over a period of fifteen years, and that other accounts be not affected. Outside of the sum due to the municipality of Dauphin for taxes, Jane McEwen apparently was not indebted to any person whomsoever.

By the proposal, she valued the land at $2,500. When applying for probate, she had valued it at $3,000. Afterwards, on August 17th, 1937, she insured the buildings for $4,050.

Immediately upon receipt of notice of the proposal, the respondent advised the Official Receiver that it had no claim against Jane McEwen and that it was not affected by the proposal. On November 28th, 1936, the respondent again wrote the Official Receiver that Jane McEwen was not a debtor and not entitled to the benefit of the Act.

Later, on March 29th, 1937, the respondent's solicitors wrote to the Registrar of the Board of Review, setting forth fully the objections of the respondent and asserting lack of jurisdiction on the part of the Board.

The Board heard the application on March 31st, 1937, and, on October 29th, 1937, purported to formulate a proposal. The respondent's mortgage account was the only obligation attempted to be dealt with. The proposal states that the amount of that debt as of November 1st, 1936, stood at $6,336.65. At the date of the proposal, another year's interest had accrued, so that the actual amount owing at that time would be $6,678.15.

The Board proceeded to direct a reduction to $2,800, with future interest at 6 per cent. The respondent dissented, as appears from a letter from its solicitors to the Registrar, dated November 9th, 1937.

The Board gave no effect to the various protests and objections of the respondent and confirmed the proposal on October 5th, 1938.

The respondent further, on several occasions, advised both Jane McEwen and Robert James McEwen, as well as Mr. A. T. Warnock, the Official Receiver, who was also apparently acting as their solicitor, that it would not be bound by or recognize the proposal. The respondent's attitude was definite and consistent throughout.

On October 10th, 1939, the respondent commenced an administration action in the Court of King's Bench against

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Jane McEwen, both as executrix of her husband's estate and also in her personal capacity. The action was brought on behalf of the respondent itself, as well as on behalf of all the creditors of the deceased. By its statement of claim, the respondent took the position that the debt of the deceased to the respondent was unaffected by the proposal, that the full amount was still owing and that the conveyance of the land to Jane McEwen as a devisee before satisfying the debts of the deceased constituted a breach of her duties as executrix. The respondent asked that the estate be administered, the conveyance set aside and the land sold to discharge the respondent's debt.

The statement of defence delivered by Jane McEwen as executrix urged that the proposal had operated to extinguish the liability of the estate. The respondent, by its reply, after setting up that the estate was not a party to the proceedings before the Board of Review, contended that the Board was without authority to deal with the matter.

It is stated that, at the request of defendant's solicitor, made because of the illness of his client, the litigation was not pressed for the time being.

Jane McEwen died on March 27th, 1940; and, on May 9th, 1940, probate of her will was granted to the appellants, Robert James McEwen and Isabella Edith McEwen. On April 28th, 1940, the respondent's solicitors wrote the solicitor for the appellant estate asking to be advised of the issue of the grant of probate. The necessary information was given by a letter dated June 29th, 1940.

It then appeared that, following the grant of probate of the will of Jane McEwen, the appellants Robert James McEwen and Isabella Edith McEwen had obtained registration of the land in their names, as personal representatives.

On June 19th, 1940, they transferred the land to themselves in their personal capacities; and, on the same day, they both joined in a transfer to Robert James McEwen, who became the registered owner. The respondent then felt compelled to take some step to have the proposal made by the Board of Review declared to be of no effect. For that purpose, on September 17th, 1940, the respondent

issued a notice of motion to be made to the Court of Appeal for Manitoba, in order that the proposal be brought before that Court by way of a writ of *certiorari*, and so that an application to have it quashed might be proceeded with.

The Court of Appeal ordered the issue of the writ, to which a return was made by the appellants, the Chief Commissioner, the Commissioners and the Registrar of the Board of Review for the province of Manitoba.

Following the return, an order declaring the proposal to be beyond the powers of the Board, and directing that it be quashed, was made by the Court of Appeal. That order is now appealed from, leave to appeal having been granted by the Court of Appeal of Manitoba.

Before this Court, the appellant Board of Review and the appellants Robert James McEwen and Isabella Edith McEwen appeared separately; but their grounds of appeal are substantially the same. They contend that the court *a quo* should have refused the motion for a writ of *certiorari* because it had no power to deal with such a matter under the Act and the rules as well as under the procedure set up by the King's Bench Act; that the proposal returned into court pursuant to the writ of *certiorari* constituted the only and entire record before the court on the motion to quash and it was not open to the court to go behind the return and to consider extraneous material; that the majority of the court, in effect, dealt with the case as if it were an appeal from the decision of the Board of Review and failed to keep within the limits of its jurisdiction on *certiorari*; that the application for *certiorari* was, in any event, barred by delay, prejudice and estoppel; that the court erred in holding that Jane McEwen did not properly administer the estate and, therefore, improperly conveyed title to herself, or in holding that, at the date of the filing of the proposal (July 31st, 1936), she was not the owner of the land; and finally that there was error in the holding of the court that the proposal of the Board of Review was a nullity, owing to absence of privity of contract between Jane McEwen and the company, as a consequence of the wrong interpretation of *The Farmers' Creditors Arrangement Act* as amended in 1938.

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The grounds of appeal may, in reality, be grouped under two heads:

(1) The Court of Appeal erred in deciding that Jane McEwen was not entitled to file a proposal under the Act, because she was not the owner of the land, and because there was no privity of contract between her and the respondent company;

(2) The Court of Appeal had no jurisdiction to deal with these matters through a writ of *certiorari;* and it could not, pursuant to that writ, go behind the proposal of the Board of Review, whose jurisdiction, on the only record before the Court, was on its face conclusive.

Dealing first with head no. 1: In order that the Board of Review may have power and jurisdiction to formulate or confirm the proposal it did, on the application of Jane McEwen, it was necessary that she should be a farmer unable to meet her liabilities as they became due, and also that she should be the debtor of the respondent company which, in effect, in the premises, was her only alleged creditor. Otherwise, it stands to reason that the respondent could not be brought in the scheme of arrangement under the Act; and the Board of Review, in formulating its proposal, and subsequently in confirming it, exceeded its powers, authority and jurisdiction.

I think the recent decision in *Diewold* v. *Diewold* (1) is conclusive on that point, so far at least as this Court is concerned.

The mortgage debt owing to the respondent, and which the proposal purported to reduce, was incurred by the deceased John McEwen. No other person ever assumed or personally became responsible for it before any application was made for a proposal. Following the death of John McEwen, the respondent had the right to look to his estate for payment of its debt.

The application which resulted in the proposal now under consideration was an application made by Jane McEwen in her personal capacity.

At that time (July 31st, 1936), Jane McEwen was not the debtor of the respondent and, moreover, was not

(1) [1941] S.C.R. 35.

insolvent. She was not, therefore, entitled to invoke the benefits of the Act, not to speak of the disputed question whether she could be classed as a farmer.

Had she come within that class, the only proposal which she could file with the Official Receiver was a proposal in respect of her actual personal obligations.

On the face of the proposal formulated by the Board, the only debt disclosed, for which she was liable, was the sum of $91 owing to The International Harvester Company of Canada, Limited, incurred in 1936 and which could not be the subject of a personal proposal.

The only other debt appearing in the proposal is the respondent's mortgage account. That was not her debt. The respondent could not have sued her for it. It was not a "debt provable in bankruptcy" against her, or against her estate in bankruptcy.

As it turned out, it seemed pretty clear that the sole object of the proceeding was to obtain a reduction in the debt owing to the respondent by the John McEwen Estate. Jane McEwen herself apparently was not indebted to any person whomsoever.

In order to bring the debt of the estate first before the Official Receiver, and then before the Board, the Act, at that time, contained no provision under which its benefits could be invoked. It was only in 1938, by the amendment adding sec. 6 (A) to the Act (sec. 4 of C. 47 of the statutes of Canada, 1938), that provision was made for proposals by legal representatives of farmers who died after the 3rd day of July, 1934, upon satisfying certain conditions there mentioned and obtaining leave of the court. This procedure was never resorted to in the present case.

Up to that amendment, it had been consistently held that an executor could only proceed as such, and not as a farmer; and, as a Board of Review could only deal with debts of farmers in order to keep them on the land, the necessary jurisdiction was lacking.

The form of the proposal herein and of everything connected therewith was, throughout, essentially a proceeding on behalf and for the benefit of the John McEwen estate; and the only personal interest of Jane McEwen shewn therein was that her name appeared in it and purported to be signed, not by her, but "per Robert J. McEwen, her

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agent". It was the latter who verified the statement of affairs and who signed the statutory declaration before the Official Receiver.

The first duty of Jane McEwen as executrix of the estate of her deceased husband was to administer properly the estate and to apply the assets in reduction of the debts before any conveyance to a beneficiary. I need not here discuss the point whether, when attempting to transfer the land to herself, she committed a breach of trust, and, notwithstanding such transfer, she should be treated as a trustee for the creditors of the John McEwen's estate. It is sufficient to state that the security given by John McEwen for the respondent's loan could not be released, reduced or affected, so long as the liability of the estate existed, by means of a proposal made and filed by Jane McEwen personally.

Under the circumstances, the Board of Review had no jurisdiction to deal with the respondent's mortgage debt. More particularly, it had no authority to reduce the rate of interest on that mortgage; and the Board of Review could not, consistently with the provisions of *The Farmers' Creditors Arrangement Act*, deal with her request, or formulate a proposal, in complete disregard of the position and interest of the respondent.

It need not be said that, so that the Act may be validly invoked, it is not sufficient that there should be a debt; it is necessary that the applicant farmer should be the debtor of such a debt. Here, there was undoubtedly a debt, but the applicant for relief was not the debtor. The debtor was the John McEwen estate, which refrained from making an application, although it might have done so after the amending legislation of 1938.

On behalf of the appellants, it was argued that another amendment introduced by that legislation (1938), and to which reference has not yet been made, has had the effect of doing away with the necessity of some privity of contract between the applicant for a proposal and the creditor.

Up till then, the Court of Appeal for Ontario, in *Gofton* v. *Shantz* (1) and in *Nesbitt* v. *Hogg* (2) had held that the Act did not apply where the relation of debtor and creditor did not exist, as here. It was claimed, however, by the

(1) [1937] O.R. 856. (2) (1938) 19 C.B.R. 254.

appellants that sec. 2(*d*) of the Act, as amended by ch. 47 of the statutes of 1938, conferred jurisdiction upon the Board in this instance.

The subsection just referred to provides:

> (*d*) "Creditor" includes a secured creditor and, notwithstanding the absence of privity of contract between the debtor and any of the persons hereinafter mentioned, a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof and, in case the debtor holds real property under an agreement of sale or under an assignment of an agreement of sale, the vendor of such property or any person entitled under an assignment by such vendor.

I do not think this new section helps the appellants.

The object of the amended definition appears to have been to enlarge the class of "creditors"; but it does not alter the status of the "debtor". This was pointed out by Masten, J.A., in *Swaffield* v. *Baycroft* (1). In that case, neither the holder of the mortgage, nor the owner of the land, was an original party to the mortgage; but the owner of the land had by an extension agreement specifically covenanted to pay the debt. Having become a "debtor", he would have come within the purview of the Act but for the fact that the extension agreement was entered into after May 1st, 1935, and that, by force of sec. 19, the Act "does not, without the consent of the creditor, apply in the case of any debt incurred after" that date.

Masten J.A., in my view, properly set forth the limits of the new definition:

> But there is nothing in the Act of 1938 which brings the situation within the principal Act if the farmer who is in possession does not owe the debt secured by the mortgage. By the statute of 1938 a limitation on his right additional to that created by the original Act is imposed on the holder for the time being of a security against the farm of the debtor; that is all. The rights and liabilities of the debtor are not referred to in the Act of 1938, and, in my view, are not affected.
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> And I should only add that, in my view, it is impossible to conceive that the statutory alteration in the definition of "creditor" carries with it by implication a corresponding alteration in the common law meaning of "debtor". That would, in my view, be legislation by the Court.

Independently of the language of section 2(*d*), which does not purport to enlarge the class of "debtors," it should be noticed that the new definition therein contained still requires, notwithstanding the absence of privity of contract

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between the applicant and the "person holding a mortgage, hypothec, pledge, charge, lien or privilege," that the mortgage or hypothec, etc., must be a mortgage or hypothec "on or against the property of the debtor or any part thereof." This requirement would make it impossible to include Jane McEwen within the meaning of the definition, as, at the time of the proposal, she was not the owner of the property mortgaged.

The reasoning of Masten J.A. is further strengthened by reference to the other sections of the Act, which assume throughout that the applicant must also be the debtor. An example of this may be found in sec. 11 (1), whereby

> on the filing with the Official Receiver of a proposal, no creditor * * * shall have any remedy against the property or person of the debtor, or shall commence or continue any proceeding under the *Bankruptcy Act*, or any action, execution, or other proceeding for the recovery of a debt provable in bankruptcy * * * unless with leave of the court and on such terms as the court may impose.

There can be no debt "provable in bankruptcy" unless the applicant for the proposal is the debtor of the "creditor, whether secured or unsecured."

I fail to see how the respondent could validly be brought in a scheme of arrangement with Jane McEwen, who was not its personal debtor and who did not own the land upon which it held its mortgage. Jane McEwen was in no way the "debtor" of the respondent within the requirements of the Act, even after the introduction of the amendment of 1938 to section 2 (*d*).

And section 19 of the Act does not improve the appellants' situation. It has already been referred to. It enacts that the

> Act shall not, without the concurrence of the creditor, apply in the case of any debt incurred after the first day of May, 1935.

The appellants rely on that section and claim that, as the mortgage debt was incurred by John McEwen on September 29th, 1919, and as John McEwen died August 26th, 1924, the Act applies to the debt so incurred.

I do not overlook the respondent's contention that it cannot be so, since the will of John McEwen was probated only on August 13th, 1935, the transfer of the land to Jane McEwen made by her as personal representative to herself in personal capacity took place only on October 20th, 1936,

and that, moreover, such a transfer was, in effect, a breach of trust which must be held ineffective, in so far as it may affect the interests and rights of the respondent. But it is sufficient to say that sec. 19 can have no other meaning than that the first day of May, 1935, therein mentioned, is referable and can be referable only to the date when the debt was incurred by the applicant farmer himself. The whole Act deals with the liabilities of the farmer who files a proposal with the Official Receiver and his "present and prospective capability * * * to perform the obligations prescribed", as well as "the productive value of his farm." The "composition, extension of time, or scheme of arrangement" for which he is authorized to file a proposal, or the Board of Review may formulate a proposal, concern only the applicant farmer, whom the Dominion Parliament has declared essential, in the interest of the country, to retain on the land as an efficient producer (See preamble of the Act). It follows that "the debt incurred", referred to in sec. 19, is necessarily the debt personally incurred by the applicant and does not concern a debt which, though at present owing by the applicant farmer, towards the creditor, was incurred by a previous debtor (who may not have been a farmer) and at a date prior to the first day of May, 1935, as is the case here.

As a consequence of the foregoing, the point raised by the respondent that if the Act, and more particularly sec. 2 (*d*), should be construed otherwise than was contended by it, the Act would be unconstitutional, need not be considered.

On that point, we have heard argument on behalf of the Attorney-General of Canada; and it is sufficient to say that as, in my view, the Act and the amendments of 1938 ought to be construed as submitted by the respondent, the latter has no interest to raise the question of constitutionality and it need not be gone into in the present case.

But the fact remains that the respondent has succeeded to establish that the Act did not apply to Jane McEwen at the time when she filed her proposal, or at the time when the Board of Review pretended to formulate or to confirm a proposal in respect of her liabilities; and that, accordingly these proposals were made without authority and jurisdiction and they were invalid, as held by the majority of the Court of Appeal of Manitoba.

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There remains to discuss whether, as contended by the appellants, that Court had no power to deal with this matter on an application for *certiorari,* and it should have refused the motion for the issue of the writ.

I do not think this Court ought to concern itself with the procedure set up by the King's Bench Act and the rules thereunder. This is essentially a matter of practice which, at least in the present case, should properly be left as settled by the Court of Appeal of Manitoba.

The same thing may be said of the point raised by the appellants that the respondent's application for *certiorari* was, in any event, barred by delay, prejudice and estoppel. This, to my mind, was a matter to be determined according to the discretion of the Court of Appeal. Moreover, where the subject of the discussion raises not only the question of the competency of the Official Receiver and of the Board of Review, but might involve as well the constitutional jurisdiction of the Parliament of Canada, I do not think that, generally speaking, an objection based on delay, latches, or estoppel, could be held to deprive the courts of the power to inquire into the substantial points which are discussed in this appeal.

The fallacy of the appellants' contention is that the Official Receiver or the Board of Review were given the authority to pass upon these substantial questions. Starting from that erroneous premise, they asked the Court to hold that the Board of Review had made findings on these substantial questions, and, there being no appeal from the decisions of the Board, the findings so made must be held as conclusive and as thereby withdrawn from the supervisory authority of the provincial Supreme Court.

But, of course, a mere perusal of the Act shows that the Board of Review has been given no such authority. The Official Receiver or the Board, naturally, must proceed generally upon a *prima facie* case of jurisdiction being established, but that is vastly different from the suggestion that, in the exercise of their jurisdiction, the Official Receiver or the Board may determine the questions of law, as distinguished from the questions of pure fact (Reference concerning the Tariff Board of Canada) (1).

(1) [1934] S.C.R. 538, at 548.

Of course, the status of a farmer, and whether he is able to meet his liabilities as they become due, and whether there exists between the interested parties the relation of debtor and creditor, are largely questions of fact; but whether these facts are covered by the Act, and whether they bring the matter within the meaning of the Act and under the jurisdiction of the Receiver and the Board are questions of law. The whole subject is one of mixed law and fact. Neither the Receiver, nor the Board, has been given by the Act the power to determine these questions in their legal aspect. The courts designated by the Act for that purpose are, in Quebec, the Superior Court and, in the other provinces, the County or District Court. The jurisdiction conferred on these courts by section 5 of the Act is stated to be "a jurisdiction in bankruptcy" and that wording implies a qualified jurisdiction. But such jurisdiction is sufficient to give to these courts the power to determine the status as a farmer of the applicant to the Official Receiver, as well as the other questions: Whether the farmer is unable to meet his liabilities as they become due and whether, for the purposes of the application of the Act, the relation of creditor and debtor exists between the interested parties.

Nowhere in the Act are the Official Receiver or the Board of Review given any such jurisdiction. And the existence of the status of farmer, or of his insolvency, or of the relation of debtor and creditor, is a condition precedent to the validity of the proceedings before the Official Receiver or before the Board; it is a prerequisite of their competency in the premises. Unless these conditions exist, the Official Receiver and the Board cannot enter into the matter at all. Further, the Receiver, or the Board, have not been given by the Act the power to decide these matters, they are specifically declared to be within the exclusive jurisdiction in bankruptcy of the courts named in section 5.

In this case, it was stated at bar, and it is apparent from the record, that these preliminary questions, which it was essential to have decided before the Receiver or the Board could acquire jurisdiction, were never brought before the County or District Court having territorial jurisdiction in Manitoba.

Upon the return to the writ of *certiorari*, the Board of Review certified to the Court of Appeal the proposal it

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made as of October 29th, 1937, confirmed as originally formulated and declared to be binding upon all creditors of the so-called farmer debtor on October 5th, 1938, and filed in the County Court of Dauphin on October 8th, 1938. This was the only document returned by the Registrar of the Board.

It is true that, as shown by that proposal, the Board therein found "the farmer entitled to the benefit of the Act," although it is not clear whether this may be taken as a finding that Jane McEwen was a farmer, or as assuming that she was a farmer and holding that she was otherwise entitled to the benefit of the Act. But, be that as it may, for the reasons above given, the exact meaning of the finding is immaterial. It is sufficient that it shows that the Board was treating Jane McEwen as a farmer entitled to invoke the Act and was proceeding to formulate a proposal as if the Act applied to her, notwithstanding the objections of the respondent clearly put before that body prior to the formulation of the proposal.

The document returned upon the writ and certified to by the Registrar of the Board of Review as being the proposal confirmed by the Board and intended to be binding upon the respondent discloses:

> That the farmer's son, Robert McEwen, who is at present living and working on the farm, intends to remain there and finds that the farm is being efficiently operated.

This statement is strongly suggestive of the fact that Jane McEwen herself was not farming the land, but that her son was the farmer who, in accordance with the preamble of the Act, was to be retained on the land as efficient producer. The statement so made, together with the facts otherwise established and related in the early part of this judgment (not forgetting that the farm was leased to the son by the mortgagee) sufficiently show that the status of Jane McEwen as a farmer was disputable and of such a doubtful character as should have required a decision by the court competent to pass upon it.

The proposal further states:

"There appeared to be no unsecured creditors"; and it mentions that

> the taxes levied against the said land by the rural municipality of Dauphin have been paid to the 31st December, 1935;

and that

the claim of International Harvester Company of Canada, Limited, having been incurred since the first day of May, 1935, shall not be affected by this proposal.

The only liability apparent on the face of the document is the respondent's mortgage there stated to have been "given by John McEwen, now deceased, the farmer's late husband". Nowhere is it stated that this mortgage has become the debt of Jane McEwen either through will, through transfer or in any other way. As there shewn, it is a debt of the estate of John McEwen.

The result is that the document itself does not show the existence of any debt owing by Jane McEwen. If that be so, there was no evidence before the Board of the alleged insolvency of Jane McEwen and, accordingly, nothing to indicate or even to suggest that she was unable to meet her liabilities, since there were none. Nor was there even a scintilla of evidence that the relation of debtor and creditor existed between Jane McEwen and the respondent.

It is clear, therefore, on the proposal itself, that none of the conditions essential and prerequisite to the existence of the jurisdiction of the Board were present in the case. These facts were still made clearer, if necessary, by the evidence put before the Court of Appeal of Manitoba in the affidavits filed by the parties.

It was objected by the appellants that the proposal, returned into court pursuant to the writ of *certiorari,* constituted the only and entire record before the court on the motion to quash, and that it was not open to the court to go behind the return and to consider extraneous material. It was argued before us that, by taking the affidavits into account, the Court of Appeal was, in point of fact, exercising an appellate jurisdiction which it could not do in *certiorari* proceedings.

Although, in my view, the proposal itself is sufficient evidence of the lack of jurisdiction of the Board, more particularly if it is coupled with the admission at bar that the respondent's objections were never submitted to the County Court, it may be in order to mention that it is not strictly correct to say that a court, acting on *certiorari* in the exercise of its supervisory authority, should not be allowed to inquire into the actual facts, in order to determine the

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question of the jurisdiction of an inferior tribunal (9 Halsbury, p. 898, sec. 1514, notes (p) and (q); *Regina* v. *Bolton* (1)).

The subject was fully considered in *Rex* v. *Nat Bell Liquors Limited* (2). In that case, Lord Sumner, delivering the judgment of their Lordships of the Privy Council, said (p. 153):

> In *Reg.* v. *Bolton* (1), Lord Denman, in a well-known passage, says: "The case to be supposed is one * * * in which the Legislature has trusted the original, it may be (as here) the final, jurisdiction on the merits to the magistrates below; in which this Court has no jurisdiction as to the merits either originally or on appeal. All that we can then do * * * is to see that the case was one within their jurisdiction, and that their proceedings on the face of them are regular and according to law * * * Where the charge laid before the magistrate, as stated in the information, does not amount in law to the offence over which the statute gives him jurisdiction, his finding the party guilty by his conviction in the very terms of the statute would not avail to give him jurisdiction; the conviction would be bad on the face of the proceedings, all being returned before us. Or if, the charge being really insufficient, he had mis-stated it in drawing up the proceedings, so that they would appear to be regular, it would be clearly competent to the defendant to show to us by affidavits what the real charge was, and, that appearing to have been insufficient, we would quash the conviction; * * * But, as in this latest case, we cannot get at the want of jurisdiction but by affidavits, of necessity we must receive them. It will be observed, however, that here we receive them, not to show that the magistrate has come to a wrong conclusion, but that he never ought to have begun the inquiry * * *

At page 154:

> The law laid down in *Reg.* v. *Bolton* (1) has never since been seriously disputed in England.

At page 160:

> When it is contended that there are grounds for holding that a decision has been given without jurisdiction, this can only be made apparent on new evidence brought ad hoc before the Superior Court. How is it ever to appear within the four corners of the record that the members of the inferior court were unqualified, or were biased, or were interested in the subject-matter?

The hearing of the Board as a result of which the proposal was formulated was held *ex parte*, for the respondent did not appear, and there were no creditors present. The consequence was that the Board assumed the reality of the preliminary questions relating to its jurisdiction and, in the result, it established its jurisdiction, or took it for

(1) (1841) 1 Q.B. 66.

(2) [1922] 2 A.C. 128.

granted, by proceeding upon assumed facts. But, in the words of Lord Sumner, "the reality of that assumption having been inquired into (in the Court of Appeal) on affidavit as to the facts, since questions going to the jurisdiction of the (Board) must, in case of need, be inquired into, and it having been found that in fact (Jane McEwen was not a farmer, was not insolvent and was not the debtor of the respondent), the order was rightly quashed" (*Nat Bell* case (1)). Further to quote Lord Sumner (p. 158):

> While the decision (of the Board) is final, if jurisdiction is established, the decision that its jurisdiction is established is open to examination on *certiorari* by a superior court.

Coleridge, J., delivering the judgment of the Court in *Bunbury* v. *Fuller* (2), stated the rule thus:

> No court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars making up together that subject-matter which, if true, is within its jurisdiction, and however necessary in many cases it may be for it to make a preliminary inquiry whether some collateral matter be or be not within the limits, yet upon this preliminary question, its decision must always be open to inquiry in the superior court.

Upon the authority of those cases, I think it must be decided that the preliminary questions raised by the respondent were of such a nature that, in an ordinary case, they would properly give rise to an inquiry on *certiorari* by a superior court and that, for the purposes of that inquiry, the facts bearing on the question of jurisdiction could be put before that court by means of affidavits (*The Security Export Company* v. *Hetherington* (3)).

The judgment of this Court in the *Hetherington* case (3) was reversed on the ground that the proceeding there in question was not judicial, but merely administrative; but the learned Law Lords fully endorsed the exposition, there made by my Lord the present Chief Justice, of the law pertaining to *certiorari* (4).

Since the enactment of *The Farmers' Creditors Arrangement Act,* procedure by way of *certiorari* in respect of proposals under the Act has been held to be available in many cases: *Re Ratz* (Manitoba Court of Appeal (5),

(1) [1922] 2 A.C. 157.
(2) (1853) 9 Ex. 11, at 140.
(3) [1923] S.C.R. 539, at 549, *et seq.*
(4) [1924] A.C. 988.
(5) (1939) 47 M.R. 381.

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Re Hawkins (Manitoba Court of Appeal) (1), *Re Hudson's Bay* (Alberta) (2), *Crédit Foncier* v. *Board of Review* (Saskatchewan Court of Appeal) (3), *Re Drewry* (Saskatchewan Court of Appeal) (4). See also *The Queen* v. *Justice of Surrey* (5) and *The King* v. *Stafford Justices* (6). Short & Mellor, 2nd Ed., p. 48.

But there was a special reason in this case why the writ of *certiorari* should be resorted to. It appears by the document certified by the Registrar of the Board of Review upon the return to the writ, that the proposal, as formulated by the Board, was confirmed by the latter and declared to be binding upon all creditors of the so-called farmer debtor on October 5th, 1938, and that it was "filed in the County Court of Dauphin, on the 8th day of Oct. 1938." This filing in the court concluded the whole matter, so far as the operation of the *Farmers' Creditors Arrangement Act* was concerned. Nothing remained to be done under it. The respondent Board of Review became *functus officio* as soon as it had confirmed the proposal formulated by it and such proposal was transmitted to the Official Receiver, to be filed by him in the court under Rule 23 of the Rules and Regulations made under the Act. The Official Receiver did file the proposal in court on October 8th, 1938, as appears on the face of the document returned upon the *certiorari*. There is no longer, under the Act, any provision that the proposal so filed should be approved by the court. Upon it being filed, it became immediately "binding upon all the creditors and the debtor" (subs. 6 of s. 12), and, in particular, upon the respondent, unless it elected to contest the validity of the same, so as to be relieved of the arrangement made by the Board.

As a consequence, the jurisdiction in bankruptcy given by s. 5 of the Act to the County Court was exhausted; and, assuming that jurisdiction was exclusive while the Act was operating, clearly it could no longer stand in the way of the supervisory authority of the Court of Appeal after the Act had accomplished its purpose and its effect (*Prudential Ins. Co.* v. *Berg.* (7).

(1) (1939) 47 M.R. 429, at 439.
(2) [1938] 2 W.W.R. 412, at 420,
(3) [1939] 3 W.W.R. 632, at 636.
(4) [1940] 2 W.W.R. 389, at 390.
(5) (1870) L.R. 5 Q.R. 466.
(6) [1940] 2 K.B. 33, at 43, 44.
(7) [1940] 2 W.W.R. 381.

In the circumstances of this case, *certiorari* was a remedy open to the respondent.

The latter might also have continued its proceedings in the Court of King's Bench in respect of its mortgage account claim which, as we were told, is still pending, although the statement of defence in that action pleaded *The Farmers' Creditors Arrangement Act* and alleged that the confirmation and filing in court of the proposal was a bar to the respondent's action.

The respondent has refused consistently to recognize the jurisdiction of the Board of Review, it has never acquiesced in it, and it could validly invoke the authority of a superior court (in this case, the Court of Appeal of Manitoba) to question the jurisdiction of the Board and to have the Court inquire whether the conditions precedent and prerequisite to the Board's competency existed in this matter.

I have, therefore, come to the conclusion that the appeal should be dismissed with costs. There should be no costs to the Attorney-General of Canada.

DAVIS, J. (dissenting):—The Board of Review for the province of Manitoba under *The Farmers' Creditors Arrangement Act*, 1934, and amendments, assumed to reduce the amount of the respondent company's mortgage on, what may for convenience be called, the McEwen farm in Manitoba. The mortgage had been on the property since October, 1919; nothing has been paid on the principal amount of $4,000; and arrears of interest on the 1st of November, 1936, amounted to $2,332.15, which indicates that the interest on the mortgage could not have been paid for many years. No proceedings appear to have been taken at any time by the respondent either to recover the money debt or to enforce the security. John McEwen, who had made the mortgage in 1919, remained the owner of the farm until his death on the 26th of August, 1934. By his will he devised and bequeathed all his property, real and personal, to his wife, Jane McEwen, and appointed her the sole executrix of the will. The widow and a son appear to have continued to reside on and work the farm following upon the death of the husband and father. Then, on July 31st, 1936, Mrs. McEwen sought relief under the provisions of *The Farmers' Creditors Arrangement, Act,* 1934, by lodging with the Official

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Receiver for Dauphin Judicial District a proposal under the statute for a composition, extension or scheme of arrangement. With the proposal was the required statement of affairs in which Mrs. McEwen said that her principal occupation was farming; that she was unable to meet her liabilities as they became due; and she gave as the amounts of claims of creditors the respondent's mortgage at $6,000 and arrears of taxes on the farm of $170. She was then, the statement said, 76 years old; had 170 acres under cultivation; the causes of her financial difficulties were, "Debt too heavy. Failure of crops and low prices."

The proceedings in connection with this proposal moved rather slowly. It was not until March 31st, 1937, that the Board of Review for Manitoba constituted under *The Farmers' Creditors Arrangement Act* heard the matter, and it was not until October 29th, 1937, that the Board formulated, what is called under the statute, its proposal wherein it reduced the amount owing on the respondent's mortgage to $2,800 as at the 1st of January, 1937, including principal and interest, and the rate of interest (which had originally been 7 per cent per annum) from the said date was reduced to 6 per cent per annum; and special terms were imposed for the repayment of the reduced principal amount in instalments.

I interject in the narrative here the statement that the proceedings out of which this appeal comes to this Court were *certiorari* proceedings that were not commenced until September 17th, 1940, on which date the respondent served notice of motion upon the Registrar of the Board of Review and upon the executors of Jane McEwen (she having died in the meantime on the 27th of March, 1940) and upon the son, Robert James McEwen, to whom his mother had devised the property by her will and who was at the time in occupation of the farm. The notice of motion was made direct to the Court of Appeal for Manitoba (in accordance with the practice in that province)

> for an order that a writ of *certiorari* do issue out of this Honourable Court for the return into this Court of the proposal made by the Board of Review under *"The Farmers' Creditors Arrangement Act,"* and dated the 29th day of October, 1937, which said proposal purports to have been made binding by the filing of the same in the County Court of Dauphin, in order that the said proposal, or those portions contained

in paragraphs numbered 1, 2, 3 and 4 thereof, may be quashed, and for such further or other order as to this Honourable Court may seem proper.

The grounds set forth in the notice of motion were that the Board of Review in making the said proposal acted without jurisdiction or in excess of jurisdiction; that Jane McEwen was not a farmer within the meaning of the statute and that she was not at the time of her application the owner of the property; and that she was not indebted to the respondent in respect of the said mortgage, never having assumed or undertaken to pay the debt secured by the said mortgage or to perform any of the covenants therein contained.

The Court of Appeal reviewed the matter at large, granted the writ and quashed the proposal made by the Board of Review, Dennistoun, J.A. dissenting, which meant that the reduction of the amount of the mortgage and the new terms of repayment were nullified. From that judgment the proceedings have come to this Court by way of special leave granted by the Court of Appeal. All phases of the matter were discussed at considerable length before us. Counsel for the respondent raised many objections to the whole course of proceedings under *The Farmers' Creditors Arrangement Act*, including an attack upon the constitutional validity of certain amendments to the Act that were made by Parliament in 1938. Some of the objections raised are undoubtedly formidable objections. But I am satisfied that the respondent misconceived its proper remedy and that in the special circumstances of this case the application for the issue of a writ of certiorari should have been refused. It may be fortunate for the respondent that an action it commenced in the courts of Manitoba many months prior to its commencement of these *certiorari* proceedings (to which action I shall later refer) is still pending. In that action the respondent itself put in issue the alleged invalidity of the proposal under *The Farmers' Creditors Arrangement Act* and the alleged lack of jurisdiction in the Board of Review to deal with the matter under the statute.

I return now to the first step that was taken by Mrs. McEwen under the statute, i.e., the lodging with the Official Receiver (having jurisdiction in the county or dis-

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trict in which Mrs. McEwen resided) of a composition, extension or scheme of arrangement. That was, as I said before, July 31st, 1936. The effect of that first step was to put the subject matter of the proposal into the exclusive jurisdiction, subject to appeal, of the County Court of Dauphin, which is admitted to be the judicial district where Mrs. McEwen resided and the farm was located. The exclusive jurisdiction of the County Court of Dauphin in the matter, subject to the right of appeal provided by the statute, is to me the fundamental and most important fact in considering the *certiorari* proceedings which have come before us. *The Farmers' Creditors Arrangement Act* is part of the bankruptcy and insolvency legislation of the Parliament of Canada and the Act was made to be read and construed as one with *The Bankruptcy Act*. Sec. 2 (2). For the purposes of *The Farmers' Creditors Arrangement Act,* Parliament saw fit to designate the local courts, the County or District Courts (except in the province of Quebec), to have jurisdiction in respect of the statutory means provided whereby compromises or rearrangements might be effected of debts of farmers who were unable to pay (the recital in the Act). The following is the provision of the statute which gave the County Court of Dauphin exclusive jurisdiction, subject to appeal:

> Sec. 5. (1) In the case of an assignment, petition or proposal, in the province of Quebec, the Superior Court of the judicial district where the farmer resides, and in other provinces, the county or district court, shall have exclusive jurisdiction in bankruptcy subject to appeal as provided in section one hundred and seventy-four of the *Bankruptcy Act*.

Section 7 enacts that a proposal may provide for a compromise or an extension of time or a scheme of arrangement in relation to a debt owing to a secured creditor, or in relation to a debt owing to a person who has acquired movable or immovable property subject to a right of redemption, but in that event the concurrence of the secured creditor or such person, shall be required, except in the case of a proposal formulated and confirmed by the Board of Review. I am not forgetting that one of the strongest points made by counsel for the respondent is that the respondent was not a secured creditor of Mrs. McEwen because she was not its debtor. But leaving that question aside for the moment, it is important, I think, to observe that Parliament gave to the

Board of Review a right to work out a proposal which might involve secured creditors, even in the absence of their concurrence.

The Board of Review is under the statute essentially an administrative body. A proposal first goes to the Official Receiver having jurisdiction in the locality and if at a meeting of creditors called by him the proposal or some modification of it is not approved by the creditors, the Official Receiver reports this fact to the Board of Review, and the Board then shall, at the written request of a creditor or of the debtor, endeavour to formulate an acceptable proposal to be submitted to the creditors and the debtor, and the Board shall consider representations on the part of those interested. Sec. 12 (4). If any such proposal formulated by the Board is approved by the creditors and the debtor, it shall be filed in the court and shall be binding on the debtor and all the creditors. Sec. 12 (5). But if the creditors or the debtor decline to approve the proposal so formulated, the Board may nevertheless confirm such proposal, either as formulated or as amended by the Board, in which case it shall be filed in the court (i.e., again the County Court) and shall be binding upon all the creditors and the debtor as in the case of a proposal duly accepted by th ecreditors and approved by the Court. Sec. 12 (6).

The proposal formulated and confirmed by the Board of Review was filed in the County Court of Dauphin October 8th, 1938. I think it obvious that the Board must have withheld the filing of the document, which was dated October 29th, 1937, because of its own doubt as to whether or not the Act applied to the case of a mortgage security which, while it lay as a charge against the farmer's lands, was not a debt which the farmer himself had incurred or had undertaken to assume and pay, until the 1938 amendments to the statute, which became effective July 1st, 1938, attempted at least to bring this sort of claim within the ambit of the statute.

In considering whether or not *certiorari* proceedings against the Board became available on the notice of motion that was not made until September 17th, 1940, it is important to observe that as early as August 5th, 1936, when the respondent was notified by the Official Receiver of the proposal he had received from Mrs. McEwen, the respondent

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took the position in a letter to the Official Receiver of that date, and has adhered to the position consistently throughout, that it was not in any way affected by the proposal. But the respondent at no time appeared or took any proceedings, either before the Official Receiver or before the Board of Review or in the County Court of Dauphin. Holding consistently to its position that Mrs. McEwen was not its debtor and that it was not a secured creditor, the respondent deliberately ignored, as it had a perfect right to do at its own risk, the proceedings under *The Farmers' Creditors Arrangement Act*. A very convenient and speedy remedy was available to the respondent when it got notice in August, 1936, that Mrs. McEwen had filed an application with the Official Receiver. It could have moved at once in the County Court of Dauphin, which in my view had exclusive jurisdiction, subject to appeal, to have the proposal set aside upon any of the grounds alleged by the respondent, that is, that Mrs. McEwen was not a farmer within the meaning of the statute, that she was not the owner of the lands and that she was not entitled to the benefit of the Act, or to stay proceedings or to have it determined that in any event the respondent was not a creditor of the applicant and was not affected by the proposal or proceedings under the statute. I have not the slightest doubt that the County judge would have entertained any such application and would have dealt with the matter at the time in a speedy and inexpensive manner. A statutory right to appeal from any decision that he might give was available. It may be that a declaratory action might have been brought in the Court of King's Bench to determine the rights of the parties and to grant relief by injunction or otherwise, though I do not find it necessary to pass upon that as an available remedy. The respondent did, however, commence an action in the Court of King's Bench on December 9th, 1939, (more than three years after Mrs. McEwen sought relief under the statute and more than a year after the Board of Review's proposal had been filed in the County Court of Dauphin), against Mrs. McEwen as executrix under the will of her deceased husband and against herself personally, for the administration of the estate of John McEwen and to have the lands ordered to be sold, subject

to the mortgage, to satisfy the debts. In the statement of claim the respondent alleged that there was then owing to it under the mortgage the sum of $7,102 and that it had security for a portion of the said debt, namely, the sum of $2,612.15, but had no security for the balance, being the sum of $4,489.85. The important point is that in that action, in reply to a demand for particulars, the respondent as plaintiff in the action stated that the figure it had given for the security on the loan was the amount fixed by the Board of Review under *The Farmers' Creditors Arrangement Act,* and in reply to the statement of defence, set up that the Board of Review

> was without power or jurisdiction to compromise, reduce or in any way deal with the debt of the deceased or his estate

under the mortgage, and, in the alternative, that

> if the said proposal does purport to compromise, reduce or deal with the said debt, such proposal was made without power or jurisdiction and is void and of no effect.

That reply was delivered January 16th, 1940. No further step appears to have been taken by the respondent in that action and it was admitted that the action is still pending in the Court of King's Bench for Manitoba. Eight months after the respondent put in issue in that action the alleged invalidity of the proposal and the alleged want of jurisdiction of the Board of Review, it commenced these *certiorari* proceedings in the Court of Appeal for Manitoba against the Board, seeking an order that the proposal of the Board be quashed. The Board had become functus so far as this matter was concerned when it filed its proposal in the County Court of Dauphin in October, 1938. The proposal rested thereafter in the said County Court, which had exclusive jurisdiction in the matter, subject to the right of appeal.

Further, it is to be observed that sec. 11 (3) of the statute provides that no proposal shall be received in the province of Manitoba later than the 30th day of June, 1939. That means in this case that if the proposal is quashed, no new proposal can now be made by the owner of the farm to gain the advantage of the provisions of the statute. Notwithstanding that the original proposal was brought to the notice of the respondent by the Official

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Receiver as early as August, 1936, the respondent did not institute these proceedings by way of *certiorari* until September, 1940.

The Court of Appeal reviewed the evidence submitted to it as if the proceedings were by way of an appeal from the Board of Review, examining the merits of the case to the extent of even admitting particulars of fire insurance policies on the buildings and contents in an effort on the part of the respondent to show that the valuation of the applicant to the Board had been an undervaluation. Further, the confirmation and filing of the Board's proposal in the County Court made that proposal, by force of the statute (sec. 12 (6)), "binding upon all the creditors and the debtor" and had the effect of a judgment of that Court. There appears to be no reported decision in which *certiorari* has been granted to quash the judgments of inferior courts of civil jurisdiction. Halsbury, 2nd ed., Vol. IX, page 844, para. 1431, note (*q*).

In view of all the facts and circumstances of the matter, I am of the opinion that the conduct of the respondent throughout has been such as to disentitle it to relief in *certiorari* proceedings. To dismiss this appeal with costs is in my opinion, with great respect to those with whom I differ, to put the appellants the Board of Review, the Registrar, the executors of Mrs. McEwen and her son, Robert James McEwen, to the burden of what appear to me to be excessive and unnecessary costs of litigation.

The application for the writ ought, in my opinion, to have been dismissed and I should therefore allow the appeal and direct that the order be refused, with costs to the appellants throughout.

Appeal dismissed with costs.

Solicitors for the appellants—The Board of Review and the Registrar: *Johnson & Bergman.*

Solicitors for the appellants: R. J. and I. E. McEwen: *A. T. Warnock.*

Solicitors for the respondent: *Hamilton & Hamilton.*