S. RAM AWADH & SONS A

v.

SABLU

[SUPREME COURT—Cullinan, J. 21 April, 1987] B

Civil Jurisdiction

Bankruptcy—Petition—proof of facts therein—affidavit of certification s.7(1)(a) may not be used—examination of authorities.

C

V. Mishra: for the Creditor

S. Ram Awadh & Sons (Creditor) presented a Bankruptcy petition against Sublu (debtor) alleging a commission of the act of Bankruptcy available under s.3(1) of the Bankruptcy Act (Cap. 48) viz. failure to comply with a Bankruptcy Notice served upon the debtor after final judgment or to satisfy the Court as to any counterclaim set-off or cross demand. He did not file any notice of dispute under R.169 of the Bankruptcy Rules 1915 (the Rules) applied to Fiji by s.146 of the Bankruptcy Act. The debtor did not appear at any hearing, the petition was verified by affidavit, upon which creditor relied to the effect that the several statements in the said petiton "are to the best of my knowledge information and belief true." D

The question was did this affidavit constitute sufficient proof? The Court ruled that it did not. This Report is as to his reasons for so ruling. E

He referred to authority. Vaughan Williams. L.J. speaking of the so called affidavit said—

> "The affidavit which is used at the time when the petition as filed is an affidavit which cannot be used upon the hearing of the bankruptcy petition." F

This decision had been approved by the Court of Appeal. (In *re a Debtor* (No. 7 of 1910) 2 K.B.) 59. To the same effect had been the decision of Sir James Bacon, C. J. in *Ex parte Dodd: In re Ormston* (1876) 3 Ch. D. 432. He was speaking of the Registrar's acceptance of that proof. Sir James Bacon's decision was upheld in the Court of Appeal. However, in that case the debtor who was in Court had given notice of his intention to dispute the statements in the petition. G

Lord Greene M.R. in *In re a Debtor* (No. 27 of 1943) (1943) 2 All E.R. 15 gave the judgment of the Court of Appeal. He noted that the debtor had admitted the debt at the hearing and the Registrar's Order made the requisite order on the undertaking of the petitioner's solicitor to file an affidavit of debt the same day. This was done. His Lordship said—

H

A "Reading the section and rule together, I am of opinion that if the debtor admits the debt and has not served notice to dispute it, the fact of admission can be accepted as proof which the section requires."

His Lordship was referring to s.5(2) of the (English) bankruptcy Act 1914 and R. 171. Later he said, of R.171—

B "....implies that the proof need not be carried any further save in cases where the debtor has given notice that he intends to dispute."

Held: After an examination of authorities including those referred to above, the learned Judge said—

C "One thing is certain the affidavit of verification is not admissible at the hearing."

Further the form of affidavit referred to in the Rules 13 passed pursuant to the English Bankruptcy Act 1952 would be acceptable.

D It is a salutary practice for a petitioning creditor to file a further affidavit within 24 hours of the hearing establishing all the statements in the petition and the continued existence of the debt.

The affidavit of verification is inadmissible at the hearing. The petitioner must be prepared to prove the contents of the petition either by viva voce evidence or an affidavit grounding the facts set out in the petition. Petition adjourned to give the petitioning creditor an opportunity to adduce evidence viva voce or file a further
E affidavit.

Cases referred to:

(1) *Re Adams (Deceased)* 10 FLR 148.
(2) *Ex parte Lindsay: In re Lindsay* (1874) 19 L.R. Eq. 52.
(3) *Ex parte Dodd: In re Ormston* (1876) 3 Ch. D. 452.
F (4) *In re A Debtor* (No. 7 of 1910) (1910) 2 K.B. 59.
(5) *In re A Debtor: Ex parte Debtor* (1935) 1 Ch. 353.
(6) *Re a Debtor* (No. 27 of 1943))(1943) 2 All E.R. 15.
(7) *Ex parte Rogers: In re Rogers* (1880) 15 Ch. D. 207.
(8) *Re Cohen* (1950) 2 All E.R. 36.

G Cullinan J.:

Order

H

This is the hearing of a creditor's bankruptcy petition. The petition alleges the commission of an act of bankruptcy under section 3(1)*(g)* of the Bankruptcy Act. Cap. 48, namely failure to comply with the requirements of a bankruptcy notice served upon the debtor after a final judgment, or to satisfy the court as to any counterclaim, set-off or cross-demand. The debtor did not file any notice to dispute under rule 169 of the Bankruptcy Rules, 1915 (applied, as amended up to 1st May, 1945, to Fiji, under section 146 of the Bankruptcy Act and hereinafter referred to by rule or as "the Rules", as the case may be): neither did the debtor appear at the hearing or the adjourned hearings.

The petition is supported by an affidavit of verification (see Form No. 12 in the Appendix to the Rules and in Appendix I to the Bankruptcy Rules 1952, and see Form 117 Atkin's Court Forms Vol. 7 2nd Ed.), to the effect that

> "the several statements in the said Petition are to the best of my knowledge, information and belief true".

The petitioning creditor relied solely on much affiadavit as proof of the petition. The question arose as to whether it constituted sufficient proof at the hearing. I ruled that it did not and adjourned the hearing in order to give the creditor an opportunity to adduce evidence viva voce or to file a further affidavit, and reserved my reasons which I now give.

Section 7(1) of the Bankruptcy Act in part reads as follows:

> "7.—(1) A creditor's petition shall be verified by affidavit of the creditor, or of some person on his behalf having knowledge of the facts, and served in the prescribed manner.
>
> (2) At the hearing the court shall require proof of the debt of the petitioning creditor, of the service of the petition, and of the act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy and, if satisfied with the proof, may make a receiving order in pursuance of the petition.
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> (3) If the Court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petiton, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may dismiss the petition...."

It will be seen from the above provisions that although the petition must be verified by affidavit, nonetheless the court shall require proof of certain matters at the hearing. Those provisions in themselves suggest to me that the affidavit of verification is insufficient for such purpose.

Rules 151 and 154 provide as follows:

> "151. Every creditor's petition shall be verified by affidavit, and when it is filed there shall be lodged with it two or more copies to be sealed and issued to the petitioner."
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> "154. After the presentation of a creditor's petition, and before sealing the copies of the petition for service, the statements in the petition shall be investigated by the Registrar, and where some of the statments in the petition cannot be verified by affidavit, witnesses may be summoned to prove the same."

A It will be seen therefore that the affidavit of verification suffices for the purpose of sealing the copies of the petition for service: indeed it seems that witnesses might have to be called before the Registrar decides to seal. All this, of course, is preliminary to the actual hearing of the petition.

In the case of *Re Adams (Deceased)* (1) at p. 151 Hammett P. J. had occasion to refer to the affidavit of verification (Form 12) as "a purely formal document". In the case of *Ex parte Lindsay: In re Lindsay* (2) a creditor's petition was supported by no more than the affidavit of
B verification. The debtor did not file any notice to dispute nor did he attend at the hearing. The Deputy Registrar was of the opinion that the allegations in the petition were sufficiently proved and made an adjudication order. The power to make such an order was based on section 8 of the Bankruptcy Act 1869: under that Act adjudication might follow upon the hearing of the petition, there being no provision under the section for the making of a receiving order. Nonetheless, the provisions of section 7 of Cap. 48 are otherwise based on the provisions of section 8 of the 1869
C Act, which provided that "at the hearing the Court shall require proof" of the debt, and the act of bankruptcy etc. The observations of Sir James Bacon C. J. in delivering his judgment in *Lindsay* (2) (at pp. 54/55) are therefore very much in point:

> "In my opinion this adjudication cannot be sustained, for the provisions of the statute have
> D not been regarded. The petition alleged the commission of an act of bankruptcy in the words of sect. 6, subsect. 2, and it was accompanied by an affidavit verifying generally the truth of the allegations according to the Form No. 11. The reason for requiring that affidavit to be made is, that it would not be right that the petition should be received by the Registrar without it; its only purpose is to justify the receiving of the petition and the sealing of a copy for serving, and it has nothing to do with the provision of sect. 8 of the Act, that the Court at the hearing
> E is to require proof of the act of bankruptcy alleged in the petition. The Form No. 12 shows what kind of an affidavit should have been made. The Court had before it no proof of the statutory requisites to the making of an adjudication, for a merely general affidavit proves nothing. By it the petitioner only pledges himself that he will adduce at the hearing the proof required by the Act. The affidavit is sufficient for the purpose of the sealing of the petition, but that is all. The debtor was not bound to offer any oppposition to a petition thus framed and
> F supported..... The Deputy-Registrar was probably misled by the non-appearance of the debtor into adopting the first formal affidavit as conclusive proof of the requisites to an adjudication. On this ground, therefore, the order cannot be sustained, and the adjudication must be annulled."

G The petitioner in *Lindsay* (2) alleged no more than that the debtor "had made a fraudulent conveyance, gift, delivery, or transfer of his property, or of part thereof": there was no more specific allegation of any particular act of bankruptcy. Under such circumstances it seems to me that the petition itself lacked particularity. The learned Chief Judge in Bankruptcy seems to have taken that view, in observing that "the debtor was not bound to offer any opposition to a petition thus framed...." Nonetheless the dicta of the learned Chief Judge in Bankruptcy are quite unequivocal in
H the matter of the affidavit: the affidavit of verification "is sufficient for the purpose of the sealing of the petition, but that is all."

The decision in *Lindsay* (2) was followed by that in *Ex parte Dodd. In re Ormston* (3). In that case the debtor filed a notice to dispute, and also an affidavit in which he claimed a set-off. He attended at the hearing in the County Court with his witnesses, but in the absence of his solicitor did not examine them or attempt to prove his objections. The Registrar made an order of adjudication on the basis of an affidavit of verification of the petitioner. No witnesses were examined nor was any additional affidavit filed on behalf of the creditors. On appeal Sir James Bacon C.J. held that there was not sufficient proof of the creditors' debt. On appeal to the Court of Appeal that Court upheld the decision of Sir James Bacon C.J., observing that the debtor had given notice of his intention to dispute the statements in the petition, and appeared at the hearing. The report of the judgment of the Court of Appeal is not verbatim: it is also brief in the extreme. Nonetheless it might be said that the latter observation of the Court of Appeal indicates that perhaps that Court might well have been satisfied with the proof involved, had the debtor not disputed the petition or appeared at the hearing. That interpretation however would not appear to find any support in the judgment of Vaughan Williams L.J., approved by the full bench of the Court of Appeal in the case of *In re A Debtor (No. 7 of 1910)* (4) at p.64. In referring to Form No. 12 in the Appendix to the Rules, that is, the statutory form of affidavit of verification, Vaughan Williams L.J. had this to say (at p.62):

> "... it is an affidavit which in effect is an affidavit for the purpose of getting leave to file a petition in bankruptcy. It is not so called, but that it is so in substance is quite plain. The affidavit which is used at the time when the petition is filed is an affidavit which cannot be used upon the hearing of the bankruptcy petition."

At to the aspect of the non-attendance of the debtor, rule 170 provides that,

> "If the debtor does not appear at the hearing the Court may make a receiving order on such proof of the statements in the petition as the Court shall think sufficient."

Quite obviously the Court of Appeal in *In re A Debtor (No. 7 of 1910)* (4) was of the view that the affidavit of verification would not amount to sufficient proof of the petition at the hearing in any circumstances, including it seems the non-attendance of the debtor. Such circumstances in my view, also include the non-attendance of the creditor, as under rule 173 the Court has power to dispense with his attendance. The rule reads as follows:

> "The personal attendance of the petitioning creditor and of the witnesses to prove the debt and act of bankruptcy or other material statements, upon the hearing of the petition, may, if the Court shall think fit, be dispensed with."

In the case of *In re A Debtor. Ex parte Debtor* (5) the Registrar exercised his discretion under those latter provisions and recorded, "The debt and act of bankruptcy admitted, attendance of petitioning creditors dispensed with". Lord Hanworth M. R. observed (at 357) that an admission is not sufficient in bankruptcy proceedings, as the Court is acting also in the public interest, and has a public function and duty to perform. The debtor in that case however had previously filed a notice to dispute. Nonetheless, it seems to me that the Registar relied upon the debtor's admission (not just of the debt but also of the act of bankruptcy) merely for the purpose of exercising his discretion under rule 173 in dispensing with the personal attendance of the creditor: thereafter the creditor could still be called upon to prove the petition by way of affidavit if necessary. It seems the notice to dispute was ultimately withdrawn and the Registrar did not in fact make the receiving order for a further five months after the debtor, it seems, had filed an affidavit in which he sought time to pay the debt.

The petition in *In re a Debtor* (5), however, was in fact presented by two moneylenders and there was a resultant further duty placed upon the Court to ensure that the provisions of the Moneylenders Act, 1927 had been complied with. Lord Hanworth's dictum was considered by the Court of Appeal in *Re A Debtor (No. 27 of 1943)* (6). The facts of that case are set out fully in the judgment of Lord Greene M. R. (at pp.15/16):

> "In this case the petitioning creditors had not, at the time of the hearing of an application for a receiving order, produced the usual affidavit that the debt was owing. The fact that it was owing was admitted by the debtor at the hearing. The registrar, without adjourning the hearing in order that an affidavit might be produced, made an order that an affidavit might be produced, made an order on the undertaking by the petitioning creditors' solicitor to file an affidavit of the debt the same day. That affidavit was filed the same day, and the matter would appear prima facie, to be perfectly regular. The point is taken that that procedure is technically wrong. The argument is based upon a decision of this in *Re A Debtor* (5). Referring to that case, it purports to be stated in a note to the Bankruptcy Rules, 1915, r.171, in *Williams on Bankruptcy* 15th Edn., p.589, that "admission or consent is insufficient." The section upon which the argument is based is the Bankruptcy Act, 1914, s.5(2), which provides as follows:
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> 'At the hearing the court shall require proof of the debt of the petitioning creditor, of the service of the petition, and of the act of bankruptcy, or, if more than one act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy, and if satisfied with the proof, may make a receiving order in pursuance of the petition.'
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> Reading that by itself one would have thought that a mere admission by the debtor that the debt was an existing debt as alleged was sufficient proof, because admissions are one method of proof. That that was the view of those who framed the Bankruptcy Rules appears to follow from r.171 which deals with this matter. It says:
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> 'On the appearance of the debtor to show cause against the petition, the petitioning creditor's debt, and the act of bankruptcy, or such of those matters as the debtor shall have given notice that he intends to dispute, shall be proved . . . .'
>
> That implies that the proof required need not be carried any further, save in cases where the debtor has given notice that he intends to dispute.
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> Reading the section and the rule together I am of opinion that, if the debtor admits the debt and had not served notice of intention to dispute it, the fact of admission can be accepted as the proof which the section requires.
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> The practice seems to be to require an affidavit of proof and I do not wish to suggest that that practice if not a desirable one. It has been modified by allowing the affidavit to be filed on the solicitor's undertaking to file it. It is said that that practice cannot be followed owing to the language used by Lord Hanworth, M. R., with the approval of Romer and Maugham, L.JJ., in the case of which I have just referred. In that case Lord Hanworth, M. R., referred to the section and to the rule and, immediately after quoting the rule, he said, at p.357:
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> 'Now, I have specifically called attention to these rules, because on July 13 there was filed a notice to dispute . . . .

That being the case, the obligation to prove the debt remained. The condition that proof of the debt is required when the debtor has given notice to dispute the debt became operative, and accordingly it became necessary to prove the debt. This was a case of a moneylender's debt to support a petition, the court is bound to require something quite different from what is required in the ordinary case. Having called attention to the fact that there was a notice to dispute, Lord Hanworth, M. R., said, at p.357:

> 'I also call attention to the fact that an admission is not sufficient in bankruptcy proceedings: the court is acting not merely inter partes but in the public interest, and that being so the court has a public function and duty to perform and is bound to perform it.'

The case before Lord Hanworth, Mr. R., was one in which notice of intention to dispute had been filed, and his observations were not intended to apply to a case where there is no intention to dispute. I am not speaking upon the propriety of calling for an affidavit in all cases whether there is a dispute or not. The practice is no doubt a salutary one. In the present case it seems to me, however, that the section and the rule have been adequately complied with and the result is that the point fails."

It will be observed that the learned Master of the Rolls was not "speaking upon the propriety of calling for an affidavit in all cases whether there is a dispute or not". As he observed, "the practice is no doubt a salutary one". He held, however, that the section and rule had been adequately complied with, as on the facts of the case there was an admission by the debtor at the hearing and in any event an affidavit was filed later in the day. The judgment describes the latter affidavit as "the usual affidavit that the debt was owing". As the learned Editors of 1943 (2) All E.R. observe (at p.15 at D), in the ordinary course the additional affidavit should be filed before the hearing. This is also the view of the learned authors of Atkin's Court Forms 2 Ed. Vol. 7 at p.277 at (n), where they also say that "the debt must be proved to be in actual existence at the date when the receiving order is made". Indeed the learned authors of Atkin's observe at Table 4. Step 29. p.97.

> "*Time:* The affidavit should be sworn at the last possible moment before, and not more than 24 hours before the hearing of the petition and should be filed at the hearing. The affidavit need not be served on the Debtor."

As to the contents of such affidavit, Sir James Bacon C. J. observed in *Ex parte Lindsay* (2) that "the Form No. 12 shows what kind of an affidavit should have been made". The learned Chief Judge in Bankruptcy was there referring to Form 12 of the Bankruptcy Forms of 1870. Those Forms are not available to me. Forms Nos. 12 and 13 in the Appendix to the Rules, are respectively entitled "Affidavit of Truth of Statements in Petition". It may well be that the 1915 Form No. 13 is based on the 1870 Form No. 12, to which Sir James Bacon, C. J. made reference: although the 1915 Form No. 13 concerns a joint petition, it takes matters further than the 1915 Form No. 12, based presumably on the 1870 Form No. 11, that is, the bare statement of verification. The affidavit of verification in respect of a joint petition is necessarily more detailed than that in the 1915 Form 12, as each creditor can only depose as to the debt owed to him: the amounts of each debt are therefore stated: the affidavit goes further however in stating that the debtor committed the act or acts of bankruptcy "stated to have been committed by him in the said beforementioned petition," and also that the debtor has "for the greater part of the past six months resided (or carried on business at (location)." The 1952 version of Form 13 contains the additional details as to whether or not the debt is secured or unsecured.

A Section 7(2) of the Act however provides that at the hearing the court shall require proof of the debt (that is, as at the date of the hearing), of the service of the petition, and of the act of bankruptcy. To my mind to allege that the debtor committed the act of bankruptcy "stated to have been committed by him in the said beforementioned petition" does not take matters any further than the bare statement in the affidavit of verification, namely that the statements contained in the petition are true. It seems that the practice has emerged of filing an "affidavit of
B debt", as it is described by the learned authors of Williams And Muir Hunter on Bankruptcy 19 Ed., who observe (at pp.645 and 660) that there is no statutory form for such affidavit. A precedent therefor is however to be found in Form 171 at p.277 of Atkin's Court Forms 2 Ed. Vol. 7, the terms of which are in clear contrast to the terms of the affidavit of verification found at Form 117 (at p.250).

C The affidavit of debt grounds only one fact however, that is, the existence of the debt, up to the date of hearing. That does not however establish the particular act of bankruptcy nor even non-compliance with a bankruptcy notice: in the case of *Ex Parte Rogers. In re Rogers* (7) the Court of Appeal held (per James L. J. at p.212):

> "... the proceedings on the debtor's summons (the forerunner of the bankruptcy notice) are a wholly distinct litigation from the proceedings on the petition . . . .
>
> D The evidence on the petition, no notice having been given of any intention to use it"

and per Brett L. J. at p.213,

> "... the act of bankruptcy should be proved again on the hearing of the petition, i.e. proved by fresh evidence which is evidence on the proceeding."

E In the case of *Re Cohen* (8) a number of affidavits were filed at the hearing, apparently seeking to establish inter alia the particular act of bankruptcy, namely departing out of the jurisdiction with the intent to defeat or delay creditors. Whether or not any such affidavit evidence will suffice, will depend on the facts of each case. Quite obviously if the debtor appears at the hearing disputing the contents of the creditor's affidavit, viva voce evidence is necessary.

F In dealing with the provisions of rule 71 in *Re A Debtor (No. 27 of 1943)* (6) Lord Greene M. R. observed that the rule

> "implies that the proof required need not be *carried any further*, save in cases where the debtor has given notice that he intends to dispute" (emphasis supplied).

G I have some difficulty in interpreting such observation. It could be interpreted to mean that there is no onus upon the creditor to prove anything other than that disputed by the debtor: that interpretation however conflicts with the provisions of section 7(2) of the Act, requiring the debt, act of bankruptcy, and service of the petition to be proved. The very attendance of the debtor at the hearing, of course, is sufficient to prove such service and that presumably is why there is no mention thereof in rule 171. The rule however requires that

> H "... the petitioning creditor's debt, and the act of bankruptcy, or such of those matters as the debtor shall have given notice that he intends to dispute, shall be proved ...."

The rule does not lend itself to ease of interpretation (and neither indeed does the revised edition thereof under rule 167 of the Bankruptcy Rules, 1952, which although confirming my interpretation of rule 171, nonetheless could in my respectful view have been worded with greater clarity). The word "those" cannot be interpreted to necessarily refer to the debt and act of bankruptcy, as the debtor could e.g. contest the question of security or domicile, etc. As I see it, the word "or", as is sometimes the case, must be construed to mean "and". If that were not the case and if the creditor was required simply to prove nothing more than that in respect of which the debtor had served notice to dispute, the relevant part of the rule, I consider, would simply have read,

> "On the appearance of the debtor to show cause against the petition, such of those matters as the debtor shall have given notice that he intends to dispute shall be proved."

If the debtor does not file a notice to dispute, and whether or not he attends at the hearing, the provisions of section 7(2) apply. If of course, the debtor makes an express admission of any fact (where no moneylending issues arise) I respectfully agree with Lord Greene M. R. that such admission would constitute sufficient proof of that fact. If however the debtor files notice to dispute any statement in the petition, such notice cannot in my view be construed as amounting to an admission of the other statements. This seems to have been the view of the learned Master of the Rolls when he observed:

> "Reading the section and the rule together I am of the opinion that, if the debtor admits the debt, and has not served notice of intention to dispute it, the fact of admission can be accepted as the proof which the section requires."

That passage indicates that a failure to file a notice to dispute the debt cannot amount to an admission thereof. The effect of the section and the rule would seem to be therefore that unless the debtor admits to the matters specified in section 7(2), those matters must be proved, whether or not he has filed notice to dispute them: furthermore, the petitioning creditor will be required to prove any additional matter disputed by the debtor. That this is the interpretation to be placed on rule 171 in particular, is confirmed by the contents of Step 35 of Table 4, at p.98 of Atkin's Court Forms Volume 7 2 Ed., which reads in part:

> "At the hearing the Creditor must give such proof as the Court thinks sufficient of:
>
> (1) the petitioning creditor's debt:
> (2) service of the petition:
> (3) the alleged act of bankruptcy, or one of the alleged acts of bankruptcy:
> (4) If the Debtor has given notice to dispute: any other matter in respect of which that notice was given.
>
> Evidence on the hearing of the petition is normally by affidavit. However, oral evidence may be adduced...."

Rule 170 provides that

> "If the debtor does not appear at the hearing, the Court may make a receiving order on such proof of the *statements in the petition* as the Court shall think sufficient." (emphasis supplied).

No doubt affidavit evidence would be sufficient proof in such circumstances, whether or not the debtor has filed notice of dispute. Of course if the debtor has made an express admission in respect of all or any of the statements in the petition (where the provisions of the Moneylenders Act Cap. 234 are inapplicable) the Court may well be satisfied with such admission as constituting sufficient proof of the petition or particular statement therein, as the case may be.

One thing is certain, the affidavit of verification is not admissible at the hearing. The petitioning creditor must then be prepared to prove the contents of his petition, by viva voce evidence if necessary. It will be seen that rule 170 refers to "the statement in the petition", that is, the entire petiton. Section 7(2) however requires proof of the debt, in which case the Court would no doubt require proof, under paragraph 3 of the petition, as to whether the debt is secured or unsecured. The court also requires proof of the act of bankruptcy and the service of the petition. The only statement in the petition not covered by the requirements of section 7(2) is the statement of domicile etc., contained in paragraph 1 of the petition, an aspect which is covered by the 1951 and 1952 Form 13 and Form No. 118 at p.250 of Atkin's, i.e. the affidavit of verification.

There is a wealth of authority pointing to the practice of the filing of an affidavit of debt before the hearing. There is no absolute necessity to file such affidavit, as viva voce evidence may be given at the hearing, establishing the continued existence of the debt. It is of course convenient to file such affidavit in case the debtor does not appear, in which case the affidavit may prove sufficient. But proof of the debt is not proof of the petition, and even if the debtor does not appear, the affidavit of verification will not suffice, and viva voce evidence will be required to prove e.g. the remainder of the petition. I would consider it a salutary practice therefore for a petitioning creditor to file a further affidavit within 24 hours of the hearing, establishing all the statements in the petition and of course the continued existence of the debt.

It will be seen that Form 13 in the Appendix to the Rules contains more detail than Form 12, due no doubt to the necessity for the separate petitioning creditors to depose to the particular statements in the petition within their personal knowledge. Form 13 does not descend to particulars in respect of the act of bankruptcy alleged in the petition: it does however give details of domicile etc. Further, the revised Form 13 under 1952 Rules gives details of whether or not each debt is secured. As all the statements in the petition must be verified on filing, if there is no lacuna in the 1915 Form 13, there can be little doubt that the revised 1952 Form is certainly an improvement thereon. In any event, it seems to me that the latter Form (see p.660 of Williams And Muir Hunter, and see also Form 118 at p.250 of Atkin's) could well be combined with Form 171 at p.277 of Atkin's, repeating and not just making reference to the contents of the petition, additionally establishing, of course, the continued existence of the debt. In the case of a joint petition, the statements of security and domicile will have already been grounded in the affidavit of verification (Form 13). For my part, I would accept the statements concerning security and domicile in an affidavit of verification of a joint petition (Form 13) as sufficient proof thereof at the hearing, that is, in the absence of dispute thereof, but in view of the terms of section 7(2) the remaining statements in the petition would have to be proved at the hearing by a further affidavit or viva voce evidence.

There is one matter which has arisen in the course of these proceedings.

The statutory form of affidavit of verification contained in Form 12 in the Appendix to the Rules reads: A

"I, the petitioner named in the petiton herewith annexed, make oath and say:

That the several statements in the said petition are within my own knowdge true."

In the case of *In re A Debtor (No. 7 of 1910)* (4) Cozens-Hardy M.R. observed that— B

"...in many cases it must be absolutely impossible that an affidavit in that form can be made without involving perjury."

In the case of *Re Cohen* (8) Sir Raymond Evershed M.R. (at p.37) had occasion to refer to such form of affidavit....it appears that steps have now being taken which will avoid the use in inappropriate cases of the present form...." C

The Bankruptcy Rules 1952 subsequently emerged in England. Form 12 has now been amended in part to read—

"I the petitioner named in the petition hereunto annexed (or, I of , being a person having knowledge of the facts to which the petition hereunto relates) make oath and say: D

That the several statements in the said petition are to the best of my knowledge information and belief true."

Form 13 in the Rules has also been suitably revised in the 1952 Rules. Quite clearly the 1952 forms are an improvement on the 1915 version. Rule 5 permits the use of the forms in the Appendix thereto "with such variations as circumstances may require". Section 146(1)*(b)*of the Act confers on a court the general power of E construing the Rules with "such verbal alteration not affecting the substance as expediency shall require". I consider therefore that there is ample authority to adopt the form of affidavit prescribed in Forms 12 and 13 in the 1952 Rules.

As for the present case, I reiterate that the affidavit of verification is inadmissible at the hearing and that the petitioning creditor must be prepared to prove the contents of the petition either by viva voce evidence or by an affidavit grounding the F facts set out in the petition, as the case may be.