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In the Matter of Freeport Italian Bakery, Inc.: Disapproving and Removing Trustees in Bankruptcy

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IN THE MATTER OF FREEPORT ITALIAN BAKERY, INC.: DISAPPROVING AND REMOVING TRUSTEES IN BANKRUPTCY

In *In the Matter of Freeport Italian Bakery, Inc.*[1] the United States Court of Appeals for the Second Circuit recently *removed* a creditor-elected trustee in bankruptcy who was a close relative of the bankrupt corporation's shareholders and creditors because he had not fulfilled his duty as trustee to press all legitimate claims of the estate.[2] Although the general rule is that a trustee may be disapproved or removed on a showing of cause,[3] the courts[4] have restrained from disapproving trustees elected by the creditors[5] and removing approved trustees.[6] This Note will analyze *Freeport Bakery* in view of the hesitancy of courts to disapprove or remove trustees, assaying the prevalent factors necessary before a court will disqualify the creditors' choice for trustee or remove an appointed trustee.

A incorporated his small wholesale bakery, beginning operations in February, 1956. It was soon apparent that more capital was needed to finance equipment purchases. A solicited loans from his brother, B and from B's son-in-law, C. C testified that he and B advanced some $17,000 between February and December 1956. This parol evidence was supplemented by cancelled checks drawn by B and C and endorsed by A. B died in 1957. In 1958 a series of notes payable to C and B's widow were prepared and signed by A as president of the corporation *and in his own name.* In 1959 a second series of notes containing the same terms were signed by a new president of the corporation and checks were issued in payment of the notes. These checks, however, were returned for "insufficient funds." C and B's widow then brought suit on the notes against A and the corporation. They obtained a default judgment only against A because the corporation had not been served with process. While a second action against the corporation was pending, they filed a petition for involuntary bankruptcy. Thereafter default judgments were rendered against the bankrupt corporation. In the bankruptcy proceedings C voted his claims for himself and was elected trustee. As trustee he made no effort to assert a claim

1. 340 F.2d 50 (2d Cir. 1965).

2. *Id.* at 54-55.

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

4. Court is defined as "the judge or the referee of the court of bankruptcy in which the proceedings are pending." Bankruptcy Act § 1(9), 52 Stat. 840 (1938), 11 U.S.C. § 1(9) (1964).

5. *E.g.*, In the Matter of G. E. C. Securities, Inc., 331 F.2d 655 (2d Cir. 1964).

6. *E.g., In re* Paramojnt-Publix Corp., 68 F.2d 703 (2d Cir. 1934).

against A as co-maker of the first series of notes. A general creditor sought to *remove* C as trustee on the grounds of improper election, for making false and fraudulent claims against the bankrupt corporation in his capacity as creditor, and for failing to prosecute the claims of the corporation to its detriment. The referee denied relief and the district court affirmed. The court of appeals reversed the order and directed the appointment of some person having no previous connection with any of the parties in the bankruptcy proceeding.[7]

Section 44 of the Bankruptcy Act[8] provides for the election of a trustee by creditors at their first meeting after the adjudication, after a vacancy has occurred, or after an estate has been reopened.[9] Before a trustee can be validly elected he must receive a "majority vote in number and amount of claims of all creditors whose claims have been allowed and who are present."[10] It must be noted, however, that such an election is not absolute. Every election is contingent on approval from the court. Section 2a (17) of the Bankruptcy Act provides that courts of bankruptcy[11] are invested with power to exercise original jurisdiction to "approve the appointment of trustees by creditors or appoint trustees when creditors fail so to do."[12]

The primary concern of sections 44a and 2a(17), however, is to vest the right of appointment in the creditors.[13] Hence, the power of the court to disapprove is necessarily contingent on a showing of cause.[14] Proper cause for disapproval exists only when it clearly appears that a fair and efficient administration of the bankrupt

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7. 340 F.2d at 55.

8. 52 Stat. 860 (1938), 11 U.S.C. § 72 (1964).

9. See *In re* Nice & Schreiber, 123 Fed. 987 (E.D. Pa. 1903), wherein the court aptly notes that the "creditors have the right to administer what is practically their own property by a proper trustee of their choosing." *Id.* at 988.

10. Bankruptcy Act § 56, 52 Stat. 865 (1938), 11 U.S.C. § 92 (1943).

11. " 'Courts of bankruptcy' shall include the United States district courts and the district courts of the Territories and possessions to which this Act is or may hereafter be applicable." Bankruptcy Act § 1(10), 11 U.S.C. § 1(10) (1964).

12. Bankruptcy Ace § 2a(17), 52 Stat. 842 (1938), 11 U.S.C. § 11a(17) (1964). See In the Matter of Eloise Curtis, Inc., 326 F.2d 698 (2d Cir. 1964). Before the Amendatory Act, 52 Stat. 840-74 (1938), 11 U.S.C. §§ 1-114 (1964), the creditors had an unqualified right to appoint their own trustee. See *In re* Lewensohn, 98 Fed. 576 (S.D.N.Y. 1899), *aff'd*, 104 Fed. 1006 (2d Cir. 1900). To offset unscrupulous elections the Supreme Court wisely promulated General Order XIII, which provided that the appointment of trustees was subject to the approval of the court. General Order XIII was abrogated as superfluous after the adoption of Section 2a(17) of the Bankruptcy Act.

13. See, *e.g.*, In the Matter of Eloise Curtis, Inc., 326 F.2d 698, 700 (2d Cir. 1964).

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

estate would be imperiled.[15] Such a determination rests largely within the sound discretion of the court.[16]

The Bankruptcy Act does not prescribe any standards for judging a trustee's competence.[17] The presence of certain factors, however, will result in the disapproval of one elected by the creditors. Trustees elected by undue activity on their own behalf[18] or by undue activity of the bankrupt[19] and those enjoying certain "prejudicial associations"[20] with the creditors[21] or the bankrupt[22] have been subjected to close judicial scrutiny before receiving approval.

In re N.S. Dalsimer & Co.[23] typifies the view that a candidate for trustee will be disqualified if his election resulted from his active solicitation of creditors for proxies. The trustee was elected by a majority in number and amount of the creditors participating. Substantially all of the votes for him were cast under powers of attorney held by him. In disapproving the creditors' choice, the district court noted that a "trustee should be wholly free from all entangling alliances or associations that might in any way control his complete independent responsibility."[24] *Dalsimer* was apparently overruled the following year by *In re Mayflower Hat Co.*[25] Under facts similar to *Dalsimer*, the *Mayflower* court reasoned that since creditors were permitted to vote for themselves as trustees, their proxy could not be disqualified from a trusteeship merely because he voted the proxies for himself.[26]

Sufficient ground for disapproving the creditors' selection exists when it can be shown that activities by the bankrupt influenced

15. See *In re* Bay Parkway Haberdashers & Hatters, Inc., 69 F.2d 103 (2d Cir. 1934); *In re* Mayflower Hat Co., 65 F.2d 330 (2d Cir. 1933); *In re* Blue Ridge Packing Co., 125 Fed. 619 (M.D. Pa. 1903).

16. *E.g.*, In the Matter of Eloise Curtis, Inc., 326 F.2d 698 (2d Cir. 1964); *In re* Thomas, 263 F.2d 287 (7th Cir. 1959); *In re* Bay Parkway Haberdashers & Hatters, Inc., *supra* note 15; *In re* Mayflower Hat Co., *supra* note 15.

17. See Bankruptcy Act § 45, 52 Stat. 860 (1938), 11 U.S.C. § 73 (1964), wherein it is provide that "receivers and trustees shall be . . . individuals who are competent to perform their duties and who reside or have an office in the judicial district within which they are appointed. . . ."

18. See generally 2 COLLIER, BANKRUPTCY ¶ 44.10 (14th ed. 1964).

19. See COLLIER, *op. cit. supra* note 18, at ¶ 44.09.

20. This term was apparently coined in Note, *Disqualification of Trustee in Bankruptcy for Prejudicial Associations*, 42 YALE L.J. 1187 (1934).

21. See generally COLLIER, *op. cit. supra* note 18, at ¶ 44.08.

22. See Casenote, *Disqualification of Trustee in Bankruptcy Due to His Prior Role as Assignee for the Benefit of Creditors Should Be Based on Discretion*, 9 UTAH L. REV. 477 (1964); see generally COLLIER, *op. cit. supra* note 18, at ¶ 44.07.

23. 56 F.2d 644 (S.D.N.Y. 1932).

24. *Id.* at 646, quoting from *In re* Rekersdres, 108 Fed. 206, 207 (S.D.N.Y. 1901). See also *In re* Lurie Bros., Inc., 267 F.2d 33 (7th Cir. 1959).

25. 65 F.2d 330 (2d Cir. 1933).

26. *Id.* at 331.

the election. *In re Bloomberg*[27] is illustrative. The bankrupt's father furnished one creditor with a list of all of the bankrupt's creditors and assisted that creditor in soliciting powers of attorney. The creditor voted all the proxies he received, which amounted to a majority in number and amount, for the trustee who was subsequently approved by the referee. The court reversed the referee's approval holding that since the trustee represented the creditors, and not the bankrupt, it was improper for the bankrupt to actively interfere, either directly or indirectly, with the creditors' right to elect.[28]

The creditors' selection for trustee will also be disapproved if the trustee's relationship with one or more of the creditors is deemed prejudicial to the administration of the bankrupt's estate. *In re Scott*[29] applied this principle. The elected trustee was an employee of a credit association which represented creditors of the bankrupt. The fees earned by the trustee went to the association under a prior agreement and compensation to the trustee-employee was fixed by the association. The court noted that a conflict of interest could arise between the general class of creditors and those creditors represented by the trustee's employer-association.[30] The trustee was therefore disapproved.

A prejudicial association between the trustee and the bankrupt has often resulted in the disapproval of the trustee. *In re Wink*[31] held that there is such a strong presumption against the approval of the bankrupt's attorney that it is doubtful whether such a choice should ever be confirmed. The court aptly noted:

> It is inexpedient that the former attorney for the bankrupt shall become his trustee. There are many and cogent reasons for so holding. One of the most obvious of these is the always existing possibility that it may become the duty of the trustee to take legal proceedings of some kind against the bankrupt. If it does, the difficulties and embarrassment which may result from recent confidential relations between the two may be of the most serious character. Moreover, for the harmonious, and therefore economical, administration of the bankrupt's estate, it is desirable, if possible that the trustee shall . . . have the confidence of the creditors generally and that his motives shall not be distrusted by even a minority of them. Such confidence is not likely to be given to one who was the adviser of the bankrupt in the commission of the act of bankruptcy.[32]

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27. 48 F.2d 635 (D. Minn. 1931).

28. *Id.* at 637. See Sloan's Furriers, Inc. v. Bradley, 146 F.2d 757 (1945); *In re* Lloyd, 148 Fed. 92 (E.D. Mich. 1906); *In re* McGill, 106 Fed. 57 (6th Cir. 1901); *cf.* In the Matter of Nat'l Discount Corp., 196 F. Supp. 766, 767-68 (W.D.S.C. 1961).

29. 53 F.2d 89 (W.D. Mich. 1931).

30. *Id.* at 90-91.

31. 206 Fed. 348 (D. Md. 1913).

32. *Id.* at 349-50.

There is, however, conflict among the courts on the application of the prejudicial association factor to assignees for the benefit of the creditors. In *Garrison v. Pilliod Cabinet Co.*[33] the court held that the selection of an assignee as trustee was presumably improper. As an assignee, the party must account to the estate. As a trustee the party is required to investigate the assignee's account. The assignee-turned-trustee must, therefore, investigate his own account.[34] The *Garrison* court had no problem in disapproving the trustee. More recently, however, the second circuit *In the Matter of Eloise Curtis, Inc.*[35] applied a different approach. In reversing the district court's disapproval of an assignee elected trustee, the court remanded the case with instructions to the referee to determine the trustee's election as an issue of *discretion*, rather than an issue of law.[36] In *Garrison* the presumption against the propriety of the trustee's selection was not overcome. The *Eloise Curtis* court suggests that the presumption can be overcome by showing that the assignee is well qualified to act disinterestedly as the trustee. In fact, his selection may be warranted on the basis of the advantages received from the continuity in administration.[37] Hence, a referee should exercise his discretion in light of the circumstances of each case.[38]

A prejudicial association with the bankrupt would appear to exist in those cases in which a relative or shareholder of the bankrupt is elected trustee. To offset the possibility of their election to trusteeship, the Bankruptcy Act forbids relatives of an individual bankrupt, and shareholders, officers and directors of a bankrupt corporation from voting at an election for trustee.[39] It would seem that a prejudicial association existed in *Freeport Bakery*. The elected trustee, who had voted claims for himself, was a close relative[40] of the corporate shareholders and creditors. The *Freeport Bakery* court, however, noted that this factor was not of itself sufficient to disqualify the relative from being elected trustee or from voting his claims.[41] The court drew a nice distinction. The elected trustee was not a relative of the bankrupt (corporation); he was merely related to the bankrupt's shareholders and creditors. Moreover,

33. 50 F.2d 1035 (10th Cir. 1931).

34. See *In re* Kellar, 192 Fed. 830, 833 (1st Cir. 1912); see also *In re* Zuky, 18 F.2d 284 (E.D.N.Y. 1926) (dictum).

35. 326 F.2d 698 (2d Cir. 1964).

36. *Id.* at 701. See *In re* Kutchler, 69 F.2d 104 (2d Cir. 1934); *In re* Blue Ridge Packing Co., 125 Fed. 619 (M.D. Pa. 1903).

37. In the Matter of Eloise Curtis, Inc., 326 F.2d at 700. See Casenote, *Disqualification of Trustee in Bankruptcy Due to His Prior Role as Assignee for the Benefit of Creditors Should Be Based on Discretion*, 9 UTAH L. REV. 477 (1964).

38. See Herzog, *The Election of a Trustee*, 34 REF. J. 73 (1960).

39. Bankruptcy Act § 44a, 52 Stat. 860 (1938), 11 U.S.C. § 72a (1964). *Cf.* Schwartz v. Mills, 192 F.2d 727 (2d Cir. 1954).

40. See Bankruptcy Act § 1(27), 52 Stat. 840, 11 U.S.C. § 1(27) (1964).

41. 340 F.2d at 54.

the prejudicial association test is used in those cases in which the trustee's approval is in question. *Freeport Bakery* was a removal action.[42]

One might initially suspect that grounds for *removal* of an approved trustee are identical to the grounds for *disapproval* of a trustee. In practice, however, such is not the case. Once the trustee has received approval after close scrutiny by the court and has assumed his position, it is detrimental to the efficient administration of the estate to remove him, except when sufficient cause warrants such action.[43] Section 2a (17) of the Bankruptcy Act expressly provides that courts may "upon complaints of creditors or upon their own motion, *remove for cause* receivers or trustees upon hearing after notice."[44]

One specific ground for removal of a trustee appears in General Order 17(3).[45] It provides:

> In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the Act or by these general orders; within five days after the same be due, it shall be the duty of the court to make an order requiring the trustee to show cause . . . why he should not be *removed* from office.

Other grounds for removal are determined by the court's exercise of sound discretion.[46] Since the trustee has been subjected to close scrutiny before receiving the court's approval, it would appear that additional circumstances must be present before a court will remove a trustee.[47] Prior circumstances, however, unknown to the credi-

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42. *Query,* if this were an appeal from the referee's approval of the creditor's election, rather than a removal action, would the case have been decided on the "prejudicial association" issue? It is suggested that the court should look at the substance of the issue and not merely the form. Judge Frank, dissenting in Schwartz v. Mills, 192 F.2d 727, 731 (2d Cir. 1954), recommends that courts "pierce the corporate veil." The fact that the trustee is related to the bankrupt is practically equivalent to the trustee's relationship with the bankrupt corporation's shareholders, although a technical distinction is apparent.

43. *Cf.* In the Matter of Flexible Conveyor Co., 156 F. Supp. 164 (N.D. Ohio 1957), wherein the court refused to disapprove the appointment of the trustee made ten months prior because it would serve no useful purpose, notwithstanding their conclusions as to an improper election.

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

45. See Bankruptcy Act § 30, 30 Stat. 554 (1898), which empowered the Supreme Court to prescribe and amend all rules, forms, and orders to effectuate the provisions of the act. This section has been repealed by 78 Stat. 1001 (1964). The repeal, however, does not invalidate or repeal rules, forms or orders issued by the Supreme Court prior to October 3, 1964. In the future, such orders will be made by the Supreme Court pursuant to 78 Stat. 101 (1964), 28 U.S.C. § 2075 (1964).

46. *E.g.,* Woodford v. Cosden & Co., 289 Fed. 67 (8th Cir. 1923).

47. *E.g., In re* Paramount-Publix Corp., 68 F.2d 703 (2d Cir. 1934) (former director, present shareholder and intimate friend of officials of bank being sued by estate); In the Matter of Holden, 258 Fed. 720 (N.D.N.Y.

tor at the time of election, or unknown to the court at the time of approval, might constitute grounds for removal. *In re Oliveri*[48] presented such a situation. The trustee was the attorney and officer of the bankrupt's landlord. The general creditors, unaware of this fact, had elected him trustee. When this fact was discovered, the trustee was removed. The court held that there was a possible conflict of interests between the landlord corporation and the general creditors who had adverse interests in the bankrupt's estate.[49]

More frequently, however, the trustee is removed for factors arising after his appointment,[50] such as misconduct in office. The classic illustration is *Bollman v. Tobin*.[51] After the adjudication of bankruptcy, two creditors led a campaign to elect a trustee who would initiate action against the bankrupt's father, allegedly a silent partner in the bankrupt brokerage firm. This faction secured a majority in number and amount of claims to elect a trustee. After their first selection was disapproved by the referee, the majority creditors elected another trustee who had been active with them. Over the objection of the minority creditors, the trustee was approved. Subsequently the trustee had many conferences with the bankrupt's father. He took no action to establish the father's liability, even though the majority creditors had presented a report indicating the father's partnership. The court removed the trustee, holding that by his conduct he had lost the confidence and co-operation of the creditors who had elected him; this impeded the efficient administration of the estate.[52]

1919) (former assignee for benefit of creditors). See generally COLLIER, *op. cit. supra* note 18, at ¶ 44.19.

48. 45 F. Supp. 32 (E.D.N.Y. 1942).

49. See also *In re* Allied Owners' Corp., 4 F. Supp. 957 (E.D.N.Y. 1933).

50. *E.g., In re* Schireson, 45 F. Supp. 416 (E.D. Pa. 1940) (bankrupt's attorney prepared various papers for the appointed trustee).

51. 239 Fed. 469 (8th Cir. 1917).

52. *Id.* at 472. *Accord, In re* Savoia Macaroni Mfg. Co., 4 F. Supp. 626 (E.D.N.Y. 1933), wherein the court noted:

> The court should not delay the necessary administration of the estate in order to determine the ultimate truth of . . . charges, for that is not the real problem before the court. The problem is to have a trustee in charge entirely independent of any faction, well qualified to administer the estate and who will not present . . . constant friction between interests, but, on the contrary, will satisfy . . . all the creditors in seeing that the bankrupt estate is well, expeditious, and duly administered.
>
> For this reason, and without deciding the trust or falsity of the various charges made . . . and solely *in the interest of harmony* and the proper and efficient administration of this estate, this court has granted the motion to remove the present trustee.

Id. at 627. (Emphasis added.) See *In re* Bloomberg, 48 F.2d 635 (D. Minn. 1931); *In re* Conemaugh Coal Mining Corp., 18 F.2d 682 (W.D. Pa. 1926) wherein the court ruled that since the three trustees were not acting together, the best interests of the estate required its administration by disinterested trustees.

Prior to 1938 a trustee who employed an attorney who was a legal

In re Stephen & Co.[53] illustrates that a court will remove a trustee for irregularities even though he was not found to be personally dishonest. The trustee had taken advances on the compensation he might receive during the administration of the estate. The referee had apparently approved the withdrawals since he countersigned the checks from the estate.[54] The court held that this irregularity alone compelled the removal of the trustee, regardless of the motive or personal honesty of the trustee. Another irregularity in the administration of the estate occurred when the trustee purchased personal property of the bankrupt estate. Although the low pecuniary value of these articles negated dishonesty, the court noted that to sanction such a transaction would invite dishonesty to the detriment of the bankrupt estate.[55]

Since the trustee represents the creditors, and not the bankrupt, he should not join with the bankrupt to effect a composition detrimental to the creditors. This principle was announced by the *In re Allen B. Wrisley Co.*[56] court:

> A trustee in bankruptcy is an officer of the court, chosen by vote of the creditors. He stands to creditors in a fiduciary relation. He holds the estate in trust primarily for the creditors, secondarily, if there be surplus, for the benefit of the bankrupt. . . . His sole care should be to make the most out of the estate. . . . When he goes beyond that, and seeks to aid the bankrupt at the expense of the creditors, and by concealment or by false representation induces creditors to act contrary to their interests, he violates his duty, and should be removed from the trust.[57]

Undue delay by the trustee in initiating suits on behalf of the estate may constitute a ground for removal. In *Zimmerman v. Farmington Shoe Co.*[58] the court imposed a duty on courts to see that the trustee's performance is prompt and efficient with regard

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advisor for one of the general creditors could be removed. *In re* Carlisle Packing Co., 12 F. Supp. 8 (W.D. Wash. 1935); *In re* Forestier, 222 Fed. 537 (N.D. Cal. 1915). Today, however, section 44(c) of the Bankruptcy Act, 52 Stat. 860 (1938), 11 U.S.C. § 72c (1964), provides that "an attorney shall not be disqualified to act as attorney for a receiver or trustee by reason of his representation of a general creditor."

53. 30 F.2d 725 (S.D. Cal. 1928).

54. See Bankruptcy Act § 58, 52 Stat. 861 (1938), 11 U.S.C. § 76(c) (1964). This section provides that the compensation of trustees for their services are payable after the services are rendered. The court relied on an earlier version of this section providing, in essence, the same. See 30 Stat. 557 (1898).

55. Other irregularities allegedly existed: (1) the trustee procured loans from the estate; (2) he hired the estate's attorney to serve as his personal attorney; and (3) he demanded rebate from a real estate broker who had received a commission from the sale of the estate's property. These acts were held to be inimical and detrimental to the proper administration of the estate.

56. 133 Fed. 388 (7th Cir. 1904).

57. *Id.* at 390.

58. 31 F.2d 405 (1st Cir. 1929).

to distribution of the estate to creditors. If the trustee caused the delay, he should be removed.[59] In *Freeport Bakery* the trustee failed to press the legitimate claims of the bankrupt estate. If mere delay constitutes a ground for removal, the refusal to initiate actions based on legitimate claims should certainly be regarded as detrimental to the proper administration of the estate and grounds for removal.

The language of the court in *Fred Reuping Leather Co. v. Fort Green Nat'l Bank*[60] seems applicable to *Freeport Bakery*:

> [T]he trustee represents all the creditors and may therefore be relied upon to press all proper objections to the claims of those whose standing is questionable. If he defaults in his duty, the court may . . . direct him in his duty or, if he be recalcitrant, remove him for disobedience.[61]

By analogy the trustee has a duty to press all proper claims on behalf of the estate. In *Freeport Bakery* the trustee failed to bring an action against the former president of the bankrupt corporation who had been co-signer on a note for which the bankrupt was liable. An indemnity recovery might have resulted in a substantial gain to the general creditors. The trustee's failure to initiate such an action places the burden on another creditor to press the claim.[62] It would appear that, on this factor alone, the *Freeport Bakery* decision is correct.[63] It is submitted that *Freeport Bakery* announces the proper test to be applied by the court before *removing* a trustee:

> If the administration of the estate in bankruptcy would suffer more from the discord created by the present trustee than would be suffered from a change of administration, the removal of the trustee is necessarily the better solution.[64]

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59. *Id.* at 406 (dictum).
60. 102 F.2d 372 (3d Cir. 1939).
61. *Id.* at 373 (dictum).
62. *Cf.* Fred Reuping Leather Co. v. Fort Greene Nat'l Bank, 102 F.2d 372 (3d Cir. 1939).
63. Although it is ordinarily proper for a creditor to be elected trustee, the additional factor that the *Freeport Bakery* trustee was a *disputed creditor* might have influenced the court in its determination to reverse the district court and remove the trustee. The prejudicial association factor could also have been considered by the court.
64. 340 F.2d at 55.