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THE FORGOTTEN REMEDY: WAGE EARNERS' PLANS UNDER THE BANKRUPTCY ACT

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INTRODUCTION

In 1938, Chapter XIII, entitled "Wage Earners' Plans" was added to the Bankruptcy Act[2] to aid those wage-earner debtors of modest means who wished to avoid straight bankruptcy and its accompanying "stigma"[3] and who desired to adjust and liquidate their debts out of future earnings through the medium of the federal courts. This, however, was not a wholly new concept. As early as 1883, England had a provision in her Bankruptcy Act[4] dealing with small debtors in a summary, inexpensive manner without going through many of the formalities of bankruptcy; and in the United States, in 1932, the Senate considered a bill[5] providing a procedure whereby the wage earner could amortize his debts by regular payments over a period of time, but the bill was never reported out of committee.

The following year, § 74 of the Bankruptcy Act[6] was enacted, allowing individuals and firms who were in difficulty, but not insolvent, to pay their debts on an installment basis through an arrangement with a majority of their creditors. A few courts, notably the district court for the Northern District of Alabama, adapted the section for the relief of wage earners who were financially embarrassed,[7] but the statute did not meet with general success, due primarily to its failure to give the court jurisdiction over the debtor's future wages and to provide for the debtor's discharge. It did, however, provide a "laboratory for experiment,"[8] and after five years of experience under it, Congress enacted Chapter XIII.

That the use of Chapter XIII proceedings is increasing is shown by the following statistics: for the fiscal year ending 30 June, 1940, 52,171

[1] Member, Student Board of Editors, THE NORTH CAROLINA LAW REVIEW.
[2] 52 STAT. 840, 930-938 (1938).
[3] The wage earner who proceeds under the provisions of this Chapter is referred to as the "debtor," not as the "bankrupt." BANKRUPTCY ACT, §§602,606(3). "Perhaps it is only a euphemism, but it seems to answer a popular demand. In the public mind there is an odium attached to the word 'bankrupt.'" Analysis of H. R. 12889, 74th Cong., 2d Sess. 103 (1936).
[4] BANKRUPTCY ACT, 1883, 46 & 47 VICT., c. 52, §§ 121, 122.
[5] S. B. 3866, 72d Cong., 1st Sess. (1932). (Hastings-Michener Bill).
[6] 47 STAT. 1467 (1933).
[7] Note, *Wage-Earner Receiverships,* 6 U. OF CHI. L. REV. 459 (1939).
[8] Woodbridge, *Wage Earners' Plans in the Federal Courts,* 26 MINN. L. REV. 775 (1942).

cases were instituted under the Bankruptcy Act.[9] Of that number, only 3,202 were wage earners' plans, comprising 6.14 per cent of the total.[10] In 1953, the latest year for which figures are available, the total number begun under the Act stood at 40,087 cases, 8,670 of which were commenced under Chapter XIII.[11] This comprises 21.63 per cent of the total and represents a gain of over 300 per cent in the space of thirteen years. This might not be especially surprising if it were not for the fact that of the above 8,670 cases, 8,478 were commenced in four states,[12] leaving but 192 to be scattered among the remaining states and territories. And while five cases or less[13] were being commenced in each of thirty-seven states, during the same period 6,252 cases were begun in a single Alabama district.[14] Why should there be this disproportionate use of Chapter XIII? If desirable results obtain in industrial Birmingham, why should not equally desirable results by achieved in industrial Detroit, or even in North Carolina?

There are a number of explanations. It has been suggested[15] that the exceptional use of wage-earners' plans in Alabama is due to: (1) a large industrial population, which due to illness, shutdowns, reduced production schedules and other causes, produces a degree of irregularity in earnings which in turn results in inability to meet credit obligations as they mature; (2) wage garnishment laws, with fairly low exemptions, and disinclination of some employers to retain employees whose wages are repeatedly garnisheed; (3) the presence of some wage earners who are simply incapable of intelligently arranging their financial affairs; (4) a large number of credit institutions and merchants pursuing policies of easy credit and stringent methods of collection; and (5) a well-developed and efficient procedure, evolved through experience and having the active co-operation of creditors, debtors, employers, and attorneys.

On the other hand, in areas where Chapter XIII is used little or not at all, the two primary reasons seem to be: (1) *the absence of wage garnishment statutes* (or where there are such statutes, the provision

[9] *Annual Report of the Director of the Administrative Office of the United States Courts* 105 (1940).

[10] *Ibid.*

[11] *Annual Report of the Director of the Administrative Office of the United States Courts* 119 (1953).

[12] Alabama, Tennessee, Missouri and Kansas. *Id.* at 196.

[13] *Id.* at 196. Research reveals that only two cases have been commenced under Chapter XIII in North Carolina and it is not indicated whether either was successfully completed. *Annual Report of the Director of the Administrative Office of the United States Courts* 158 (1947).

[14] This was the Northern District of Alabama, which encompasses the industrial Birmingham-Bessemer area. *Annual Report of the Director of the Administrative Office of the United States Courts* 119 (1953).

[15] This information was contained in a letter from Referee Herbert R. Maulitz, Birmingham, Alabama (October 26, 1954); see also, Maulitz, *Operations Under Chapter XIII*, 27 J. N. A. REF. BANKR. 68 (1953).

of relatively liberal exemptions),[16] which tends to reduce the amount of financial pressure which can be brought to bear upon the debtor, and (2) *the fact that the Bar is generally unaware of the Chapter's existence or is unfamiliar with its provisions and procedures.*[17] Additional reasons which have been advanced are that the *presence* of a garnishment statute leads debtors to make little use of Chapter XIII, for since employers commonly will discharge an employee who receives two or three garnishments, wage earners are fearful that if they approach their employers for co-operation in a wage-earner's plan, they will be discharged for that also;[18] and in many larger cities there are courts of conciliation in which debtors can obtain most of the relief they desire without resorting to the federal courts.[19] One North Carolina referee is of the opinion that if a wage earner is going to use the bankruptcy court, he would simply prefer straight bankruptcy,[20] although statistics from Alabama might suggest otherwise[21] where there is a wider use of Chapter XIII and where debtors are more familiar with its provisions.

Finally, in some jurisdictions the judges and referees are openly hostile[22] and have arbitrarily refused to approve wage-earner proceedings.[23] Certainly, given a hostile court and a Bar unfamiliar with its provisions, Chapter XIII can little benefit the wage-earner debtor, but given a more friendly atmosphere, it offers a happy alternative to the wage-earner contemplating bankruptcy as the solution to this financial woes. It is the purpose of this article to examine the procedures and mechanics of this solution.

[16] For this information, the author is indebted to Referees Rufus W. Reynolds, Greensboro, N. C. (letter of October 25, 1954); Joseph B. Cheshire, Jr., Raleigh, N. C. (letter of October 22, 1954); Henry A. Bundschu, Kansas City, Missouri (letter of October 28, 1954).

[17] *Ibid.*

[18] This suggestion was contained in a letter from Referee Walter I. McKenzie, Detroit, Mich. (October 26, 1954). This result is contrary to that experienced in Alabama. See Maulitz, *supra* note 15.

[19] *Ibid.*

[20] Letter of a North Carolina referee, dated October 25, 1954.

[21] Referee Herbert Maulitz, Birmingham, Alabama, furnishes the following information in a letter of October 26, 1954:

Bankruptcy and Debtor Cases Filed in the Southern Division Of the Northern District of Alabama

Year	Wage Earner Petitions	Bankruptcy Petitions
1938	1131	2220
1942	2475	1483
1946	1488	580
1950	4807	619
1954	5346	661

[22] Referee Snedecor in 14 J. N. A. REF. BANKR. 33 (1942) relates that one referee recommended disbarment for any attorney who advised his client to make use of Chapter XIII.

[23] Referee Bundschu states that this attitude persists among some referees. (Letter of October 28, 1954).

I. The Petition

A. *Who May File and Where*

Not all persons who work for wages may make use of Chapter XIII proceedings, for § 606(8) of the Bankruptcy Act[24] specifically requires the wage earner to be one who "works for wages, salary, or hire at a rate of compensation which, when added to his other income, does not exceed $5000 per year."[25] Thus, if his income is $5000 or less, and he is insolvent or unable to pay his debts as they mature,[26] the wage earner may voluntarily[27] file a petition with the object in mind of effecting a plan for the composition of, or the extension of time for the payment of his debts, or both.[28]

The Act prescribes two methods of approach. Where the wage earner is already involved in a pending bankruptcy proceeding, he must file his petition under § 621, either before or after he has been adjudged bankrupt. Where no bankruptcy proceeding is pending, he is directed to file an original petition under § 622. In either case he may have some degree of latitude in choosing the court in which to file the petition. For example, if he files a § 621 petition, he must file it in the court in which the bankruptcy proceeding is pending.[29] However, there may be two or more bankruptcy proceedings pending in different districts, in which case he could file in any one of those districts. If the petition is an original one filed pursuant to § 622, he must file it "with the court which would have jurisdiction of a petition for his adjudication" in bankruptcy.[30] In such case, the venue requirement is in the alternative[31] and satisfaction of any one of the alternatives is sufficient. Having chosen the proper court, the wage earner then proceeds to submit his petition to the clerk of court, or to the judge if he permits it.[32]

[24] For the purpose of this article, sections referred to shall refer to sections of the Bankruptcy Act, unless otherwise indicated. General Orders and Official Forms referred to are promulgated by the Supreme Court in conformity with the power conferred by § 30 of the Bankruptcy Act.

[25] This is in contrast to the definition of "wage earner" in orthodox bankruptcy, where the limitation upon earnings is $1500. § 1(32).

[26] § 623.

[27] There is no provision made for the filing of an involuntary petition under Chapter XIII.

[28] § 606(6)(7).

[29] § 621.

[30] § 622.

[31] *E.g.*, the bankruptcy courts are vested with jurisdiction to adjudge persons persons bankrupt who have resided *or* had their domicile within their respective territories for the preceding six months; § 2a(1).

[32] In some districts, local rules specifically require filing with the clerk alone. *E.g.*, Rule XIII-4A of the Rules of the Southern District of New York. This emphasizes the importance of examining local rules for any effect which they might have upon proceedings under this Chapter.

B. *Contents of Petition*

There are, in the wage-earner's petition, a number of essential allegations. 1. The petitioner must allege his capacity to file the petition; that is, that he works for wages or salary and that his total income from all sources does not exceed $5000 per year.[33] 2. He must allege proper venue.[34] Since a § 621 petition must be filed in the *pending* bankruptcy proceeding, the petition need only allege the pendency of such proceeding in the court in which the petition is filed, and need not allege other facts dealing with venue.[35] 3. Because an original petition can be filed only if there is no bankruptcy proceeding pending, the § 622 petition should allege that there is none pending.[36] 4. There must be an allegation of insolvency, or of inability to pay debts as they mature, whichever is appropriate.[37] 5. Finally, there should be an allegation that the wage earner desires to effect a composition or an extension of time, or both, out of his future earnings.[38]

Accompanying the petition, there must be a statement of the debtor's executory contracts, and also his schedules and statement of affairs if not previously filed.[39] These are not required to be a part of the petition, but must be annexed to it.[40] The nature of the statement of executory contracts is not prescribed either by the Act or by General Order No. 58 but it is suggested that it contain a summary of the important features of each contract, such as the names of the parties, the subject matter, term, and consideration, and the performance already rendered, if any.[41] Neither are the contents of the schedules or statement of affairs prescribed; hence the provisions of § 7a(8)(9) necessarily apply. Section 7a(8) provides that the schedules shall consist of a schedule of the debtor's property and a schedule, or list, of his creditors, including all persons asserting contingent, unliquidated, or disputed claims. The schedules should also contain claims for the same exemptions as the debtor would be entitled to under federal or state law if he were a bankrupt.[42] Section 7a(9) does not itself specify the contents of a statement of affairs but authorizes the Supreme Court to pre-

[33] § 606(3)(6); OFFICIAL FORM No. 58.
[34] While no provision of Chapter XIII requires this, Official Form No. 58 does so prescribe.
[35] 9 COLLIER, BANKRUPTCY ¶ 24.06 (14th ed. 1942).
[36] OFFICIAL FORM No. 58.
[37] § 623; OFFICIAL FORM No. 58.
[38] OFFICIAL FORM No. 58.
[39] § 624 (1). If the petition is filed pursuant to § 621, it is possible that the schedules and statement of affairs have already been filed in the pending bankruptcy proceeding. Where preciously filed, the petition should allege that fact and date of filing. 9 COLLIER, BANKRUPTCY ¶ 24.06 (14th ed. 1942).
[40] OFFICIAL FORM No. 58.
[41] 9 COLLIER, BANKRUPTCY ¶ 24.06 (14th ed. 1942).
[42] § 637. See also § 7(8).

scribe them, which it has done in Official Form No. 2. This includes statements of the debtor's name and address, his occupation and income, his bank accounts, safe deposit boxes, books and records.

If the debtor files with his petition a list of his creditors and their addresses, and a summary of his assets and liabilities, but does not file his statement of executory contracts, schedules, and statement of affairs, the court may, on application of the debtor and for cause shown, grant him further time (up to ten days) in which to file.[43] The petition may be dismissed if these statements are not filed and if no further time in which to file is granted by the court.[44] In this event, if there is a pending bankruptcy proceeding and the debtor has not yet been adjudged a bankrupt, he is so adjudged, and the bankruptcy is proceeded with[45] as though no § 621 petition had ever been entered.[46] If the petition is an original one, the debtor may be adjudged bankrupt only if he consents, at which time the court orders bankruptcy to be proceeded with[47] as if the debtor had filed a voluntary petition for adjudication in bankruptcy and as if a decree of adjudication in bankruptcy had been entered on the day the § 622 petition was filed.[48] If the debtor does not consent, then his petition is simply dismissed.[49]

In the event an order is entered directing that bankruptcy be proceeded with,[50] only tax claims and claims provable under § 63 of the Bankruptcy Act can be allowed.[51] This limitation is made because claims which may be allowed under Chapter XIII are of a broader scope than those allowed under ordinary bankruptcy proceedings.[52] When bankruptcy follows the dismissal of a wage-earner's plan, then, those broader claims can no longer be allowed.

There is no express provision dealing with the time within which proof of claim must be filed or else be barred in the wage-earner's proceeding under Chapter XIII,[53] but a time is provided within which proof of claim must be filed where the Chapter XIII proceeding is followed by an order directing that bankruptcy be proceeded with.[54] Section

[43] § 624(1). This time will not be extended further except for cause shown and on such notice and to such persons as the court may direct.
[44] § 666; § 678(3).
[45] § 666(1).
[46] § 667(2).
[47] § 666(2).
[48] § 667(2). Only under §§ 666(1)(2) and 671(1) can a debtor be adjudged a bankrupt during the pendency of a Chapter XIII proceeding. § 668.
[49] § 666 (2).
[50] This may be done pursuant to either §661 or §671(1).
[51] § 643.
[52] *Cf.* § 606(1) with § 63.
[53] This is true both as to original petitions and as to petitions filed in prior bankruptcy proceedings. Under §§ 632 and 633, proofs of claim are to be received and allowed at the first meeting of creditors, or at any adjourned meeting thereof.
[54] § 643.

643 deals with the filing of claims where a § 621 petition, filed in a pending bankruptcy proceeding, is in turn followed by an order reinstating the prior proceeding. The section clearly implies that claims already duly filed in the prior bankruptcy proceeding need not be refiled when the proceeding is reinstated, but it is expressly provided that, as to those claims not filed, claimants have six months from the date of the first meeting of creditors in which to file them, if that date was set *after* the § 621 petition was filed. If the date of the first meeting of creditors was set *before* the petition was filed, claimants have six months from the date of mailing of notice to creditors that an order reinstating the bankruptcy proceeding has been entered, that date being deemed to be the date set for the first meeting of creditors. However, if before the § 621 petition was filed, a claim had been barred by failure to file within six months, that claim remains barred when bankruptcy is subsequently proceeded with.

Although § 643 is silent on the point, where a § 622 proceeding under Chapter XIII is succeeded by bankruptcy, creditors doubtless have six months from the date set for the first meeting of creditors within which to file their proofs of claim, and not merely six months from the date of the mailing of notice referred to above, since there has been no prior bankruptcy proceeding in which to file.

Finally, § 624(2) requires the petition, if filed pursuant to § 622, to be accompanied by the payment of $15 to the clerk, $10 going to the Treasury of the United States for deposit in the referees' salary fund and $5 going to the clerk.[55] The payment of this sum may be made in installments if the debtor cannot obtain the money with which to pay the filing fees in full at the time of filing.[56] Section 624(2) does not apply to petitions filed in pending bankruptcy proceedings since, in such case, the requisite fees have already been paid.

C. *Effect of Filing*

The filing of the Chapter XIII petition carries with it numerous important consequences. One is that a constructive adjudication in bankruptcy results, with three effects: (1) it gives creditors and all other persons the same rights, duties, and liabilities with respect to the debtor's property that they would have after an adjudication in an ordinary bankruptcy proceeding;[57] (2) it gives the officers of the court the same rights, duties and powers, and gives the debtor the same rights, privileges and duties that both possess after an adjudication in an ordinary bankruptcy proceeding;[58] and (3) it gives the court the

[55] § 624(2). This is in lieu of the fees of $17 and $8 prescribed at §§ 40c(1)(a), 52a.

[56] § 624(2); GENERAL ORDER No. 35(4).

[57] § 641.

[58] § 636.

same jurisdiction, powers, and duties that the court possesses after an ordinary bankruptcy adjudication,[59] which includes exclusive jurisdiction of the debtor and his property, wherever located, and of his earnings and wages in the period during the filing of the petition and confirmation of the plan.[60]

Another consequence is that upon the filing of a Chapter XIII petition, § 614 confers injunctive powers upon the court in two broad situations:[61] (1) the court may, without giving notice, enjoin or stay the commencement or continuation of suits other than suits to enforce liens on the debtor's property, until a final decree is entered;[62] and (2) the court may, upon notice and for cause shown, enjoin until final decree any act or the commencement or continuation of any proceeding to enforce a lien on the debtor's property.[63] In this connection, courts often issue temporary injunctions when the petition is filed and enclose a copy in the general notice to creditors.[64]

When a petition is filed, all statutes of limitation affecting claims provable under the Bankruptcy Act are suspended[65] until the proceeding is dismissed. The petition filed in an ordinary bankruptcy proceeding seeks an adjudication in bankruptcy[66] and the judge or referee, as the case may be, is required either to make the adjudication or to dismiss the petition.[67] If the debtor is so adjudged, his estate is administered for the purpose of liquidation and distribution to his creditors.[68] The final consequence of filing a Chapter XIII petition, specifically one filed pursuant to § 621, is that it operates automatically to stay the adjudication of the debtor if he has not already been adjudged a bankrupt, and to stay the administration, and therefore the liquidation, of his estate.[69]

In this event, the court may in its discretion require the debtor to give bond to indemnify the estate against loss or diminution during the period of the stay, but only "upon hearing after notice to the debtor and

[59] § 612.
[60] § 611.
[61] § 614.
[62] *In re* Enderson, C. C. H. ¶ 54,537 (S. D. N. Y. 1943). Here the creditor was enjoined from garnishing the debtor's earnings.
[63] *In re* Duncan, 33 F. Supp. 997, 43 Am. B. R. (N. S.) 692, C. C. H. ¶ 52,702 (E. D. Va. 1940). In this case, the creditor's suit to repossess a chattel sold to the debtor under a conditional sales contract was stayed.
[64] § 632. See NADLER, THE LAW OF BANKRUPTCY § 830 (1948).
[65] § 676 also provides for the suspension of the running of "all periods of time prescribed by this Act in respect to the commission of acts of bankruptcy, the recovery of preferences and the avoidance of liens and transfers" while a Chapter XIII proceeding is pending and until it is finally dismissed.
[66] § 59 a, b.
[67] § 18 d, e, g.
[68] Guaranty Trust Co. of N. Y. v. Henwood, 86 F. 2d 347, 352, 32 Am. B. R. (N. S.) 264, 273 (8th Cir. 1936) *cert. denied* 300 U. S. 661, 57 Sup. Ct. 492, 81 L. Ed. 870 (1937).
[69] § 625.

such other persons as the court may designate."[70] The application for an order requiring bond may be made by any party in interest, or a hearing may be called by the court without application by any party.[71] The purpose of the bond is to protect the estate in the situation where the plan is dismissed either before or after it is confirmed and the case is again administered as an ordinary bankruptcy proceeding,[72] since in that event the estate may suffer loss or diminution due to the delay in liquidating the debtor's assets. If a bond is required and the debtor fails to comply with such requirement, the proceeding is dismissed.[73] It follows, although not expressly stated in § 626, that the pending bankruptcy proceeding is reinstated.[74] Chapter XIII makes no provision for an indemnity bond where the petition is filed pursuant to § 622.

II. Meeting of Creditors; Procedure Therein

Assuming that the petition of the wage earner has been duly and properly drawn and filed with the court, the judge may refer the proceeding to a referee[75] and the judge, or the referee, must then promptly call a meeting of creditors, giving at least ten days' notice by mail both to the creditors and to the debtor.[76] At this meeting or at any adjournment thereof, the judge or referee presides, examines the debtor and hears witnesss on any relevant matter, and receives proofs of claim, which he then allows or disallows as the facts may warrant.[77] These claims, with the exception of claims secured by estates in real property or chattels real,[78] include all claims against the debtor or his property whether provable as debts in an ordinary bankruptcy proceeding or not, and whether secured or unsecured, liquidated or unliquidated, fixed or contingent.[79] Each proof of claim must contain proof that the claim is free of usury before it can be allowed, unless the court is satisfied that the claim is not based upon money loaned, or on a note or bond.[80]

It is at this initial meeting of creditors that the wage earner presents his plan,[81] and if the proceeding has been referred to a referee, he must deposit a further fee, not to exceed $15, with the clerk, for payment into the referees' salary fund.[82] If the debtor cannot pay this fee in full, the court may allow him to pay it in installments.[83] The court then receives and determines the written acceptances of those creditors who

[70] § 626. The court also designates the time within which and the form and manner in which the notice shall be given. § 615.
[71] 9 Collier, Bankruptcy ¶ 24.14 (14th ed. 1942).
[72] §§ 666(1), 671(1)(a). [73] § 626.
[74] 9 Collier, Bankruptcy ¶ 24.14 (14th ed. 1942).
[75] § 631.
[76] § 632; Official Form No. 59. A copy of this notice, and of all notices given pursuant to Chapter XIII, must be sent to the Secretary of the Treasury. § 678(2).
[77] § 633(1). [78] § 606 (1). [79] § 63.
[80] § 656(b); General Order No. 55(5).
[81] The plan is discussed in detail subsequently. [82] § 633(2).
[83] *Ibid.*; General Order No. 35(4).

have accepted the proposed plan.[84] If the plan is accepted, the court appoints a trustee to receive and distribute all moneys paid by the wage earner under the plan. As a final matter, unless the plan has been accepted by all the creditors, the court fixes a time for filing application to confirm the plan and for a hearing[85] on the confirmation, if these dates were not specified when notice of the first meeting of creditors was given.[86] Since the court *must* confirm the plan if it has been accepted by all creditors (subject to certain conditions hereinafter discussed under Confirmation),[87] no time for filing an application to confirm or for holding a hearing upon confirmation need be fixed in that event.

It is well to note that a number of factors may cause the wage-earner's petition to be dismissed at this stage of the proceeding. A plan, for some reason, may not have been proposed by the debtor, or having been proposed, it may have been withdrawn or abandoned before its acceptance, or it may not have been accepted by the requisite number of creditors. Perhaps the deposit, if required, was not made, or the application for confirmation was not made within the time set by the court. Any one of these events is sufficient to cause dismissal of the petition, and the wage earner should take care to avoid them, especially since in appropriate cases bankruptcy will ensue.[88]

III. The Plan

The plan offered during the meeting of creditors must at all times contain certain mandatory provisions herein discussed if the debtor is to effectuate his purpose of scaling down his total indebtedness, or postponing the time for payment of his debts, or both, and may include certain other enumerated provisions as well. While the plan is the debtor's, the judge or referee can facilitate matters by taking an active part in its formulation, both as to the amount of installment payments to be made and as to the provisions under which the creditors will share in these payments. A fair proposal coming from the referee and acquiesced in by the debtor may be accepted immediately, while an identical proposal coming from the debtor or his attorney may be greeted by endless debate and delay.[89]

[84] § 633(2). This provision must be viewed in the light of §§ 651, 652, dealing with confirmation of the plan. These sections are discussed subsequently.

[85] Creditors are entitled to ten days' notice by mail of the hearing on the application to confirm the plan. §§58a(2), 677.

[86] § 633(5). The form for the application for confirmation is Official Form No. 60.

[87] § 651.

[88] §666.

[89] Maulitz, *Operations Under Chapter XIII*, 27 J. N. A. Ref. Bankr. 68 (1953).

A. *Mandatory Provisions*

The plan must deal with all unsecured creditors in the same manner upon any terms,[90] but it must be kept in mind that the terms of the plan are not binding until the plan is confirmed,[91] which depends upon obtaining its acceptance by creditors[92] and upon satisfying the court that the plan is, among other things, for the best interests of the creditors.[93] The plan must provide for the submission of the debtor's future earnings or wages to the supervision and control of the court.[94] This requirement is indicative of the basic concept of Chapter XIII relief, in that the settlement is to be made primarily out of the debtor's future earnings.[95] The final mandatory provision is that provision must be made to allow the court after confirmation to increase or reduce the amount of any installment payments as provided by the plan, or to extend or shorten the time for such payments where it appears that the debtor's circumstances warrant it.[96] Apparently this provision does not authorize any increase or reduction in the amount to be paid as specified in the plan but instead authorizes the amount or frequency of payment of the installments, which make up that specified amount, to be increased or reduced.[97]

B. *Permissible Provisions*

It is permissible for the plan to deal with any secured debts,[98] other than those secured by estates in real property or chattels real,[99] and if secured creditors are dealt with, they must be dealt with individually[100] on any terms which they will accept.[101] That is to say, two or more secured creditors cannot be placed in a class and dealt with collectively, but must be treated separately even though the terms provided for one secured creditor may be identical with the terms provided for another.

Some difficulty arises due to the failure of Chapter XIII to define "secured creditor." The Bankruptcy Act defines a secured creditor as one "who has security for his debt upon the property of the bankrupt of a nature to be assignable under this Act or who owns such a debt for which some indorser, surety, or other person secondarily liable for the bankrupt has such security upon the bankrupt's assets."[102] There is

[90] § 646(1).
[91] § 651.
[92] §§ 651, 652(1).
[93] § 656(a)(2).
[94] § 646(4).
[95] Other provisions also reflect this concept. §§ 611, 623, 658.
[96] § 646(5). A copy of this order must be sent to the Secretary of the Treasury. § 687(6).
[97] 9 COLLIER, BANKRUPTCY ¶ 28.06 (14th ed. 1942).
[98] § 646(2).
[99] § 606(1).
[100] § 646(2).
[101] Each secured creditor dealt with must accept the plan. §§ 651, 652(1).
[102] § 1(28). Under this provision, a number of situations have arisen in ordinary bankruptcy proceedings: (1) if the creditor holds a simple note of the debtor, without security or surety thereon, he is obviously not a "secured creditor"; (2) if the

no visible reason why the Bankruptcy Act definition and the decisions thereunder should not control in a Chapter XIII proceeding.[103] Thus[104] only where the creditor holds as security property which would otherwise swell the assets of the debtor's estate, or indirectly holds the property through having the obligation of another who holds such property, is he entitled to be dealt with as a "secured creditor"[105] in the plan.

Where the plan deals with both secured and unsecured debts, there may be a provision made for priority of payment as between them.[106] Priority in favor of unsecured creditors presents no problem since confirmation of the plan is conditioned upon acceptance by every secured creditor dealt with.[107] But it is not essential to confirmation that a plan be unanimously accepted by the unsecured creditors and it was formerly suggested[108] that non-assenting unsecured creditors could urge that the plan was not "fair and equitable"[109] as to them if it provided for priority in favor of secured creditors. It is likely that this possible objection has been overcome, however, the "fair and equitable" requirement having been eliminated in 1952,[110] but the plan to be confirmed must still be found by the court to be "for the best interest of the creditors."[111]

The plan may also provide for the rejection of any of the debtor's executory contracts,[112] including unexpired leases of real property.[113] But until the plan is confirmed, the rejection is without any effect[114]

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creditor holds a note on which there are sureties, absent other facts, he is not a "secured creditor," *In re* Shatz, 251 Fed. 351 (E. D. Pa. 1918); *In re* Foster Motor Car Co., 219 Fed. 168 (4th Cir. 1914); (3) if the creditor holds a note with sureties on it and also holds collateral security which is the property of the sureties and not of the debtor, he is still not a "secured creditor." *In re* United Cigar Stores Co. of America, 73 F. 2d 296 (2d Cir. 1934), *cert. denied*, 294 U. S. 708, 55 Sup. Ct. 405, 79 L. Ed. 1243 (1935); *In re* Pan-American Match Co., 245 Fed. 995 (D. Mass. 1917).

[103] §602.

[104] *In re* Blizard, 20 F. Supp. 481 (E. D. Pa. 1937): "A creditor's claim may be amply secured, but he is not a 'secured creditor' within the meaning of the act, unless the security is on 'property of the Bankrupt.'" Also see *In re* Pan-American Match Co., 242 Fed. 995, 996 (D. Mass. 1917).

[105] *In re* Schatz, 251 Fed. 351, 354 (E. D. Pa. 1918).

[106] § 646(3).

[107] §§ 651, 652(1).

[108] 9 COLLIER, BANKRUPTCY ¶ 28.04 (14th ed. 1942).

[109] Former § 656(a)(3).

[110] Pub. L. No. 456, 82d Cong., 2d Sess. § 50 (1952).

[111] § 656(a)(2).

[112] § 646(6).

[113] § 606(5). Section 642 states: "The claim of a landlord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease must be limited to an amount not to exceed the rent, without acceleratioin, reserved by such lease for the year next succeeding the date of the surrender of the premises to the landlord or the date of entry of the landlord, whichever first occurs, whether before or after the filing of the petition, plus unpaid accrued rent, without acceleration, up to the date of surrender or re-entry."

[114] § 657.

other than to make any person who will be injured by such rejection a creditor for the purposes of Chapter XIII.[115] Rejection cannot be tacit but must be expressly provided for in the plan if it is to take affect[116] and the contract must be rejected in its entirety or not at all.[117] It should also be noted that this is not the only provision made in Chapter XIII for the rejection of executory contracts, for the court itself may permit rejection in its discretion.[118]

The plan may also "include any other appropriate provisions not inconsistent with" Chapter XIII.[119] This permits a wide variety of provisions whose nature will depend upon the needs and desires of the particular wage earner. For example, the plan may provide that it shall terminate upon the happening of some condition set out in the plan,[120] at which time the proceeding must be dismissed,[121] or it it may provide for the assumption, settlement, or payment of any state or federal tax included in § 680, but it cannot, for instance, deal with a creditor whose debt is secured by a lien on real estate.[122]

IV. CONFIRMATION

A. *Acceptance by All Creditors*

A plan, which at the first meeting of creditors has been accepted in writing by all the creditors affected thereby[123] (whether or not their claims have been proved), must be confirmed by the court,[124] provided that certain conditions are met. The deposit required by Chapter XIII[125] and by the plan if it so provides,[126] must have been made[127] and the court must be satisfied that the plan and its acceptance are in good faith and have not been procured by any means, promises, or acts forbidden by the Bankruptcy Act.[128] These conditions have been supple-

[115] § 642.
[116] *In re* Greenpoint Metallic Bed Co. Inc., 113 F. 2d 881, 43 Am. B. R. (N. S.). 373 (2d Cir. 1940), decided under Chapter X.
[117] 9 COLLIER, BANKRUPTCY ¶ 8.05 (14th ed. 1942).
[118] § 613(1).
[119] § 646(7).
[120] § 666.
[121] *Ibid.*
[122] § 606(1).
[123] § 607: "A creditor shall be deemed 'affected' by a plan only if his interest shall be materially and adversely affected thereby. In the event of controversy, the court shall, after hearing upon notice, summarily determine whether any creditor is so affected."
[124] § 651.
[125] §§ 633(2), 624(2).
[126] The plan may require the immediate deposit of money with the trustee. § 646(7).
[127] § 651.
[128] *Ibid.* 8 COLLIER, BANKRUPTCY ¶ 9.20 (14th ed. 1942) states: "'good faith' is not defined by the Act, but since this provision views not only the conduct of the debtor but that of the creditor as well, it has been suggested that 'the basic inquiry should be whether or not there has been an abuse of the provisions, purpose, or spirit' of Chapter XIII in the proposal of the plan or in its acceptance." For

mented by General Order No. 41 which requires all creditors and other persons who may have waived their right to share in the distribution of the deposit or in payments under the plan to set out in writing and under oath all agreements with the debtor, his attorney, or other person with respect to such waiver. The debtor is required to state by affidavit what he has not paid or promised any consideration to any attorney, trustee, receiver, creditor or other person in connection with the proceedings except as stated in his affidavit or in the plan, and that he has no knowledge of any such payment or promise by any other party.[129] Only after these conditions are fulfilled, if all creditors have accepted, must the court confirm the plan.

B. *Acceptance by Less Than All Creditors*

The above does not mean, however, that if less than all the creditors accept, the plan cannot be confirmed; for in that event § 652 provides that after, but only after, all secured creditors dealt with by the plan and a majority in number and amount[130] of all the unsecured creditors have given their acceptances in writing, and after the debtor has made the requisite deposits under the provisions of the Chapter and the plan,[131] the debtor may apply to the court for confirmation of the plan[132] within the time fixed by the court for such application.[133] A hearing is then held, at which time objections to confirmation may be made.[134]

Before confirming the plan, "the court shall require proof from each creditor filing a claim that such claim is free from usury as defined by the laws of the place where the debt was contracted,"[135] (required at the meeting of creditors, as previously discussed) and as a final matter, the court must be satisfied as to the existence of four facts which are prerequisites to confirmation. 1. All the provisions of Chapter XIII must have been compiled with.[136] 2. The plan must be for the best

example, a petition for composition and extension filed by one who listed no assets and whose earning capacity was $73 per month for the admitted purpose of preventing garnishment of wages, in which petition a monthly payment of $370 to creditors was contemplated was held properly dismissed because it was obviously not filed in good faith. Hill v. Topeka Morris Plan Bank, 105 F. 2d 299 (10th Cir. 1939), decided under former § 74.

[129] GENERAL ORDER No. 41. See Official Form No. 61 for form of order confirming a plan where all affected creditors have accepted.

[130] § 652(1).

[131] § 633(2); note 126 *supra.*

[132] OFFICIAL FORM No. 60.

[133] §§ 652, 633(5).

[134] § 633(5). Creditors are entitled to ten days' notice. §58a(2). Any order fixing the time for confirmation which affects claims of the United States must include notice of not less than ten days to the Secretary of the Treasury. §678(7).

[135] § 656(b). See note 80 *supra.*

[136] § 656(a)(1). For example, if the court finds that some of the plan's mandatory provisions have not been complied with [§ 646(1)(4)(5)], or if the plan attempts to deal with a creditor secured by an estate in real property [§ 606(1)], the plan cannot be confirmed.

interests of the creditors and it must be feasible.[137] 3. The court must be satisfied that the debtor has not been guilty of any act or failed to perform any duty which would bar the discharge of a bankrupt.[138] 4. The proposal and its acceptance must have been made in good faith and must not have been procured by any means, promises, or acts forbidden by the Act,[139] although confirmation of the plan cannot be refused for the sole reason that the plan preserves some interest of the debtor.[140]

The determination of these four facts lies in the court's discretion and the decision reached will not be disturbed on appeal unless this discretion has been abused.[141] If the court finds that one or more of these requirements have not been met, the plan cannot be confirmed, and the proceeding must be dismissed.[142] But once the court is satisfied that the four above facts exist in a case, the plan must be confirmed upon the filing of the requisite affidavits.[143]

C. *Effect of Confirmation*

When the plan is confirmed, it becomes binding upon the debtor and upon all his creditors[144] and the order of confirmation is as conclusive upon the rights and interests of the parties as any other judgment would be.[145] This simply means that the plan is not subject to collateral attack, even by nonassenting secured creditors who still have rights aside from the plan. During the period when the plan is in operation, the court retains the exclusive jurisdiction[146] over the debtor and his property which it had before confirmation[147] and also has supervision and control over any agreement or arrangement provided for in the plan in respect

[137] § 656(a)(2).

[138] §656(a)(3). Grounds barring discharge of a bankrupt are set out at § 14(c).

[139] § 656(a)(4). This is the only condition shared by § 651 and § 656.

[140] § 656(4).

[141] *In re* Pilsener Brewing Co., 79 F. 2d 63 (9th Cir. 1935), decided under former § 77-B; *In re* Youtie, 44 F. 2d 56 (3d Cir. 1930), decided under former § 12. Reversed for abuse of discretion: Farkus v. Katz, 54 F. 2d 1061 (5th Cir. 1932); Fleischmann & Divine Inc. v. Saul Wolfson Dry Goods Co. Inc., 299 Fed. 15 (5th Cir. 1924), decided under former § 12.

[142] § 666. Bankruptcy may ensue. The same result follows if a debtor defaults in any of the terms of the plan after confirmation. Miller v. Wooley, 141 F. 2d 837 (9th Cir. 1944), decided under Chapter XI. Only in one other instance may the plan be dismissed after confirmation, that being for fraud involving the debtor. §671(1). Where the court orders that bankruptcy be proceeded with, pursuant to either § 666 or § 671(1), the trustee in bankruptcy is vested with title to all the debtor's property as of the date of the order. The unsecured debts incurred by the debtor after confirmation and before bankruptcy ensues share on a parity with debts incurred before confirmation unless the plan expressly provides otherwise. The provisions of Chapters I through VII of the Bankruptcy Act are expressly made to apply to the rights, duties, and liabilities of these creditors holding later-acquired claims, and to all other persons with respect to the debtor's property. § 669.

[143] GENERAL ORDER No. 41.

[144] § 657.

[145] *In re* Koncus *et al.*, 123 F. 2d 92; 47 Am. B. R. (N. S.) 321, C. C. H. ¶ 53, 439 (7th Cir. 1941) decided under former § 74.

[146] § 658(1).

[147] § 611.

to the debtor's future earnings.[148] In addition, the court may issue such orders as are required to effectuate the provisions of the plan, including orders to the debtor's employer.[149]

V. Modification and Alteration of the Plan

A. *Before Confirmation*

Should the need arise for the alteration or modification of the provisions set forth in the plan, Chapter XIII provides the machinery for doing so under certain circumstances, both before and after confirmation of the plan.[150] For instance, it may be that the debtor has made no provision for the rejection of executory contracts, but before confirmation finds it desirable to make such a provision.[151] To effect this change, the court in its discretion may grant leave to the debtor to propose any alteration or modification he thinks necessary, at any time before the plan is confirmed.[152] Notice to creditors and to other parties is not required before leave can be granted, so the application for such leave may apparently be made *ex parte*. The application should be by verified petition, setting out the alterations or modifications sought, the facts why leave should be granted, and why no notice should be given if leave is sought *ex parte*.[153] If leave is granted, a separate instrument setting out the proposed amendments should be filed, unless the order which grants leave to propose the changes itself sets them out and adjudges that they have been duly proposed, thereby making their subsequent proposal unnecessary.[154]

Assuming that leave is granted, the alteration or modification proposed by the debtor may, or it may not, materially and adversely affect the interests of creditors.[155] If the proposal does not have that effect, or if it does, but all adversely affected creditors have assented to the proposed change in writing, then the court may simply enter an order declaring that the proposed alteration or modification does not materially and adversely affect the interest of any creditor who has not assented in writing.[156]

However, if there are creditors who are adversely affected and who do not assent in writing to the proposed change, the court must adjourn the meeting of creditors, or if it has been closed, reopen it, and

[148] § 658(1).
[149] § 658(2).
[150] §§ 653, 654, 655, 671.
[151] § 646(6).
[152] § 653.
[153] 8 Collier, Bankruptcy ¶ 9.10 (14th ed. 1942).
[154] *Ibid.*
[155] *I.e.*, the proposed change must materially and adversely affect the interests of creditors to a greater extent than the original plan affected them. 8 Collier, Bankruptcy ¶ 9.11 (14th ed. 1942).
[156] § 654.

the court, although not required to do so, may enter an order that "any creditor who accepted the plan and who fails to file with the court within such reasonable time as shall be fixed in the order a rejection of the altered or modified plan, shall be deemed to have accepted" the altered or modified plan, unless his acceptance of the original plan provides otherwise.[157] If this order is entered, all acceptances of the original plan are acceptances of the changed plan, with three exceptions: (1) where the acceptance of the original plan expressly provides that it is not to be considered an acceptance of an altered or modified plan;[158] (2) where a creditor who accepted the original rejects the amended one within the period fixed by the court for that purpose;[159] (3) and perhaps where the creditor withdraws his acceptance before confirmation due to fraud or misrepresentation.[160] If such order is not entered, the necessary consequence is that none of the acceptances of the original plan any longer have effect and cannot be deemed acceptances of the amended plan.[161] The plan as altered or modified must then meet the same requirements and must be accepted by the same number of creditors as it would if it were the initial petition, before it can be confirmed.[162] At least ten days' notice of the adjourned or reopened meeting must be given to the creditors and other parties in interest, together with a copy of the proposed alteration or modification and of the above order, if entered.[163]

B. *After Confirmation*

Other than dismissal for the debtor's default in honoring the terms of his plan,[164] the only mischance which can befall the plan after confirmation stems from fraud.[165] Should any parties in interest[166] make application to the court within six months after confirmation,[167] and upon application if they can show that fraud was practiced in procuring the plan[168] but that they did not learn of it until after the plan was con-

[157] *Ibid.* [158] *Ibid.* [159] *Ibid.*

[160] *In re* Jablow, 15 F. 2d 132 (2d Cir. 1926); *In re* Levy, 110 Fed. 744 (W. D. Pa. 1901), decided under former § 12.

[161] 8 COLLIER, BANKRUPTCY ¶ 9.11 (14th ed. 1942).

[162] *E.g.*, §§ 646, 651, 652, 656.

[163] § 655. The form and manner in which this notice may be given is left for the court to designate. § 615. A copy of the notice is sent by the clerk or referee to the Secretary of the Treasury. § 678(2).

[164] § 666. [165] § 671.

[166] "Parties in interest" is not defined but presumably would include all creditors.

[167] *In re* Jersey Island Packing Co., 152 Fed. 839 (N. D. Cal. 1906); *In re* Eisenberg, 148 Fed. 327 (S. D. N. Y. 1906), decided under former § 13.

[168] The act done must have been done with actual fraudulent intent. *In re* Isidor Klein, Inc., 22 F. 2d 906 (2d Cir. 1927), decided under former § 13. Thus, omitting a creditor from the debtor's schedule in bad faith constitutes fraud, *In re* Siff *et al.*, 295 Fed. 761 (S. D. N. Y. 1923), but omission through mere mistake is insufficient, *In re* Siff, *supra; In re* Rudnick *et al.*, 93 Fed. 787 (D. Mass. 1899), decided under former § 13.

firmed,[169] the plan may be either set aside so that bankruptcy may ensue, or amended so that the fraud may be excised. The alternative to be used will depend primarily upon whether or not the debtor is involved in the fraud.

If the debtor has been guilty of, or has participated in the fraud, or has had knowledge of the fraud before confirmation and has failed to inform the court of it, the court may set aside the confirmation, adjudge the debtor a bankrupt, and direct that bankruptcy be proceeded with.[170] The court is not restricted to this remedy, however, if the debtor is personally involved in the fraud. It may instead pursue either of two remaining courses: (1) the court may set aside the confirmation and reinstate the Chapter XIII proceeding, rather than directing bankruptcy, and may hear and determine application for leave to propose alterations and modifications of the plan, for the sole purpose of correcting the fraud;[171] (2) or the court itself may alter or modify the plan to correct the fraud, instead of directing that bankruptcy ensue or that confirmation be set aside.[172] However, if the fraud in issue is not that of the debtor, the court's choice of remedies is limited to the two last mentioned.[173]

If the court itself chooses to alter or modify the plan, the plan must not be changed in any material manner that will adversely affect the interests of a party who did not participate in the fraud, unless he has consented to the change.[174] Nor can the court change the plan so as to prejudice rights acquired by an innocent person in reliance upon confirmation of the plan, if those rights were acquired for value after the plan was confirmed.[175] If it would be necessary, in order to correct the fraud, for the court to affect adversely the interests of a non-consenting party or to prejudice rights acquired by an innocent person after confirmation, then the court can proceed only by setting aside the confirmation and either allowing the proposal of alterations or modifications of the plan, or, if the debtor is involved in the fraud, directing that bankruptcy be proceeded with.

[169] If the applicant had knowledge of the fraud before confirmation, his application will be denied. Union Furniture Co., *et al.* v. Walker-Cooley Furniture Co. *et. al.*, 206 Fed. 217 (N. D. Ga. 1913), decided under former §13.

[170] § 671(1). A copy of all orders entered pursuant to § 671, setting aside confirmation or directing that bankruptcy be proceeded with, must be sent to the Secretary of the Treasury. § 678(3).

[171] § 676(2). This amended plan must meet the same requirements and contain the same mandatory provisions as the original plan. *E.g.*, §§ 646, 651, 652, 656. A copy of the order approving the proposed changes, along with a copy of such proposals must be sent to the Secretary of the Treasury. § 678(4).

[172] § 676(3). See note 171 *supra*.

[173] § 676(2)(3).

[174] § 671(3).

[175] *Ibid.*

VI. The Trustee

A. *Appointment*

The trustee is appointed after the wage-earner's plan has been accepted by the requisite number of creditors[176] at the first meeting of creditors,[177] although he may be appointed earlier if the plan calls for an immediate deposit of money with the trustee,[178] which it may do.[179] While conceivably a separate trustee could be appointed for each case, the common practice where large numbers of Chapter XIII cases are handled is to appoint a standing trustee to administer all cases arising under the Chapter.[180] This course seems sanctioned, since General Order No. 14, which prohibits appointment of standing trustees,[181] is inapplicable to Chapter XIII proceedings[182] unless bankruptcy is subsequently directed.[183]

The advantages of appointing a single trustee are numerous.[184] It is simpler for all concerned. Creditors and their attorneys have a single office to consult on claims; employers have a single office to which the wages of debtor-employees may be transmitted; and debtors' attorneys are able to follow their clients' cases easily, with only one official to contact for information. This results in greater efficiency, thus lowering expenses and facilitating the handling of individual cases. For example, an employer making wage deductions can send to a single trustee a check covering all his employees engaged in Chapter XIII proceedings; when the trustee pays out funds, he may be able to write a single check to a given creditor which will include payment from a number of debtors; and if the case-load is heavy enough to necessitate a full-time trustee and staff, specialization of the functions of each may produce even further efficiency and economy of operation. Where there is a single trustee, a closer working relationship with the referee is possible. Policy decisions of the referee may be promptly put into effect by the trustee. Physical proximity of the office of the trustee to that of the referee may be arranged for quick interchange of information, and for the prompt transmission of orders and other papers; and a multiplicity of conferences and mailings may be avoided thereby.

[176] §§ 651, 652.
[177] § 633(3).
[178] Woodbridge, *Wage Earners' Plans in Federal Courts*, 26 Minn. L. Rev. 775, 784 (1942).
[179] § 646(7). See also §§ 651, 652(2).
[180] This information is contained in letters from three referees: Maulitz (Birmingham, Alabama), Bundschu (Kansas City, Missouri), and Sloan (Topeka, Kansas).
[181] General Order No. 14.
[182] General Order No. 55(2).
[183] §§ 666, 671. But see 9 Collier, Bankruptcy ¶ 25.10 (14th ed. 1942).
[184] Maulitz, *Operations Under Chapter XIII*, 27 J. N. A. Ref. Bankr. 68 (1953).

B. *Duties*

The duties of the trustee are two-fold: to receive money paid in by the debtor under the plan, and to distribute such money in payment of certain expenses and in payment of the wage-earner's creditors.[185] In the former instance, three methods of payment have been recognized.[186] The debtor may make the payments himself, which might eventually lead to failure to make payments, or the employer may send the debtor's entire wages to the trustee, who then deducts the payment and turns over the remainder to the debtor, which method appreciably increases the trustee's book-keeping burden. The recommended procedure is for the employer himself to make the deduction and send it to the trustee, and to pay the balance to the debtor.[187] This increases the likelihood that payments will be made and reduces the amount of book-keeping required of the trustee; yet at the same time it does not usually involve any substantial difficulty or expense to the employer since many large employers' book-keeping systems are already designed to handle a variety of pay-roll deductions. In Birmingham, the court has been most successful in engaging employer cooperation in this respect.[188] However, should the court be met with employer resistance, it has the power "to issue such orders as may be requisite to effectuate the provisions of the plan, including orders to any employer of the debtor,"[189] so that a recalcitrant employer could be required to cooperate.

Before there can be any distribution of payments to the creditors, a number of expenses must be paid in full out of moneys paid to the trustee by the debtor.[190] The costs of the referee[191] and the costs and expenses of the trustee must be met and an additional fee for the referees' salary fund paid,[192] computed on the basis of payments actually made by the debtor. A commission of 5 per cent is provided to compensate the trustee and is computed upon and only paid out of those payments actually made by the debtor. It would seem that this is the *minimum* which can be provided[193] but in at least one area where the case-load is heavy, it is a common practice to pay the trustee a salary

[185] § 659.

[186] Bundschu, *Administration of Wage Earners' Plans in the Bankruptcy Court*, 18 J. N. A. REF. BANKR. 55 (1944).

[187] *Id.*; Maulitz, *Operations Under Chapter XIII*, 27 J. N. A. REF. BANKR. 68 (1953).

[188] Maulitz, *Operations Under Chapter XIII*, 27 J. N. A. REF. BANKR. 68 (1953).

[189] § 658(2). This order may be enforced in the manner for the enforcement of judgments. § 658(2). This is governed by Rule 69 of the Federal Rules of Civil Procedure which in general adopts the practice of the State in which the federal court is located.

[190] § 659.

[191] These costs are determined by § 633 (2).

[192] This fee is graduated and charged in the manner outlined in § 40c(2).

[193] Sen. Doc. No. 65 (72d Cong., 1st Sess. 82, 197 (1932).

which actually amounts to less than the regular statutory commission that would be received from the aggregate of cases.[194] Finally, there must be paid to the debtor's attorney such reasonable fee as the court may have allowed for services rendered in the proceeding, all costs, expenses and fees in a superceded bankruptcy proceeding, if that is the case, and all debts entitled to priority in the order of their priority, as provided by § 64a of the Bankruptcy Act.[195]

After these expenses have been met, the trustee may proceed to distribute payments to the creditors.[196] Chapter XIII does not specify to which creditors distribution should be made, but it would seem that all unsecured creditors and such secured creditors as were dealt with by the plan[197] are entitled to participate, subject to whatever necessity there may be for the creditors to file proofs of claim and obtain their allowance, as to which there is some conflict of opinion. One recognized authority states that "it was well settled under § 12[198] that general creditors whose claims were scheduled but not filed participated in the composition," the conclusion being that if the debtor had scheduled the claim as a fixed, liquidated liability, proof of claim need not be filed nor need the claim be allowed in order for the scheduled general creditors to share subsequently in the distribution.[199] On the other hand, another concludes that to participate, such claims must be filed and allowed.[200] If this is the case, the period within which such claims must be filed or be barred is uncertain, since there is no apparent time limitation specified.

[194] This is in Birmingham, Alabama. The theory supporting this practice is that "acceptance of such a salary, pursuant to the employment contract, either would be a complete accord and satisfaction as to all claims the trustee might have to additional fees in the form of commissions, or would constitute a valid waiver of a claim for the statutory commission." Woodbridge, *Wage Earners' Plans in Federal Courts*, 26 MINN. L. REV. 775, 785 (1942).

[195] A tax owed by the debtor to the United States or to any state is one such debt entitled to priority [§ 64a(4)] and the debtor must deposit money sufficient to pay tax claims assessed before confirmation, either scheduled by him or filed by the taxing authority. This gives full protection to tax claims which are scheduled or filled before confirmation. See 8 COLLIER, BANKRUPTCY ¶ 12.07 (14th ed. 1942). Section 680 protects those claims filed or scheduled after confirmation, subject to two limitations: (1) the taxes must have been due "within one year from the date of filing" the Chapter XIII petition, and (2) they must have been assessed after confirmation of the plan.

One further tax provision, § 679, should be noted. No income or profit may be deemed to have accrued to a debtor, for tax purposes, by reason of a modification or concellation of a debt in a wage-earner's proceeding unless a primary purpose of the plan was to evade the tax.

[196] § 659. [197] § 646(1)(2).

[198] Former § 12 resembled Chapter XIII in that it did not specify the creditors to whom distribution was to be made.

[199] 9 COLLIER, BANKRUPTCY ¶ 29.09 (14th ed. 1942); see also Parker, *Distribution to Creditors in Wage Earners' Plans—Must Proof of Claim Be Filed?* 19 J. N. A. REF. BANKR. 123 (1945).

[200] Woodbridge, *Must Creditors File Proofs of Claim in Wage Earners' Proceedings Before They Can Share in Dividends?*, 17 J. N. A. REF. BANKR. 93 (1943).

It would seem essential, however, that the filing be done before confirmation of the plan, for otherwise the court would not have the amount before it for consideration when deciding whether or not the plan should be confirmed. If the claim which is scheduled is unliquidated or in dispute, then proof of claim must be filed and allowed in order to participate,[201] and all claims which are allowed, whether scheduled or not, participate.[202] Presumably the listing of secured creditors in the plan is sufficient to entitle them to participate without filing proofs of claim and obtaining their allowance,[203] and if the plan provides for priority of payment as between secured and unsecured debts,[204] the trustee must observe this priority when making distribution to creditors.[205]

VII. Discharge

If the debtor has complied with all the provisions of the plan, has completed all payments called for by it, and has avoided the pitfalls leading to dismissal of the proceeding, the court must enter an order discharging him from all the debts and liabilities the plan provided for,[206] including all unsecured debts and all secured debts dealt with.[207] This, however, is subject to one exception. A debt which is not dischargeable under § 17 of the Bankruptcy Act is not here discharged if the creditor holding such debt has not accepted the plan.[208] But if the creditor has accepted it, then the debtor is discharged as to that debt as well.

Even though the debtor may not have completed his payments under the plan, if he makes application to the court, the court in its discretion may order the debtor discharged from the debts and liabilities provided for in the plan if three years have elapsed since the plan was confirmed.[209] This the court may do after hearing upon notice, but only if satisfied that the failure of the debtor to complete his payments was due to circumstances for which he could not justly be held accountable.[210] While application for discharge may be made three years after confirmation, this does not mean that a plan cannot provide for payments to be made over a longer period; and the debtor's application for discharge can-

[201] *In re* Everick Art Corp., 39 F. 2d 765, 16 Am. B. R. (N. S.) 77 (2d Cir. 1930); *In re* Mirsky, 32 F. 2d 676, 14 Am. B. R. (N. S.) 155 (2d Cir. 1929), *cert. denied* 280 U. S. 579, 50 Sup. Ct. 32, 74 L. Ed. 63 (1929), decided under former § 12.

[202] *In re* Mirsky, *supra* note 201.

[203] 9 Collier, Bankruptcy ¶ 29.09 (14th ed. 1942).

[204] § 646(3).

[205] 9 Collier, Bankruptcy ¶ 29.09 (14 ed. 1942).

[206] § 660. The clerk or referee must send a copy of the order to the Secretary of the Treasury. § 678(3).

[207] § 660. An unsecured creditor may be bound by the plan whether he accepts it or not; §§ 651, 657.

[208] § 17. *E.g.*, taxes, liabilities for willful and malicious injuries, etc.

[209] § 662.

[210] *Id.* An identical provision is made in § 661 for debts not dischargeable under § 17 as is made in § 660, discussed at note 208 *supra.*

not properly be made until the time for the completion of payments has expired pursuant to the terms of the plan, even though that time may be more than three years from the date of confirmation.[211]

Whether the debtor is discharged as a result of successful completion of his plan or as a result of inability to complete his plan within three years after confirmation, he may plead the discharge (with the same effect as a discharge in bankruptcy) to bar recovery by a creditor covered by the plan.[212] Upon consummation of the plan by either method described above,[213] the court enters a final decree discharging the trustee, closing the estate, "and making such provision, by injunction or otherwise, as may be equitable."[214] Thus, the wage-earners' proceeding has run its full course with the entry of this decree.

CONCLUSION

A Chapter XIII proceeding which has been carried through to a successful conclusion, one in which a debtor has paid his debts and has been discharged of them, results in a double service to the community: an individual who with much less effort might have become a bankrupt has been helped toward financial rehabilitation; and as a consequence, the business community has been saved a financial loss.

It would seem reasonable, then, to expect at least some debtors to find a wage-earner's proceeding a more attractive solution to their financial distress than bankruptcy, if the opportunity were theirs to examine it. Therefore, it has been the purpose of the article not to encourage the use of the proceeding for the sake of use alone, but rather to call attention to its existence and method of operation, with the hope that if an alternative to bankruptcy is sought, the debtor and his attorney might derive some benefit from this article.

[211] 9 COLLIER, BANKRUPTCY ¶ 29.11 (14th ed. 1942).

[212] Cumberland Glass Manufacturing Co. v. DeWitt & Co., 237 U. S. 447, 35 Sup. Ct. 636, 59 L. Ed. 1042 (1915); *In re* Mirkus, 28 Fed. 732 (2d Cir. 1923), decided under former § 12.

[213] §§ 660, 661.

[214] § 662. The court may make "such provision" by enjoining suits based upon debts discharged under § 661 or § 662.