DRAFT CHAPTER FOR FINAL REPORT

CHAPTER

INVALID DISPOSALS OF THE INSOLVENT'S PROPERTY.

1. General

From the earliest initiation of a bankruptcy code - both in England in 1603 and in Scotland in 1623 - it has been necessary to provide for the setting aside of transactions between the debtor,(later made a bankrupt) and other parties, and in particular relating to the disposal of the debtor's property in the period immediately preceding his bankruptcy. The social and moral justifications for the setting aside of such transactions by an insolvent debtor were and are that they are in the circumstances prima facie prejudicial to the interests of the general body of his creditors. Indeed, in the particular case of "fraudulent conveyances", which is one category of such disposals, the/law was first introduced in 1577.

relevant

2. Such transactions basically fall into three main categories :-

(a) The "preferring" of one creditor (or more than one) by paying to him the whole or part of his debt, or otherwise treating him in a more generous basis than other creditors e.g. by returning goods which have not been paid for, to the detriment of the general body of creditors;

(b) The disposal to another person of the assets, or part

of the assets, of the insolvent which would otherwise have been available for the payment of the creditors' debts, either -

(i) with a deliberate intent to defraud the creditors or some of them, or

(ii) by way of gift or other voluntary disposition which includes a transaction unaccompanied by adequate valuable consideration passing from the recipient to the insolvent, even where there is no adequate proof of a deliberate intent to defraud creditors;

(c) Other categories of invalid transactions were later developed, such as (i) the preferring of sureties or guarantors for the debt due to a creditor;
(ii) the impounding for the benefit of creditors generally of goods of which the insolvent was the "reputed owner";
(iii) the levying of an execution over the insolvent's property which had not been "completed" before the relevant date for the accrual of the creditors' rights, an
(iv) the creation of mortgages or charges over the insolvent's property which were not in due form or had not been duly registered. These ~~"non-fraudulent"~~ special categories will be considered separately below.

3. Once the legislature had established a bankruptcy law, founded upon the concept that a trader (to whom alone the bankruptcy laws originally applied for the first 300 years) who was unable to pay all his debts in full, should be made

"bankrupt", so that his available assets could be divided up fairly and equally among all his creditors, the legislature, and the judges applying that law, applied themselves in their respective fields to the identification of those assets, past or present, which the law should deal with in the interests of the general body of creditors in accordance with these principles. This process led both to the definition of "acts of bankruptcy" (see Chapter ante), that is to say, events which were to be regarded as marking the moment of time when the insolvent's assets should be, as it were, "frozen", for the purposes of ensuring an equal and/or equitable distribution of them, and to a definition of those modes of ~~the~~ disposal of those assets which, in the interests of the creditors, should be set aside, so as to return them or their value to the common pool.

. "Fraudulent Preferences" (now to be retitled "Voidable Preferences").

4. We shall deal first with the case of the "preferring" of one creditor (or of more than one) which has hitherto been generally known as the doctrine of "fraudulent preference". For reasons which we give below, we wish to abandon the use of the adjective "fraudulent" in this context, and to adopt ~~we prefer~~ the adjective "voidable", and hereafter we shall refer to the doctrine of "voidable preference".

5. Until the 1869 Act, the operation of this doctrine had principally owed its development to case law, in the form of the decisions of the judges of the Bankruptcy Courts in the application of the principles regulating the extent to which

~~acts of the insolvent having the effect of preferring one creditor to others should, in justice, be set aside.~~

6. Although the doctrine was thus initially judge-made, and not statutory, it had, by the year 1862, come to be regarded as sufficiently well-established and well-defined as to permit its importation wholesale into the code for the winding-up of insolvent limited companies which was established by the Companies Act of that year; for Section 164 of that Act applied to the winding-up of such companies the same law as to acts etc. done "by way of undue or fraudulent preferences", as then applicable in bankruptcy. In the 1869 Act, however, the first statutory definition of such preferences made to the prejudice of creditors, was attempted, and that definition - except as to the period in respect of which such preferences might be attacked, and as to the preferring of ~~guarantees,~~ sureties or guarantors, - has remained the law, both in bankruptcy and in winding-up, down to the present day.

7. The vital difference, as it seems to us, between the original judge-made definition and the later statutory definition under the 1869 Act, is that that Act expressly introduced, for the first time, as a prerequisite for establishing a voidable preference, proof of the "view" of the bankrupt to prefer the creditor, which has now bacome known as "the intention to prefer", and which the trustee was thereafter going to be required to prove. It will seen that this represented a significant departure from the Privy Council's 1867 definition.

In its present form, the doctrine is stated in section 44(1) and (2) of the Bankruptcy Act 1914, as follows:

acts of the insolvent having the effect of preferring one creditor to others should, in justice, be set aside. The dostrine of "fraudulent preference" appears to have been first formulated by Lord Mansfield in the year 1768 in the case of Alderson v. Temple 4 Burr.2241, and the same Lord Chancellor in the year 1786, in the case of Thompson v. Freeman, 1 T.R. 155, crystallised it in these words: "A bankrupt, when in contemplation of his bankruptcy, cannot by his voluntary act, favour any one creditor". Eighty years later, in the year 1867, immediately before the passage of the 1869 Act, the Privy Council, in the case of Nunes v. Turner L.R. 1/P.C. 348, summed it up thus: "A fraudulent preference arises where the debtor in contemplation of bankruptcy, i.e. knowing his circumstances to be such that bankruptcy must/or be will be the probable result, although it may not be the inevitable result, does ex mero motu " (i.e by his own voluntary act)" make a payment of money or a delivery of property to a creditor, not in the ordinary course of business and without any pressure or demand on the part of the creditor".

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"(1) Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or of any person in trust for any creditor, with a view of giving such creditor, or any surety or guarantor for the debt due to such creditor, a preference over the other creditors, shall, if the person making, taking, paying or suffering the same is adjudged

bankrupt on a bankruptcy petition presented within 6 months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy.

(2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt."

Subsection (2) is of particular significance, both in the light of the changes made in 1869, and in the context of our recommendations below.

8. To this code have been added the provisions of Sections 92 (2), (3) and (4), and Section 115(4), of the Companies Act, 1947 (still unrepealed), which established the principles applicable to and the procedure for dealing with, the situation where the person "intended to be preferred" is or was a surety or guarantor for the debt owed to the creditor who was in fact preferred by the act of the insolvent; this situation is dealt with later at paragraphs 26 and below. These statutory provisions as enacted ~~and that~~ currently in relation to bankruptcy are applied by Sections 320 and 321 of the 1948 Acts to an insolvent winding-up, in order to deal with transactions which are done by a company but which would be deemed in a bankruptcy to be "a fraudulent preference".

9. Whatever had been the characteristics and extent of the original doctrine of "fraudulent preference" in the judge-made law prior to the 1869 Act, the statutory definition provided by Section 92 of that Act, which is reproduced in the current legislation, wholly replaced the doctrine as declared prior thereto. That section 92 had a marginal note referring to "Fraudulent Preference" but neither that section nor its successors in the 1883 and 1914

Acts have ever ~~actually~~ expressly described the transactions struck at ~~expressly~~ as "fraudulent preferences", but only that a transaction answering the description in the section should be "deemed fraudulent and void against the trustee in/the bankruptcy". This phrase (now used in Section 44(1) cited above) is a striking example of the use of "deeming" provisions in insolvency legislation. As has already been noted ~~above~~, however, when the bankruptcy doctrine was imported into the Companies Acts, the term "fraudulent preference" was used, and it is still to be found in other sections of the Bankruptcy Acts (sections 1(1)(c) and section 26(3)(i) of the 1914 Act). As ~~already~~ we have stated, we have thought it appropriate to substitute the term "voidable preference", except where the context otherwise requires.

80. The doctrine, as it has been in fact expounded and applied in caselaw since 1869 down to the present day, both in bankruptc and in winding-up, has not generally involved any specific consideration of the presence or absence of "fraud" in the sense of morally blameworthy conduct. Lord Evershed M.R., probably put it at its strongest when, (the drawing of the inference of the intent to he described ~~a fraudulent~~ preference), in Re. M. Kushler Limited (1943) Ch.248 C.A. at p.25 as "~~involving~~ having about it, at the least, a taint, and ~~sometimes~~ in extreme cases much more than a taint, of dishonesty". However, many transactions effecting preferences of creditors have in fact been inspired by motives not directly exposing their authors in general parlance, to moral censure in that sense. The term has undoubtedly been carried down from the earlier periods of the development of the bankruptcy law, when all acts done by an insolvent to the prejudice of his creditors were regarded

as being "in fraud of creditors", a phrase found in other sections of the Acts, and constantly employed in the decided cases, as exemplified in the dicta already cited. There can be no doubt that this approach to "preferences", by whatever censorious adjective they may be described, reflects a fundamental view about the propriety (or rather the impropriety) of an insolvent paying one creditor in preference to and to the prejudice of the others. It was no doubt to reflect this sense of impropriety, and its consequent unfairness, that the concept of "the intention to prefer", or as the statutes described it, an act done "with a view of giving such creditor ..... a preference over the other creditors", was introduced; the object of such a provision was to strike down those acts, and only those acts, which could be proved to have been done with such an intent; but from 1869 onwards the burden of proof of the presence of such an intent in the mind of the insolvent at the relevant time has been placed firmly upon the trustee or the liquidator.

91. The structure of the section, since the form it took in the 1883 Act, has been held to make it plain that it was an irrelevant consideration whether or not the preferred creditor himself knew that he was being preferred. Accordingly, the "fraudulent" element in a case of "preference", if present at all (and in many cases there can undoubtedly be seen to have been an element of conscious and unfair discrimination between creditors), at present refers exclusively to the state of mind of the insolvent himself, or - in the case of a company in insolvent winding-up - of its directors, or those of its directors who

took the actual decision to "prefer" the creditor which is being attacked. We shall have occasion later, at para. below, to review the significance of the creditor's knowledge, or any strong suspicion that he harboured, that he was receiving a voidable preference.

The relevant period for the avoidance of preferences.

10. The doctrine, in the form in which it now forms part of the law of bankruptcy and winding-up, - the relevant provisions being, as can be seen above, substantially identical - applies only to transactions done during the period of six months preceding the presentation either of the bankrupt's petition or the compulsory winding-up petition or the passage of the resolution for creditors' voluntary winding up. This period had originally been fixed, by the 1869 Act, at 3 months; before that Act, the retrospective period was ~~unspecified~~ it. The increase to 6 months was only introduced by the Companies Act, 1947, s.115(3) (still unrepealed ~~and~~ applicable to both bankruptcy and winding-up). Although the period was thus lengthened for the purposes of voidable preferences, the original period of 3 months was effectively retained in bankruptcy ~~as~~ when relating to a "fraudulent preference" as being an act of bankruptcy under what is now s.1(1)(c) of the 1914 Act, and was expressly retained under the title of "undue preference" as a "fact"(of misconduct) requiring to be taken into consideration, under what is now s.26(3)(i) of the 1914 Act on the bankrupt's application for discharge; it was also expressly left unchanged in the avoidance of preference provisions of s.8(5) of the

Agricultural Credits Act, 1928, relating to the validity of charges created by farmers in favour of their bankers.

11. The prescribed periods, both the current 6 months and the original 3 months, plainly terminate on the presentation of the petition, or the passage of the resolution, and ~~would~~ therefore seem to leave uncovered the period which must almost invariably ~~follow~~ ensue before the receiving order or the winding-up order is made. This gap is filled, in the winding-up code, by the "relation-back" of the winding-up order to the date of the presentation of the petition which constitutes the commencement of the winding-up (ss.227 and 229 of the 1948 Act), and thus invalidates subsequent dispositions of the company's property unless the court otherwise orders. In a creditors' voluntary winding-up, the date of such "commencement" is the passage of the creditors' resolution under s.293, read with s.229; but a gap may still arise in practice, as indicated in paragraph 15 below.

14. It was at one time considered that a voidable preference effected <u>after</u> the presentation of the bankruptcy petition ought to be set aside as being "contrary to the policy of the bankruptcy laws", notwithstanding the terms of the relevant section; but this view must be regarded on the caselaw as unsustainable, and the gap, in bankruptcy, remains open, so that an insolvent can, in certain circumstances, prefer a creditor if he waits to do so until after the petition is presented against him.

15. It is our view that the position should be regularised and

and harmonised under all three modes of insolvent administration, and that all transactions which in principle constitute voidable preferences should be so voidable, whether made before or after the petition. It would probably also be just and convenient to cover the at least notional gap which might arise in a creditors' voluntary winding-up immediately after the passage of the members' resolution and before the passage of the creditors' resolution (if it should occur that it is not in fact passed, as has been known to happen).

16. As regards the appropriate period prior to the relevant dates discussed above, during which a transaction should be liable to be set aside as a voidable preference, we have carefully considered whether the current period of 6 months should be lengthened, shortened, or maintained at its present duration. We do not consider that it would be realistic to shorten it, in the light of the re-structuring of the statutory provisions into the form in which we now envisage them; there were good reasons for the extension of the period from 3 months to 6, as enacted in 1947. For the same reasons of our proposed restructuring, we do not think it would be just or convenient to lengthen the period. Insofar as the validity of the transaction will depend upon contemporaneous evidence of the parties' acts and the statements of their respective affairs at the relevant time, too long a period could in our opinion work injustice.

17. There is an additional consideration to which we have given attention in the context of what we have just observed as to the significance of the contemporaneous evidence of what actually happened. There are a number of cases known to members of the Committee and brought to our attention by our consultees, where the an application to set aside a voidable preference has been made a very substantial time after the

commencement of the bankruptcy or the winding-up, and therefore after an even more substantial time since the transaction which it is sought to set aside. It is our view, therefore, that in the interests of justice, and of fairness to the creditor whose receipt of these voidable preferences it is sought to set aside (upon the basis of which receipt he may have ordered his own affairs), the trustee or liquidator should give notice not later than a certain period after his assumption of office as to his intention to challenge a particular transaction, so that the creditor can preserve or assemble the relevant evidence so far as concerns the acts of himself or his agents, with a view to resisting the application to set aside or - as will be seen below in relation to our proposals for restructuring the provisions - with a view to justifying the receipt ~~which he has~~ of which he has had the benefit. This period we feel might be fixed at 12 months from the assumption of office by the trustee or the liquidator, subject to an extension by the court for good cause shown.

The burden of proof of an intention to prefer.

16. It was apparently the opinion of the Blagden Committee (see para.116 of their Report) that the fraudulent preference provisions of the Bankruptcy Acts had given rise to a very great deal of litigation. This view, expressed in the year 1957, does not seem to be consistent with the volume of relevant caselaw over the last 50 years, nor does it accord with the experience of our members. In fact, in our opinion, no doubt there would have been a great deal more litigation with a view to setting aside voidable preferences both in bankruptcy and winding-up, but for the problems facing the trustee or the liquidator who seeks to challenge ~~such~~ a transaction as being such a voidable preference. The principal problem with which he is confronted is the need for him to discharge the burden of proof that the insolvent, or if it be a company its effective agent, had the intention to

prefer and that such intention was paramount. The discharge of the burden of proof of the existence of a state of mind in an opposing litigant is never easy, the more so when the operation under consideration involves, on however formal a basis, the proof of the existence of a "fraudulent" state of mind. For a court to arrive at such a conclusion must almost inevitably involve the drawing of inferences, which, in relation to acts allegedly done "in fraud of creditors", courts are not prone ~~not~~ lightly to draw. We have already drawn attention to the dictum of Lord Evershed in Re. M. Kushler Limited (see para. 8 above) as to the taint, or sometimes more than a taint, of dishonesty involved in the drawing of such an inference. In another of the leading cases of comparatively recent vintage, Re. Cutts (1956) 1 W.L.R.728 C.A., per Lord Justice Jenkins ~~L.J.~~ at p.739, it was held that the intention to prefer must be inferred to be "so much the most probable of the possible explanations that the court can properly hold it to be the true explanation".

19. The Blagden Committee in their Report drew particular attention to this problem of the burden of proof resting upon the trustee or liquidator and to their limited means for discharging it. The Committee did not, however, contemplate any change in the location of the burden of proof as such; instead they proposed, while retaining in force the existing doctrine covering the whole of the final six months before the presentation of the bankruptcy petition, during which the burden of proof of intention to prefer should rest upon the trustee, to introduce a new and shorter period of what they called "absolute preference" (suggested by them to be a period of 21 days before the presentation of the petition or at any time thereafter), during which period any transaction which preferred

a creditor de facto should be void, without the trustee being required to discharge any burden of proof of any intention on the part of the bankrupt to prefer the creditor.

20. We have carefully considered this concept of a period of "absolute preference" preceding the commencement of the insolvency, as a possible solution to some of the problems presented by voidable preferences and the difficulty of proving an intent to prefer. Some of the consultees have themselves put forward such a solution, and we have learned that it exists in other insolvency codes, both within the British Commonwealth and also in the United States of America. The concept has the attractions of certainty and simplicity; but it seems in our view to present serious countervailing disadvantages. If there is to be a statutory period of "absolute invalidity" (a term which we prefer to that of "absolute preference"), which is to be introduced so as to affect all transactions done with the insolvent during that period, the consequences seem to us to be likely to be as follows, and to be of considerable gravity:

(1) The trustee or the liquidator would be under a statutory duty, first to apply to every creditor preferred de facto during the period for the return of what he had received by way of cash or its equivalent, and then to apply to the court to set aside every transaction (which had not already been the subject of a voluntary reimbursement) which had been effected during that period however bona fide it may have been in its intention and in its carrying into effect, and however beneficial its carrying into effect may have been to the insolvent estate;

(2) The carrying out of that duty would be bound to increase

litigation, delay, and the costs of administration;

(3) The "diligent creditor" (discussed in more detail below), who, quite reasonably and in the ordinary course of the collection of business debts, insists on being paid, would know that he would be at risk of refunding the money received if the debtor were to be adjudged an insolvent within the statutory period (however long that should be) subsequent to his receipt of payment;

(4) Creditors who were entitled to ~~regard~~ insist upon the payment-off in whole or in part of their accrued debts as a valid pre-requisite for the making of further supplies of goods or services on credit (e.g. the public utilities, or some key supplier of raw materials or components) would be bound to consider very carefully whether they should accept payment and continue supplies of goods and services on credit, and what would be the risks of their so doing;

(5) Creditors might therefore tend not to accept payments of their debts from a debtor appearing to them to be in financial difficulties, but they would opt for proceedings to put their debtor into insolvency, or at least to cut off further supplies on credit;

(6) The cumulative effects of these factors would be to precipitate the descent into absolute insolvency of insolvents whose private lives or undertakings could have been salvaged;

(7) The principles involved in this field would cease to bear any substantial relationship to the concept of "preference" in any historically relevant sense.

"Absolute Invalidity, Unless ..."

22. In reality, almost every extant code which has been drawn to our attention and which contains any provision amounting

to "absolute preference" or as we prefer to call it "~~the~~ "absolute ~~avoidance of preferences~~ invalidity" over a specified period contains some form of proviso in favour of, and for the protection of, transactions of certain specified types, which although effecting a preference of the creditor de facto are not to be set aside. This approach may conveniently be labelled "absolute ~~invalidity~~ invalidity, unless ..... ". Implicit in this approach are four factors :

(i) That the burden of proof of an intention ~~to prefer~~ in the mind of the insolvent to prefer the creditor is lifted from the trustee or the liquidator;

(ii) That creditors who have received, during the relevant period, a preference de facto have to discharge the burden of justifying it;

(iii) That all "bona fide" transactions (the meaning of "bona fide" in this context being discussed below at para.), will in the ordinary course of circumstances, be sustained but others - "suspect transactions" - may be set aside;

(iv) That the trustee or liquidator can "pick and choose" according to his judgment those transactions which seem to him to be "suspect".

What transactions should be regarded as bona fide and protected

20. It does not seem to us to be either easy, or necessarily desirable, to define with any precision what types of transaction should be regarded as per se "bona fide" within the context of any particular insolvency. We may take as our first example in this field the the payment off of the outstanding (and inevitably over-due) electricity bill. If this bill is not paid, the current will be cut off; the same position would

arise with the gas bill, the telephone bill, or the water rates. Our second example may be the unpaid supplier of some important material or component. Only the evidence when produced will establish how essential it was - and therefore how "bona fide" it was - to settle up with that supplier, and whether or not such settlement of the bill (in whole or in part) did keep supplies on credit available.

23. When, however, we consider payments (or other disposals of assets) made "under pressure", other than the obvious examples given in the last paragraph, we are in more debateable country. It has long been held, as a general principle of the law of voidable preferences, that "pressure rebuts preference", but that the "pressure" in question must be real and effective pressur which creates the situation where "submission to pressure" can be regarded as "the most probable explanation", i.e. as in Lord Justice Jenkins' sense, excluding the intention to prefer. It is therefore in every such case necessary to examine the nature of such pressure and by whom and in what circumstances it was exerted, so as to determine whether the transaction contended to be done in consequence of such pressure was indeed "bona fide". Our consultees, and members of our Committee, have had experience of bogus pressure, exercised for example by serving a writ or even obtaining a judgment, which exercises are designed to provide an ostensible foundation for a defence against any subsequent allegation of the receipt of a voidable preference. For a trader to be sued to judgment by his father-in-law does not constitute per se (although it might indeed be proved to be so by the evidence) the exercise of irresistible pressure, justifying the payment of the father-in-law's account: the same principle applies if "pressure" exerted by a director upon his own company

24. Once one moves out of the field of relationships between individuals illustrated by our last example, into the normal corporate business field, the problem of "bona fides" becomes

accentuated. If a bank's customer pays off, or even substantially reduces, his bank overdraft, is he likely to have intended to "prefer" the XYZ Bank Limited, a multi-million pound banking corporation? In the ordinary course of life, this would seem to be an improbable ~~inference.~~ explanation But what if he really intended to "prefer", in the sense of benefiting or at least saving from the censure of his superiors in the bank, his "friendly bank manager", who had extended to him such ample (and ex hypothesi unjustifiable or unsecured) facilities? Would not proof of such a motivation in the customer (we deliberately avoid using the word "intention") be relevant to ~~the situation~~ question whether the payment was "bona fide" from the point of view of the other creditors of the customer?

25. On the other hand, it may well be contended that it is in the general course of business, and indeed in the ordinary way of life, that payments received in the form of drafts or crossed cheques must be paid into some bank account; ~~and~~ if they are paid by the recipient into an overdrawn account in that course of business or in that way of life, so that the overdraft is thereby reduced pro tanto, are those transactions of payment-in "bona fide" or "not bona fide"? Much will depend here too on the circumstances; if the bank has stopped payment of all further cheques or drawings, an insolvent customer may well be ~~required~~ expected to have ~~given~~ due consideration to the question whether his incoming credits should not, in the interests of his creditors generally, be paid either into a special "non-settable-off account" at his bank, or into a new account at another bank where it can be preserved for the benefi of the creditors. Accountancy advisers in insolvency have a standard practice which they adopt in such cases, so as to avoid the "automatic" reduction of the indebtedness of their client to the bank.

26. A yet further situation may arise in connection with the insolvent's bankers with regard to payments-in to an overdrawn account, namely where that account is guaranteed, by contract of guarantee and/or by the deposit of securities, either #, in the case of an individual insolvent, by members of his family or his friends, or #, in the case of a limited company, by directors or members of their families or their friends. Payments-in in this class of case, if of a suspected preferential character, are not ~~really~~ intended to prefer the bank, but rather to prefer the guarantor or surety. This subject of the preferring of sureties or guarantors, is dealt with in more detail below at para. . But the problems it presented, in practice in the context of the doctrine of voidable preferences required the amendment of the Bankruptcy Acts so as to identify the person who was the true object of the preference, and, more recently, to do justice procedurally between the creditor actually preferred and that person, in the form of the enactments which we have quoted at para. 6 above. Suffice it to say at this point that if such repayment falls within the prescribed period, it will be voidable by the trustee or liquidator, unless the bank can establish its bona fide character which # we have no doubt that they will be able, in the vast majority of cases, to do. It must not be thought, from the foregoing, that the giving of guarantees of credit ~~to suppliers~~ is confined to banks and similar financial institutions. They are not uncommonly found as between vendor and purchaser of goo

27. Against the general background of payments made or # property transferred by the insolvent during the prescribed period, the real cases of voidable preference and, in at least some cases, of really "fraudulent preference" in the literal sense, as having been carried out with a dishonest intention, will, we believe, stand out unmistakably. There is, in our experience, and in that of our consultees, a recognisable pattern or "nexus", which almost invariably perceptible between

the insolvent and the creditor de facto preferred, which enables the court, even under the present system which places the burden of proof on the trustee or the liquidator, to draw the inference of an intention to prefer, and that such intention was the insolvent's "paramount view".

28. If our analysis of the probable factual relationships is accurate, and if our experience and that of our consultees are adequately representative, the reversal of the location of the burden of proof under the present system, so as to transfer it to the preferred creditor, will not, in our opinion, be productive of any serious injustice or oppression to creditors (save as to their need to justify a transaction being substituted for their right to defend it), while on the other hand it will greatly facilitate the challenge to transactions having the effect of preferring unworthy recipients against whom under the present system, the trustee or liquidator may not have sufficient material or feel sufficient confidence to proceed ~~attack~~. A particular example of this arises, of course, where the individual insolvent, or the director of an insolvent company, are dead or have disappeared, so as not to be available witnesses as to the contemporaneous circumstances, either for the purposes of being interrogated before the insolvency court or being called upon to give evidence in proceedings to set the transactions aside.