amended 11/9/79

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INSOLVENCY LAW REVIEW COMMITTEE

Note to Members

FINAL REPORT

Enclosed are two copies of Chapter 4 which is intended to give a factual description of the existing insolvency procedures. Perhaps you would kindly let me have your comments and suggested amendments on one of the copies. Suggestions on matters still to be completed would be particularly welcome.

2 Chapter 5 is in sight.

T H TRAYLOR
Secretary to the Committee
28.8.79

FIRST DRAFT
11.7.79

INSOLVENCY LAW REVIEW COMMITTEE

CHAPTER 4

INSOLVENCY PROCEDURES

(1) Bankruptcy procedure

4.1.1. Bankruptcy applies only to individuals and partnerships; it does not apply to companies incorporated under the Companies Act 1948, which are subject to the winding-up provisions of the Companies Acts. This is not so in many other countries; the bankruptcy laws of the Continental Members of the EEC, Canada and the USA (but not Australia) apply both to physical and to corporate debtors.

4.1.2. All bankruptcy proceedings start with a petition to the Court which may be presented by the debtor himself, by a creditor or creditors jointly, or by the legal representative of the estate of a deceased insolvent. Where initiation is by the debtor, the procedure is for him to file in the appropriate bankruptcy court his own petition, in which he asks for a Receiving Order to be made against him and, almost invariably, for an order that he should forthwith be adjudicated bankrupt. A debtor's own petition must state that he is unable to pay his debts. A Receiving Order is invariably made forthwith on a debtor's petition, and (if asked for) an order of adjudication also. Only later may the propriety of the debtor presenting his own petition be investigated and adjudicated upon.

4.1.3. Where a creditor commences proceedings, the procedure is much more complicated. He must be able to point to the commission by the debtor of ~~"an"~~ at least one "available act of bankruptcy", as prescribed in Section 1(1) of the Bankruptcy Act, 1914. Such an available act of bankruptcy constitutes a statutory recognition of the

debtor's insolvency, and proof of its existence is a prerequisite for the presentation of a bankruptcy petition by a creditor. The most common act of bankruptcy met with in practice is the failure by the debtor to comply with the requirements of a Bankruptcy Notice, that is, a demand for payment served upon him by a creditor with an unsatisfied judgment. [We should refer forward here to that part of the Report where we deal with complaints and recommendations about Bankruptcy Notices]. Other acts of bankruptcy are committed, for example, by a debtor who, with intent to defeat or delay his creditors, departs from his dwelling house or otherwise absents himself or, in the archaic language of the statute, begins to keep house.

Better examples

4.1.4. Once an act of bankruptcy has been committed by a debtor, it remains "available" for the presentation of a petition by any creditor for a period of three months. During that period any creditor with an unpaid debt of £200 or more, or two or more creditors whose aggregated debts amount to at least £200, are entitled to present a petition against the debtor, relying upon any such available act of bankruptcy.

4.1.5. The crucial step on the road to bankruptcy is the making of the Receiving Order. Its effect is, on the one hand, to free the debtor in general from all further proceedings against his person or his property by any of his creditors but, on the other hand, to deprive him of the use of his assets, which are for the time being placed under the control of the Official Receiver; in the event of the debtor being adjudicated bankrupt, a trustee in bankruptcy will be appointed not merely to control the assets, but to become "vested" with them as his own property legal property (qua trustee). From the making of the Receiving Order, the debtor becomes in jeopardy of prosecution for bankruptcy offences under the Act. His creditors are also "bound" by the Order, even if

His status resembles that of a receiver appointed by the court

4.1.6. Under a Receiving Order the Official Receiver becomes the receiver of the debtor's property. At this stage his duties are to take custody of and protect the debtor's estate, interview the debtor to enquire into his financial affairs, and to call a meeting of the creditors.

(state where)

4.1.7. The Receiving Order is advertised and is generally regarded by the public at large as tantamount to the debtor having been "made bankrupt." This, strictly speaking, is not the case, the legislature having deliberately intended that there should be a short period between the Receiving Order and adjudication, during which the debtor is to be at liberty either to apply to the court to rescind the Receiving Order on the ground that he is able to pay his debts in full, or to put before his creditors a proposal for a composition or scheme of arrangement which, if approved by the court, will also enable him to rid himself of the Receiving Order. In the absence of any technical objections to the making of the Receiving Order, such as, for example, a defect in service of the creditor's petition, the processes of bankruptcy are fully launched once the Receiving Order has been made and, except in the limited circumstances described, they will lead inexorably to the making of an order adjudicating the debtor bankrupt.

4.1.8. The consequences which follow upon the making of a Receiving Order are the same irrespective of whether that order was made upon a debtor's own petition or a creditor's petition. The debtor is obliged to attend upon the Official Receiver and to be questioned and to give him a statement - generally known as "the preliminary narrative" - which deals with background information relating to

the history of the debtor and the causes of his failure. He is also required to fill in a standard form of questionnaire in which brief particulars of such matters as his principal assets and liabilities and his earnings are stated. Later, he is required to file in the court his "Statement of Affairs", which is a full ~~sworn~~ statement of his assets and liabilities, together with a deficiency or surplus account as the case may be. All Statements made to the Official Receiver's Office are expressed to be made under section 5 of the Perjury Act 1911, i.e. as if made under oath.

4.1.9. Shortly after the Receiving Order has been advertised, the Official Receiver summons, and presides as chairman at, the first meeting of the creditors, ~~is held.~~ The creditors' meeting considers any proposal by the debtor for settling his debts either in full or by way of composition or scheme of arrangement. In the absence of acceptable proposals and unless the debtor has already himself consented to adjudication, the creditors may decide to ~~ask~~ pass a resolution asking the court to adjudge the debtor bankrupt and to appoint a named person of their choice as trustee of his estate. Any such application to the court is in fact normally made by the Official Receiver, who is entitled to apply for such an order notwithstanding that the creditors have passed as such resolution or have even voted to the contrary effect. The creditors will also generally elect a Committee of Inspection from among their number. If the creditors do not wish for a trustee (that is to say, an "outside trustee") the Official Receiver will upon adjudication automatically become the trustee.

4.1.10. The debtor is declared bankrupt by an order of adjudication made on motion to the court, notice of which is to be served on him. This order ~~which~~ operates to divest him of all his property and to vest it legally in the trustee. The trustee is then in a position to realise the assets and to distribute the proceeds among the creditors in accordance with the priorities laid down in the 1914 Act (as amended). The individual remedies which are normally available to unsecured creditors are extinguished, and their remaining right is to prove their claims in the bankruptcy. The rights of secured creditors are generally unaffected (see post "Secured Creditor")

Similarly, if the creditors do not (or cannot, for lack of members) appoint a Committee of Inspection, the Department of Trade will function as Committee of Inspection, acting through the Official Receiver.

4.1.11. Apart from its ~~proprietary~~ effects upon his property rights, adjudication involves several unpleasant and limiting constraints and consequences for the bankrupt which are designed to ensure his co-operation in the administration of his estate, and to prevent him from participating in many aspects of public life, and from engaging in activities involving a high degree of trust. The adjudication of the bankrupt undoubtedly brings about a diminution in his civil status and capacity to which he remains subjected until he obtains his discharge from bankruptcy (or an annulment) and, in some respects, even beyond such discharge. It is this aspect of bankruptcy which has in the past ~~given rise~~ largely contributed to the view that bankruptcy is of a quasi-penal nature. Thus, so long as a person remains bankrupt he may not obtain credit for £50 (increased in 1977 from £10) or over without disclosing his status, nor may he trade in a name other than that under which he was adjudicated without disclosing that name. He may not, without the leave of the court, act as a director or receiver of a company or be concerned directly or indirectly with a company's management. He is disqualified from being elected to ~~or~~ the House of Commons or from sitting in either House of Parliament. He cannot be elected to or act as a member of a local authority. He cannot act as a Justice of the Peace, hold a solicitor's practising certificate or act as a trustee in bankruptcy or of a trust estate, and is disqualified for other minor public appointments. Furthermore, any property (with certain exceptions) which he acquires before he obtains his discharge belongs to his trustee in bankruptcy who, if he is able to intercept it, is entitled to it for the benefit of the bankrupt's creditors. Where the bankrupt is the beneficiary of certain types of settlement or trust ~~fund~~ instrument which contains a "forfeiture upon bankruptcy" clause, he will generally be deprived of any income payable to him thereunder, and his creditors will not benefit thereby.

4.1.12. The Official Receiver has a statutory duty to investigate the manner in which the debtor has conducted his business and to report to the court whether the debtor may have committed a "misdemeanour" under the Bankruptcy Acts. This involves interviews with the debtor, examination of books of account and relevant papers and correspondence with those with whom he has had financial dealings. Until recently, a public examination of ~~the~~ every debtor was normally held in open court to complete the examination of the debtor as to his conduct, dealings and property, and to set down the evidence and the circumstances leading up to and resulting in the failure. Under the Insolvency Act 1976 the court may now, upon application by the Official Receiver, make an order dispensing with the public examination of the debtor.

4.1.13. A public examination is conducted, in the first place, by the Official Receiver who normally puts to the bankrupt in question and answer form (essentially in a "leading question" form) the information, or much of the information, obtained in the course of the preliminary examination at the Official Receiver's office, though he is by no means confined to this information as the basis of his questions. The trustee in bankruptcy or any creditor present (who has proved a debt) are also entitled to question the bankrupt, but no-one else. Persons (other than creditors) whose names are ~~heard~~, or whose affairs, are mentioned by the bankrupt in his answers have no right to examine him thereon, or otherwise to intervene.

4.1.14. At any time after he has been adjudicated bankrupt, but not before the conclusion of his public examination if not dispensed with, the bankrupt may apply for his discharge from bankruptcy. The effect of a discharge order is to release the bankrupt from all debts which were provable in the bankruptcy, save for a

no - not from public disqualifications after the expiry of five years from its date

limited number of exceptions and to free him from virtually all of the restrictions and disqualifications of a bankrupt. The "normal" form of discharge must be sought by the debtor himself; the other forms of discharge are dealt with below.

4.1.15. An application for discharge is heard in open court. Notification of the date of the hearing is given in advance to creditors, and at the hearing the Official Receiver is required to submit to the court a report in writing dealing with the history and causes of the bankruptcy, the bankrupt's conduct during the proceedings and also the results of the administration of the estate by the trustee in bankruptcy. One of the principal objects of the report is to disclose to the court any conduct of the bankrupt which, in the opinion of the Official Receiver, falls within a specified category of "facts" which are contained in Section 26 of the 1914 Act, such as that the bankrupt's assets are not of a value equal to 50p in the £ on the amount of his unsecured liabilities, or that he continued to trade after knowing himself to be insolvent. If any such "facts" are found to exist, then the court is precluded from granting an immediate discharge.

Prior to the coming into force of the Insolvency Act 1976

4.1.16. In practice a bankrupt usually allowed a fairly considerable period of time to elapse before applying for discharge, ~~if indeed~~ many of the never did so at all. Many bankrupts did not apply, either through ignorance of the procedures or through reluctance to attract possible publicity for themselves, their post-bankruptcy activities and their families. This meant that they remained under considerable civil disabilities, and exposed to the risk of committing bankruptcy offences.

(who might indeed be ignorant of their husband's or parent's status)

4.1.17. However, Sections 7 and 8 of the Insolvency Act 1976 introduced automatic discharge and review provisions under which, when they were brought into force on 1 October 1977, anyone who was made bankrupt before 1 October 1967 and had not subsequently secured his or her discharge received an automatic discharge. It was expected that more than 60,000 undischarged bankrupts people would benefit from this amnesty for 10 year old and longer bankruptcies.

4.1.18. The same section of the Act also provides that anyone declared bankrupt between 1 October 1967 and 1 October 1972 will receive an automatic discharge on the tenth anniversary of adjudication. Neither the court, nor creditors, can prevent automatic discharge taking effect in these cases.

4.1.19. In the case of bankruptcies ~~occurring since~~ where the order of adjudication was made after 1 October 1977, the court, when it concludes (or dispenses with) the public examination, may decide that:

(i) automatic discharge will take effect on the fifth anniversary of the adjudication, or that

~~(ii)~~ automatic review (but not automatic discharge) will take place during the year following the fifth anniversary of adjudication.

4.1.19.1 Section 7

This automatic review in the year following the fifth anniversary will apply also to those who were made bankrupt between 1 October 1972 and 1 October 1977. Creditors can, of course, influence the outcome of reviews.

APP.

[Insert statistics on discharge applications.]

4.1.20. The trustee in bankruptcy is the person charged with the collection and distribution of the bankrupt's assets. He is, in the more substantial cases, usually a professional accountant but, where the estate is likely to be small, the office is frequently left in the hands of the Official Receiver himself. The trustee is responsible to the Committee of Inspection (S.20, 1914 Act).

[Insert here statistics on numbers of cases, annually, dealt with by OR's and non-official trustees.]

4.1.21. The distribution of the proceeds of the bankrupt's assets is carried out by the trustee in accordance with a specified order of priorities. In brief, after satisfying the costs, charges and expenses of the administration, including his own remuneration, not equivalent to Department's payment is made to the categories of preferential creditors principally enumerated in Section 33 of the 1914 Act (as subsequently amended and extended), and only when those debts have been paid in full, is any distribution made by way of dividend to the bankrupt's other creditors.

[Possibly put in some statistics on deficiencies.]

(2) Deeds of Arrangement

4.2.1. A deed of arrangement is an agreement by a debtor (an individual or partnership, not a company) with his or their creditors to arrange his or their affairs to avoid bankruptcy with its publicity and disabilities.

4.2.2. Deeds take the following forms:

(i) An assignment of property by a debtor to a trustee for the benefit of his creditors generally, or if the debtor is insolvent, for the benefit of any three or more of his creditors.

(ii) An agreement to pay to creditors a sum less than the full amount owing to them.

(iii) A deed of inspectorship for the carrying on or winding-up of a business under the supervision of the creditors.

(iv) A letter of licence by which the creditors give an extension of time for payment and authorise ~~the continuance~~ of the business and pay the net proceeds into a banking account operated by a committee of the creditors for distribution by them.

4.2.3. A meeting of creditors is called to consider the suggested arrangement, and if approved the deed is executed by the debtor and the creditors present at the meeting. The deed must then be registered at the Department of Trade within seven clear days of its execution, failing which it will have no effect. If the deed is expressed to be for the benefit of the creditors generally, in order to be effective it needs to have the agreement of a majority in number and value of the creditors within twenty-one days of its registration.

4.2.4. The execution of the deed being an act of bankruptcy, a creditor for more than £200 who does not assent to the deed may present a petition for bankruptcy within three months of its execution, and if a receiving order follows the deed is set aside.

4.2.5. A Register of Deeds is kept by the Department of Trade, and local registers are kept by County Courts. Any person may search the register.

4.2.6. The deed trustee must submit accounts to the Department of Trade ~~and Industry~~ every twelve months, and statements should be sent to the creditors at six-monthly intervals. As soon as all the property included in a deed has been realised, and a final dividend or final instalment under a composition paid to the creditors, or in any case as soon as the obligations of the trustee are fulfilled, a final account must be immediately submitted to the Department of Trade. The trustee gets his discharge automatically when he has carried out the terms of the deed. Failure to lodge accounts can result in a trustee being committed for contempt of court.

4.2.7. Although a deed of arrangement is subject to the provisions of the Act, it is in fact a contract governed by the ordinary principles of the law of contract, and if one party fails to fulfil a condition of the contract the other party may be released from his liability. The rights and liabilities of the various parties under the deed depend upon the terms of the deed in the same way as any contract.

the Stock Exchange Rules ~~(Appendix 37)~~, which comes into operation when a stockbroker or stockjobber is "hammered". A comparable power is employed by Lloyd's of London.

(place)

4.2.1.2 A deed has three parties, the debtor, the trustee and the creditors, and the advantage to the debtor ~~to~~ in entering into a deed is that he rids himself of the burden of his debts without the stigma and publicity of bankruptcy. In the case of an inspectorship deed or letter of licence (both of which are almost obsolete), he retains the ownership of his property, although he restricts his own power of dealing with it. An assignment of property to creditors need not necessarily cover all the debtor's property, and it may also be made only in favour of some of his creditors, and not of all of them as is the case of the Stock Exchange and Lloyd's standard deeds referred to above.

(3) Administration Order procedure

4.3.1. County Court Administration Orders are made under the authority contained in Section 148 of the County Courts Act, 1959 and are governed by that Section, the following Sections 149 to 156, and Order 22 of the County Court Rules. These enactments provide that when a debtor

(a) is unable to pay forthwith the amount of a judgment obtained against him in a County Court, and

(b) alleges that his total indebtedness does not exceed £2,000, inclusive of the debt for which the judgment was obtained (a figure increased by the

X the court may make an administration order providing for the administration of his estate.

4.3.2. The debtor's estate (if any) is not, in fact, "administered" in the same sense as in bankruptcy; the substantial purposes of the administration order ~~being~~ one to ascertain details of the debtor's judgment creditors and non-judgment creditors and the

amounts owing to them, to give the debtor protection against further legal proceedings by them for the recovery and enforcement of their debts, and to arrange for the total or partial liquidation of all the debts by reasonable instalments.

4.3.3. The debtor's application to the court is made on a form of affidavit which sets out a list of all his creditors and the amount of their respective debts, his income, outgoings and personal circumstances, and his proposals for payment of the whole or a part of the debts by instalments.

4.3.4. A notice of the application with the date and time of hearing is sent to all the creditors and the debtor. The creditors may inspect the list of creditors at the court office, and provision is made whereby they can object to any debts included in the list or to the amount of the composition or instalments proposed by the debtor.

4.3.5. Pending the hearing of the application, proceedings on any judgment, order, execution, judgment summons or order of commitment may be stayed by a judge or registrar.

4.3.6. The debtor must attend the hearing unless the court otherwise directs, and he must answer all questions put or allowed by the court. Provision is made for the attendance of creditors, for the admission of evidence and for the proof of debts.

4.3.7. The court, if ~~making~~ it makes an administration order, will provide for the payments of the debts by instalments or otherwise, and either in full or to such extent as to the court in the circumstances of the case appears practicable, and subject to any conditions as to his future earnings or income which the court may think just. There are no preferences and all debts therefore rank equally. The provision limiting the period over which instalment payments can be made to 10 years has been revoked and there is now no limit. When the order is made it is registered in the Register of County Court Judgments and posted on the notice board of the County Court; also, a copy is sent to every creditor.

4.3.8. Any person who becomes a creditor of the debtor after the date of the order may apply to be scheduled as a creditor for the amount of his proof of debt, but he ~~shall~~ will not be entitled to any dividend until the creditors who are scheduled as having been creditors before the date of the order have been paid to the extent provided by the court.

4.3.9. The effect of the order is that no creditor will have any remedy against the person or property of the debtor in respect of any debt which has been notified or scheduled, except with the leave of the court, and proceedings pending in respect of any such debt are stayed.

4.3.10. When making an administration order, the court appoints one of its officials to have the conduct of the order, and in particular it is his duty, if default is made in the paying of any

instalments, to apply for a judgment summons against the debtor, or, if it appears that he is unable to pay for reason of illness or other unavoidable misfortune, to apply to the court for ~~the~~ suspension of the operation of the order or for a new order for payment by instalments. It is also his duty to bring to the notice of the court facts which might lead to the order being set aside or rescinded.

4.3.11. If the debtor can be shown to have property, not exempted from execution, which exceeds in value £10, the Registrar may be required by any scheduled creditor to issue execution against the property.

4.3.12. It is contemplated and prescribed that an administration order, which is designed for the benefit of a "multiple-debtor", should be set aside or rescinded if he fails to fulfil his part of the bargain. The effect of a recission is that the debtor ceases to ~~have~~ enjoy any protection and is exposed to the risk of proceedings by any of his creditors.

4.3.13. On an application to rescind, the court may

(a) set aside or rescind the order, or

(b) suspend the order or make a new order for payment by instalments, or

(c) make an order directing that the administration order shall be set aside or rescinded unless the debtor pays the sum in payment of which he has made default, either within a specified time or by instalments to be specified in the order.

4.3.14. In addition to the protection of the debtor and the orderly collection of instalments from him, the object of the administration order is the distribution of the monies collected from him amongst the creditors pari passu inter se, subject only to the priority given to those creditors who are scheduled as having been creditors before the date of the administration order.

4.3.15. Under Section 11 of the Insolvency Act 1976, it is provided that if a debtor fails to make any payment under an administration order a court having bankruptcy jurisdiction may revoke the administration order and make a receiving order. In courts not having such jurisdiction, the Registrar may refer the matter to such a court for consideration. A receiving order in a County Court will be made by a Judge, in the High Court it will be made by a Bankruptcy Registrar.

4.3.16. Mention should be made of two other ways in which an administration order may originate:

(i) Under Section 4 of the Attachment of Earnings Act 1971, it is provided that where, on ~~the~~ an application for an attachment of earnings order to secure payment of a judgment debt, it appears that the debtor has other debts, the court is required to consider whether the case be one for the making of an administration order. The court may order the debtor to furnish a list of his debts in a sworn

statement, and such a list is deemed to be an application for an administration order.

(ii) On the oral Examination of a debtor under Order 25, Rule 2, of the County Court Rules, a debtor may be required to furnish to the court a list of his creditors and the amounts owing to each, and to give sufficient particulars of his resources and needs. If this is done it may be treated as a request for an administration order.

4.3.17. All monies paid or levied under an administration order have to be paid into court and they are appropriated as follows:-

(a) in satisfaction of the costs of the plaintiff in the action in respect of which the order was made;

(b) next in satisfaction of the costs of the administration; and

(c) then in liquidation of debts in accordance with the order.

4.3.18. On payment of the whole amount payable under the order, the order is superseded and the debtor is discharged from his ~~debt~~ indebtedness to the scheduled creditors. Save in these circumstances, no provision for the discharge of the debtor similar to that provided in bankruptcy is contained in the Rules.

[Suggest we put in here some statistics on past performance of administration orders.]

(4) Winding Up

4.4.1. The term "winding up", as applied to companies, means the process of realising and collecting in the assets and distributing the proceeds to those entitled, with a view to bringing the legal existence of a company to an end. The term "bankruptcy" is not used in connection with the winding up of a company. A winding up order made by the court or a resolution for winding up by the company is the event which gives legal force to the process of winding up. A company being wound up can be described as being "in liquidation", and the process of winding up can be referred to as liquidation.

4.4.2. For England and Scotland, the winding up of companies is regulated by the Companies Acts, 1948 and 1967. For England, these Acts are supplemented by the Companies (Winding-Up) Rules, 1949, and in Scotland by the Act of Sederunt (Provisions under Companies Act 1948). For Northern Ireland, winding up is regulated by the Companies Act (Northern Ireland) 1960 and the Companies (Amendment) Act (Northern Ireland) 1963, supplemented by the relevant Rules contained in the Rules of the Supreme Court, Northern Ireland. For all companies, the rules governing the avoidance of certain preferences are those applicable in bankruptcy. In the case of insolvent companies, the rules in force under the law of bankruptcy are applicable regarding the rights of creditors, as to debts provable and as to the value of certain claims.

4.4.3. A major difference in the administration of the winding up of companies in England on the one hand, and Scotland and

there is equally force of bankruptcy

Northern Ireland on the other, is that, in England only does there exist there is also an Official Receivers' Service (the "Insolvency Service"). Official Receivers are officers of the Department of Trade and are attached to the courts having jurisdiction in bankruptcy and to wind up companies. Their duties mainly comprise acting as provisional liquidators to preserve and protect assets of companies ordered to be wound up, pending the decision of creditors and members as to whom they wish to nominate for the office of liquidator, to summon call and act as Chairman of separate meetings of creditors and members for this purpose, and to arrange for and ensure submission of the Statement of Affairs of the company. The Official Receiver also (whether he remains liquidator or not) has a duty, also, to enquire into the conduct of a company's affairs, to establish the causes of its failure and to report to the appropriate authority if it appears that fraud or other wrong-doing may have taken place in its administration. Although a civil servant, the Official Receiver is an officer of the court when carrying out his duties under the Companies Acts and is responsible to the court as such.

see 4.5.9.

He may also be appointed "provisional liquidator" of the company in a different sense, namely after the presentation and before the hearing of the petition, for the purpose of safeguarding the Suggest we refer forward, here, to the chapter on the Insolvency Service.

see 4.5.4.

company's assets and safeguarding its business. Until recently it was considered that only the Official Receiver could be appointed provisional liquidator in this sense, but "outside" through a Deed arrangement

4.4.4. A company can be wound up in three ways: appointments have now been made to be made

(i) compulsorily by order of the court;

(ii) voluntarily, which will be a members' voluntary winding up if the company is sworn to be solvent and able to pay its debts within a period of one year, otherwise it will be a creditors' voluntary winding up; or

(iii) under the supervision of the court, a method which is rarely used and which can take place only after a company has started to wind up voluntarily.

4.4.5. The date of the winding up order should not be confused with the date of the commencement of the winding up. The commencement of the winding up is the date of the presentation of the petition for winding up to the court, or of a previous resolution for voluntary liquidation. Where there is no petition to the court, it is the date of the resolution for voluntary liquidation.

see 4.5.5.

(5) Compulsory Winding Up by the Court

4.5.1. The High Court has jurisdiction to wind up any companies which are registered in England; ~~and~~ if the paid-up capital does not exceed £10,000, the county court having bankruptcy jurisdiction for ~~of~~ the district in which the company's registered office is situate has concurrent jurisdiction with the High Court to wind up the company. It is not uncommon for petitions to be presented simultaneously both courts.

4.5.2. A company can be wound up by the court in any of the following circumstances:-

(i) If the company has passed a special resolution to wind up.

(ii) If default has been made by the company in delivering the statutory report to the Registrar of Companies or in holding the statutory meeting.

the initial meeting

(iii) If the company does not commence business within one year from incorporation ~~and~~ or suspends its business for one whole year.

(iv) If the number of members falls below seven or, in the case of a private company, below two.

(v) If the company is unable to pay its debts. For this purpose, a company will be deemed to be unable to pay its debts if a debt exceeding £200 remains unpaid after written notice requiring payment has been served on the company, or if any execution remains unsatisfied, or if the court is satisfied that the company is unable to pay its debts.

(vi) If the court is of the opinion that it is just and equitable that the company should be wound-up. In England and Scotland, a company may be ordered to be wound-up on this ground if the court considers there is no other way in which to remedy the oppression of ~~the~~ a minority, while in Northern Ireland this is specifically stated as a ground for winding-up. Examples of where a company has been ordered to be wound-up on just and equitable grounds are where the whole object of a company was fraudulent, where its substratum had gone, and where there was "deadlock", that is the continued disagreement between two members or groups of members, each of ~~whom~~ which controlled half the voting power.

4.5.3. Application for a compulsory winding up is by way of a petition presented to the court. A petition may be presented by the company itself, by a creditor, by a contributory, in certain circumstances by the Secretary of State, or by the Official Receiver. If the company is a registered charity, the Attorney General may petition, and the Chief Registrar of Friendly Societies can petition in the case of certain defaults of a Building Society. not other FS?

4.5.4. The presentation of a petition gives the court competence to deal with the affairs of the company, although no winding up order has been made. At any time after a petition has been presented, the court, on application by the company, a creditor or a contributory, may stay or restrain any action or proceeding against the company. As already mentioned, a provisional liquidator may also be appointed, with such powers and duties as the court orders. In practice, the court only appoints a provisional liquidator when it can be shown that the company's assets may be in jeopardy, and the provisional liquidator's powers are usually restricted to preserving and protecting the assets.

see 4.4.3.

4.5.5. The making of the winding up order places the company in liquidation; but the winding up is deemed to have commenced at the date of the presentation of the petition, or if there is a resolution for voluntary winding up, from the date of the resolution. The date of commencement is important because of the application of certain retrospective provisions.

Duplication? see 4.4.5

4.5.6. Any disposition of the property, transfers of shares or alterations in the status of members after the commencement of a winding up are void.

Likewise, any attachment, sequestration, distress or execution put into force after the commencement of a winding up is void to all intents.

4.5.7. A floating charge created within twelve months of the commencement of a winding up is invalid unless the company was solvent immediately after the creation of the charge (and) except to the extent that cash was paid to the company at the time of or subsequently to the creation of the charge.

4.5.8. Any parting with or charging of property of the company in the period of six months prior to the commencement will be invalid if it would have been a fraudulent preference under the bankruptcy law.

Dysfunction? 4.4.3.

4.5.9. The Official Receiver becomes the provisional liquidator. He has the duty of summoning and acting as chairman at separate meetings of creditors and contributories, which decide whether or not application is to be made to the court for the appointment of some person whom they nominate to be liquidator in place of the Official Receiver, and for the appointment of a Committee of Inspection. If for any reason no other person is acting as liquidator, the Official Receiver acts by virtue of his office. The Committee of Inspection consists of representatives of creditors and contributories although, if the company is insolvent, it usually comprises representatives of creditors only. The Committee of Inspection acts with the liquidator and its sanction, or that of the court, is required by a liquidator to do certain acts in the liquidation.

4.5.9.1. If ~~not~~ the meeting of creditors more than one candidate is nominated to be liquidator, it will be - 23 - for the court to decide, on the application of the Official Receiver, which candidate shall be approved or, it may be that the Official Receiver should remain as liquidator.

4.5.9.2. In practice, attendance at meetings of creditors is frequently delegated by creditors to 'expert' "representatives" often particular ~~creditors~~ class

of trade associations, who are often associated with trade protection associations or similar groupings, and such representatives may often be proposed as liquidators, a task for which their expertise frequently renders them particularly suitable candidates.

4.5.10. The winding-up order has the further effect of terminating the employment of employees and other agents of the company. The ~~dismissed~~ terminated directors are similarly ~~dismissed~~ terminated and their powers to act on behalf of the company cease.

4.5.11. The liquidator in a compulsory winding-up is an officer of the court and subject to the control of the court. He should have regard to the wishes of creditors and, the Committee of Inspection, although he is expected to use his own discretion. He can apply to the court for directions on any matters arising in the liquidation, and any person aggrieved by the liquidator's actions has the right to apply to the court.

4.5.12. The liquidator's duties are to get in and realise the property of the company, to pay its debts according to the priorities laid down by law, and to distribute any balance among the contributories. His powers are those necessary to enable him to carry out his duties. They enable him to carry on the business of the company insofar as it is necessary for beneficial winding up.

4.5.13. When a liquidator has completed the winding up or has resigned or his been removed from office, he can apply to the Department of Trade for his release from the office of liquidator. Until he is granted by release, the liquidator remains personally liable to creditors for the conduct of the liquidation. In the absence of fraud or concealment of material facts, the release discharges the liquidator from all liability in respect of any act or default by him or on his behalf in the conduct of the liquidation.

see 4.6.5

(6) Voluntary Winding Up

4.6.1. Voluntary winding up is originated by a resolution passed by the company itself in general meeting. If the company is solvent and able to pay its debts within a period of one year, the winding up will be a members' winding up; ~~but in any other case~~ in the absence of such an affidavit, it will be a creditors' winding up.

4.6.2. The scheme of voluntary winding up is ~~not to~~ and involve the courts ~~but~~ and to allow the company and its creditors to settle affairs between themselves, with, however, recourse to the court in the case of difficulty or dispute. Most voluntary liquidations are carried out without any involvement of the court, but if an application is necessary it should be to the court having jurisdiction to wind up the company compulsorily. Notwithstanding that the company has resolved to go into voluntary liquidation, a creditor may still ~~apply~~ petition for a compulsory winding-up

4.6.3. A company may be wound up voluntarily in any of the following circumstances:

(i) When the period, if any, fixed for the duration of the company by its Articles expires or the event, if any, occurs on the occurrence of which the Articles provide that the company is to be wound up; and the company in general meeting has passed a resolution requiring the company to be wound-up voluntarily.

(ii) If the company resolves by special resolution that the company be wound up voluntarily.

(iii) If the company resolves by extraordinary resolution to the effect that it cannot by reason

of its liability to continue its business and that it is advisable to wind up.

4.6.4. A voluntary winding up commences and dates from the passing of the resolution which authorises it, and thereafter the company ceases to carry on its business except for the purpose of its beneficial winding up. After a resolution for voluntary winding up, transfers of shares without the sanction of the liquidator and any alteration in the status of members are void, but the corporate state and powers of the company continue until it is dissolved. As in winding up by the court, floating charges created within twelve months prior to the commencement may be invalid, and any parting with or charging of the company's property in the six months before commencement is invalid if it would have been a fraudulent preference according to bankruptcy law.

4.6.5. A members' voluntary winding up is available only if the company is solvent. A statutory declaration of solvency has to be made by a majority of the directors of the company to the effect that, in their opinion, the company will be able to pay its debts in full within a period of one year. The declaration must contain a statement of the company's assets and liabilities. before the resolution is passed

see 4.6.1.

4.6.6. A liquidator is appointed by the company in general meeting, whereupon the powers of the directors cease, except insofar as the company in general meeting or the liquidator sanctions their continuance.

4.6.7. In any case where a declaration of solvency has not been made, the company must also call a meeting of creditors to be held

after the general meeting of the company at which the resolution for voluntary winding up is to be proposed. The creditors and the company in general meeting may each nominate a liquidator but, in the event of the meetings nominating different liquidators, the nomination of the creditors will prevail, subject to an application to the court. The creditors may also appoint a Committee of Inspection to act with the liquidator. On the appointment of the liquidator, all powers of the directors cease except as the Committee of Inspection or, if there is no Committee, the creditors sanction their continuance.

4.6.8. The duties of the liquidator are broadly the same as in a compulsory winding up by the court; that is, to get in and realise the property of the company, to pay its debts according to the priorities laid down by law and to distribute any balance among the members.

4.6.9. The liquidator may exercise without sanction any of the powers given to a liquidator appointed by the court except that in regard to paying any class of creditors in full, making any compromise or arrangement with creditors, or compromises on calls or debts, he needs the sanction of the company in general meeting in the case of a members' voluntary liquidation, and the sanction of the court or the Committee of Inspection in the case of a creditors' voluntary liquidation.

4.6.10. As soon as the company's affairs are fully wound up, the liquidator must summon a final meeting of the members of the

company to which he submits an account showing how the winding up has been conducted and he secures his release. In a creditors' voluntary winding up, in addition to the meeting of members there must also be a meeting of creditors. The company is deemed to be dissolved at the end of three months from the receipt by the Registrar of Companies of notice that the final meetings have been held.

(7) Winding up under the supervision of the court

4.7.1. When a resolution has been passed to wind up voluntarily, the court may order that the winding up should proceed under the supervision of the court. The court may appoint a liquidator in addition to the liquidator already appointed by the company and he will have the same powers as if he had been appointed by the company. The liquidator may exercise all his powers without the sanction of the court as in a voluntary winding up, but subject to such restrictions as the court may direct.

4.7.2. The effect of an order for winding up under the supervision of the court is much the same as an order for compulsory winding up and is conducted in the same way, except that the Official Receiver is not involved, the powers of the Department of Trade in a compulsory winding up do not extend to the proceedings and the accounting provisions are not applied.

4.7.3. This method of winding up is rarely used and the Jenkins Committee recommended that the relevant provisions of the 1948 Act served no useful purpose, and ~~that they~~ should be repealed. A clause in the 1973 Companies Bill which, in the event, did not reach the Statute Book, ~~gave~~ would have given effect to the Jenkins recommendation.

Only sixteen orders have been made in the 15 years ended 1977.

(8) Receiverships

4.8.1. A receiver of the property of a company may be appointed by the court, or under the powers contained in an instrument such as a mortgage debenture. A body corporate is not qualified for appointment as receiver, and an undischarged bankrupt may not act as receiver or manager unless he has been appointed by the court.

4.8.2. The appointment of a receiver "under hand" takes effect when the document of appointment is handed to him in circumstances which indicate that the appointment is by an authorised person and it is accepted by the receiver.

4.8.3. The appointment of a receiver out of court will depend on the terms of the instrument creating the debt or charge, and normally his powers, duties and liabilities are also defined in the document. Usually they provide that he is to take into his custody the property of the company, and to take any necessary action or proceedings to that end. This may entail carrying on the company's business, borrowing money on the security of the assets, selling the assets, compromising with creditors, and generally taking such actions as may be necessary in the interests of those who appointed him.

4.8.4. The Companies Acts contain special provisions in cases where a receiver or manager of the whole or substantially the whole of a company's property is appointed on behalf of a debenture-holder who is secured by a floating charge.

4.8.5. A floating charge is a security interest over the property of a company. In its most currently used form ~~Generally speaking~~, it exists over all the property for the time being belonging to the company, but while it is still "floating" it does not prevent the company disposing of its property in the ordinary course of business. Once the property has been disposed of by the company, the floating charge ceases to affect it, but it does apply to any new property acquired by the company. The fact that the charge does not prevent the company from dealing with its property makes this a very useful security in the case of companies which have a large and/or a constantly changing mass of book debts or other receivables stock in trade which is constantly turning over. If the company is wound up, the charge "crystallises", that is, it becomes fixed and applies to all the property belonging to the company at that time. Debts secured by a floating charge take priority over ordinary unsecured debts, but not over preferential debts and not normally over a fixed charge. Floating charges must be registered and if they are unregistered they are void as against the liquidator and the other creditors.

H.S.S.1. A company may create more than one debenture, each creating a floating charge, which rank in priority of registration, unless by agreement a debenture is postponed to a later one.

4.8.6. The provisions relating to receivers or managers appointed under floating charges are designed to ensure that members and creditors of the company and the debenture-holders should have sufficient information about the financial position of the company after the appointment of the receiver. It is provided, therefore, that a statement of affairs must be submitted by the directors of the company as at the date of the receiver's appointment, similar to that which is required in the event of a winding up. Also, a summary of the receipts and payments in the receivership must be prepared at yearly intervals, as well as a statement showing the position at the conclusion of the receivership.

4.8.7. Normally 14 days is allowed for the company to submit the statement of its affairs, but this period may be extended by the court. The intention is that the receiver should receive the statement as soon as possible after his appointment, so that he may check the assets at the earliest possible time. The receiver is required to send copies of the statement, together with his comments, to the court (if he was appointed by the court), to the Registrar of Companies and to the debenture-holders. A copy of his comments, if any, is also sent to the company.

4.8.8. A receiver appointed under the terms contained in any instrument may apply to the court for guidance, and this may be of considerable assistance in questions affecting contracts already entered into by the company before his appointment, or if, for any reason, he finds that he is unable to complete such contracts. He may of course enter into fresh contracts under which he will be personally liable and entitled in respect of that liability to indemnity out of the assets. If the assets are not sufficient to indemnify him, he has no other claim for an indemnity. In many cases ~~Cases~~, the receiver will require, and will be supplied by the debenture-holder with, an personal indemnity in respect of the performance of his functions.

4.8.9. A receiver deals with the assets for all practical purposes as a liquidator until he has satisfied the claim of the debenture-holder. The ability with which he carries out his duties affects the interests not only of the debenture-holder on whose behalf he has been appointed, but also the interests of the unsecured creditors and the shareholders who hope to obtain any surplus which the assets of the company, after satisfaction of the claims of the debenture-holder, may realise.

4.8.10. The assets realised by the receiver are paid out as follows:

(i) in paying the receiver's expenses and remuneration;

(ii) in paying the costs of the debenture-holder or other person who brought ~~the~~ any action for the appointment of the receiver;

(iii) in meeting preferential claims (eg. wages and salaries, ~~redundancy pay etc.~~ wages, salaries, unpaid)

(iv) in paying the debenture debt itself with interest up to the date of payment.

[To be drafted - a section on Schemes of Arrangement for companies]

11.7.79

INSOLVENCY LAW REVIEW COMMITTEE

Note to Members

Attached is the agenda for the next meeting on 18 March; I accept that the number of items is probably optimistic, but there remains much to be done and the back-log continues to increase. You may like to consider the possibility of having an extra meeting each month, say from 10.00 to 13.00, starting in May.

2 It would be most helpful if you could kindly let me have as soon as possible, details of any points you wish to raise on the various subjects due for discussion next time. This will enable them to be sent to other members in good time for the meeting. You may recall that the Chairman wishes the discussions at meetings to be limited to points which have been notified (para 5 of the minutes of the 35th Mtg refers).

Trevor Traylor

T H TRAYLOR
28.2.80

INSOLVENCY LAW REVIEW COMMITTEE

THIRTYNINTH MEETING

Meeting to be held in the Conference Room, 2-14 Bunhill Row, on Tuesday 18 March 1980 at 10.00 am.

A G E N D A

1 Minutes of the meeting on 21 February.

2 Matters arising.

3 Secretary's report.

4 Sureties and guarantors (ILRC 89 - see paras 16 and 17 of the 38th Mtg minutes).

5 The Administrator (ILRC 99) - to consider any further proposals put forward by members. (See para 37 of the 38th Mtg minutes).

6 Voluntary arrangements for individual debtors (ILRC 104).

7 Preferential rights (DT4, ILRC 107).

8 General assignment of book debts (ILRC 91).

9 Conclusion of a receivership. (ILRC 103).

10 Any other items.

11 Agenda for next meeting (16 April).

Trevor Traylor

T H TRAYLOR
28 February 1980

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CHAPTER .

THE INITIATION OF INSOLVENCY PROCEEDINGS

1.1. For historical and procedural reasons which have been described earlier in this Report, there exists in the present law and procedure governing the various types of insolvency proceedings - by which is meant, as has already been made clear, every kind of proceeding dealing with the affairs of an insolvent debtor, - a very considerable differentiation between the limited company, i.e. the corporate debtor, and the individual or personal debtor, or partnership of debtors; Similar differences exist in the case of certain insolvency modes of regulating both types of debtor, in particular circumstances. Examples of these differences, and indeed anomalies, have already been given in Chapter above.

1.2. The second of our Terms of Reference reads as follows: Indent "(ii) to examine the possibility of formulating a comprehensive insolvency system and the extent to which existing procedures might, with advantage, be harmonised and integrated." In pursuit of that Term of Reference, we have had to consider with great care, and with the assistance of our Consultees, what are "the existing procedures" in the case of each type of insolvency proceeding, to what extent their differences are significant in their social or legal content, and how far it is not only possible, but indeed necessary, to harmonise and integrate them. We may illustrate this problem by the very simplest examples; a man, alone or with his wife, runs a shop or small business as an individual trader or trading partnership, whose affairs, who, when he or they fail in business, are administered in bankruptcy by means of a bankruptcy petition, presented against him or them by (almost invariably) an individual creditor, which petition is heard in camera, without advertisement or publicity, unless and until a Receiving Order is made: if, on the other hand, he, or they, have been trading as a limited company, - having maybe no more than two one pound issued shares, and maybe only one director, and that company fails, it is proceeded against ~~by a winding-up petition pre~~

by means of a winding-up petition, advertised both centrally and locally, and heard in open court, with the potential participation of as many of the company's creditors as have seen or heard of the advertisement. In our studies of these matters, we have termed the former procedure, that of the present banruptcy law, the "one-to-one" basis, and the latter, under the present winding-up law, the "collective" basis procedure; we refer to the progress of an insolvency administration ~~application~~ from the former stage to the latter as ~~it~~ becoming "collectivided". In all our thinking, we have had to remind ourselves that the ~~whole~~ main purpose of any insolvency administration has always been, from earliest days, the collective realisation and distribution of the debtor's assets among his (or its) creditors generally. But just as it is the duty of any insolvency code to do justice as between the debtor and his creditors generally, so it must also do justice to the debtor himself, and as between the debtor and society as a whole.

1.3. In our own opinion, as well as under the guidance of the Term of Reference we have quoted above, we have to examine, value and where necessary refashion, the manifold existing procedures into one just and logical whole, - a n Insolvency Code which applies equally, and so far as practicable identically, to debtors of every status, as well as to creditors of every status. As we have described in the preceding Chapter " "The Credit World", insolvency must in all cases represent a personal, and also a social, disaster for the debtor, whose ripples and reverberations spread far and wide, both in the personal and in the corporate fields. It was not without reason that those who fashioned the original Bankruptcy laws and procedures provided for bankruptcy proceedings, initially by debtors summons and then by petition, to be heard in private; only very recently, the paramount necessity for this was emphasised by an appellate bankruptcy court.

1.4. When the winding-up procedure was devised for the purpose of, in effect, "making limited companies bankrupt", under new and different statutes, which borrowed some portions, while discarding other

portions, of the bankruptcy code, the mode of proceeding was, as we have just described, the presentation of a public and advertised petition for the "bankrupting" of the company. Such advertising, and such public hearing, of the petition was of course in one sense the carrying out of the first of the purposes of insolvency, namely the participation of all creditors in the proceeding; it was however in another sense calculated to effect the probable destruction of the company as a going concern, albeit at the instance of a single creditor. It must of course be borne in mind in any such analysis and comparison that until late in the 19th century, if not indeed later, trade and business was carried on, to a very large extent, on a personal or partnership basis, whereas the limited company tended to be confined to a substantial extent to the field of enterprises of large proprtions. Our Victorian grandfathers were not likely, we think, to have felt much need to concern themselves with the corner shop as a limited company undertaking; they had enough problems dealing with the administration in insolvency of massive trading partnerships, with unlimited, or largely unlimited liability, whose litigious misfortunes help to fill the pages of the Law Reports. They have now become limited comoanies too, or were so, until the incidence of corporation tax tempted some of them back to the pastures of unlimited liability. With the recent increase in the permissible number of partners in partnerships, and the consequent creation of firms of enormous proportions, for example in the professions of solicitors and accountants, the social, as well as the legal balance has begun to tilt the other way. Joseph Green Ltd. our corner shop greengrocer, will have its failure administered by winding up petition, whereas Green, Black, White, Brown & Co., the eminent firm of purveyors of professional services, will (if it is not disrespectful to contemplate it) have their failure administered in the bankruptcy court. Whether that court as at present constituted could cope with the bankruptcy of two dozen, or maybe four dozen, of partners, one may take leave to doubt. On the other hand, such an entity

seems hardly suitable litigation-fodder for a public hearing in open court.

1.5. It seems to us, in the light of the foregoing considerations, to be necessary to rethink the whole insolvency procedure, from the point of the initiation onwards, with a view to unifying it into one all-embracing code. In arriving at this decision, we have to come down unequivocally on one side or the other of the two central issues, first, "one-to-one" or "collective", and secondly "in camera" (i.e. in Chambers from which the other creditors and the public are excluded) or in open court. We have decided these questions in favour of the initial process being in all cases on a one-to-one basis, and in all cases to be heard initially in Chambers (which term means where the numbers of persons participating are too great, the Court "sitting as in Chambers").

1.6. It is upon the fundamental decisions that we have endeavoured to construct our unified system for the initiation of every type of insolvency proceeding, which is described below. It will not necessarily apply to "voluntary" insolvencies, nor to very small cases.

The New Procedure

2.1. The term "petition", as at present used to describe the initiatory process in both bankruptcy and winding-up, will be replaced by the term "insolvency application", which we shall employ in what follows, with the "petitioning creditor" being termed "the applicant creditor". The term "debtor" will refer to every type of debtor, whether individual, partnership or corporate, and for convenience we shall refer to all those different debtors all as "he" or "his", "it" or "its".

2.2. Although every bankruptcy and winding-up petition has always had to be based on a debt, possessing certain characteristics, no petition could be presented in bankruptcy, for several centuries, without the proof by the petitioner of one or more "acts of bankruptcy". In winding-up, however, the prerequisites were

for petitioning were much simpler and less rigorous, being directed, - as were acts of bankruptcy - to establishing the insolvency of the company, but comprising no more than (a) the non-payment of a debt of a specific sum for a specific time after formal demand, or (b) an unsatisfied execution, or (c) proof that the company was unable to pay its debts, including where appropriate its contingent or prospective ~~debts, or~~ liabilities. The prerequisites in bankruptcy, namely proof of an act of bankruptcy (of which there are no less than sixteen ~~thirteen~~) have become encrusted with a large amount of case-law, and have seen an increase over the centuries, even as recently as 1973, when the invention of "criminal bankruptcy" (discussed in Chapter or Appendix) necessitated an order of a criminal trial judge causing a convicted person to be treated as if he ~~(or she)~~ had committed an act of bankruptcy at that moment. The strictness of proof of at least one act of bankruptcy has often afforded a loophole for an otherwise unmeritorious debtor to escape ~~- although~~ had its origin in what is called the "quasi-criminal" characteristics of bankruptcy *. Although very many bankruptcies are nowadays founded upon a "bankruptcy notice", which resembles the "statutory notices" in winding-up, even though every they are much more strictly construed, and not infrequently trip up the ~~debtor~~ creditor or his solicitor, with technicalities which also necessitate personal service.

2.3 We have therefore decided to propose the total abolition of acts of bankruptcy in relation to bankruptcy proceedings, and to adopt, for all proceedings by way of insolvency application, a simplified version of the present winding-up prerequisites, which - like the latter - are designed to produce a prima facie proof of insolvency, with which the debtor can nevertheless take issue, in the forms we describe. We would however observe, in anticipation of our later discussion, that the elimination of acts of bankruptcy removes the basic "anchor" of the trustee's title, the "terminus a quo" from which his title generally commences, and we shall require to provide ~~an adequate substitut~~

an alternative system to the "period of relation-back" to the act of bankruptcy now applying under the Bankruptcy Act, and to a much lesser extent in winding-up to the date of presentation of the winding-up petition; this result we propose to achieve by what we shall later be describing as the "claw-back" provisions, which are to entitle the administrator of the insolvency administration to set aside antecedent transactions which may be deemed to have been detrimental to the creditors.

2.4. What therefore should be the criterion of that state of insolvency which justifies a creditor in applying for and the court in applying the discipline of insolvency administration. It is plain that the criterion must not be too severe, so as to discourage the enforcement of just debts, nor too lax, so as to encourage indignant, malicious or merely "on the make" creditors from commencing unjustifiable proceedings, or proceedings founded on unliquidated or unenforceable debts. Our choice is for the non-payment of any debt, which fulfils one of the three prerequisites outlined below, in circumstances in which and by a procedure by which the debtor has an adequate opportunity of defending himself against an insolvency order. In substance, this to a large extent reproduces the present position in bankruptcy, in the case of the non-payment of a bankruptcy notice founded on a judgment debt, and in winding-up, in the case of the non-compliance with a statutory notice in respect of any debt, or the mere non-payment of a judgment debt or, in modern usage, any reasonably undisputed non-judgment debt. But these categories of debts are not exhaustive; justice may demand that a debt should be a permissible foundation for insolvency proceedings, even where it is not yet due and payable, or is otherwise contingent or prospective, the recovery of which when due and payable may be established to be at risk, or - to use a recognised legal term, - "in jeopardy".

2.5. Such a jurisdiction hardly exists at all in bankruptcy,

except where a still current bill of exchange becomes immediately payable by virtue of the commission by the accepter of an act of bankruptcy; in winding-up, special provision is made for the founding of a petition on a contingent or prospective debt, but only on terms of satisfying the Court (in fact, the Registrar) that there is a prima facie case, and of giving security for costs. In our opinion, provided that there are adequate safeguards for the debtor against irresponsibly initiated applications, and against the damage capable of being caused by advertising an ill-founded petition, there is no reason why contingent or prospective debts should not in principle become the foundation for insolvency applications.

2.6. We therefore propose that the categories of debt which will support the initiation of an insolvency application against any debtor should be the following:

2.7. (1) (a) a judgment debt, of a minimum amount to be prescribed (the present minima being both in bankruptcy and in winding-up - for the purposes of the statutory notice - £200), on which amount we shall make suggestions later, and not subject to a stay of execution. Although prima facie a judgment debtor is not entitled to any notice requiring him to pay the judgment per se, there are cases where judgment has been entered in default of appearance or attendance of the defendant personally or by solicitors or counsel, which in themselves would justify some notice being given; we further think that the optimism or fallibility of human nature is such as to justify a requirement of the giving of such notice, viz. of an intention to proceed with an insolvency application, to all defendants, without qualification.

(b) Such notice will be given by first class post to the debtor at his last known address, if an individual, or

to a corporate debtor at its registered office, or if there is reason to think that that would be an unsatisfactory destination, at its principal place of business, alternatively to the address of the duly constituted agent of the debtor. This notice will briefly indicate to the debtor the consequences of ignoring it. The length of the notice should be 21 days, as for the present "statutory notice" in winding-up. Its despatch should not be a prerequisite for the making of the insolvency application, but its absence may be relevant in considering the merits of the debtor if he appears and defends. In this respect, it is to be distinguished from the more formal notice referred to in (2), in connection with non-judgment debts.

2.8. (2) A Non-Judgment Debt, of the same minimum amount, and of a reasonably indisputable character, formal notice to pay which has been given to the debtor or his or its agent not less than 21 days before the making of the insolvency application, by registered post. The principle, applied under the present procedure both in bankruptcy and in winding-up, that insolvency proceedings must not be taken on a disputable debt, is in our opinion sound and just, and ~~xxx~~ is recognised by our formulation above. The applicant creditor takes the risk of being found to have proceeded on such a debt, with the more serious consequences that we later propose. The Insolvency Court, like the present courts, will in ~~xxx~~ but the most exceptional cases, abstain from "trying" a disputable, and disputed debt.

2.9. A debt which falls half-way between a judgment debt, which is presently due and payable, and a non-judgment, is a debt payable under a judgment at a future date, e.g. a judgment debt or part of it, which is payable at a future date, by instalments. In such a case, it is more than "contingent or prospective" (our next category), and each instalment must, when it falls due, fall to be considered as a judgment debt capable of being proceeded upon, if it be of the requisite minimum amount. In respect of such debt, or such

instalment not yet due, we consider that it should be treated as an undisputable if it fell within (2) above, as a non-judgment debt.

2.10. (3) A contingent or prospective debt, in respect of the prospect of payment of which, as and when (or if and when) it becomes due and payable, the creditor advances reasonable grounds for his apprehension of "jeopardy". We have already referred in paragraph 2.5 above, to the existence of this ground for petitioning in winding-up, and its vestigial existence in bankruptcy. It is, in our opinion, necessary tp provide for the possibility of an insolvency application being founded upon such a debt, while considerably enhancing the penalties on the creditor for any abuse of that right. A formal notice, as under (2) above, would be required to be sent, and a very full"affidavit of merits" as to the alleged jeopardy should be filed. The Insolvency Court should, we think, retain the power to refuse to entertain the application if dissatisfied as to those merits.

2.11. We are omitting from our examination at this stage the grounds for the making of an insolvency application which are not founded on, and commenced for the purposes of enforcing, a debt; the "just and equitable" ground for petitioning in winding-up even in a petition founded expressly on a debt appears to us to be either a historical survival, or to reflect the Court's equitable jurisdiction to do justice between creditors and to have regard to their wishes (as required by section 346 of the Companies Act, 1948), - a jurisdiction for which we specifically provide in our later proposals. We euqally omit the present proceeding to wind up a company on that ground for reasons unconnected with the non-payment of a debt, e.g. by aggrieved shareholders. As regards the other separate category, namely the procedure whereby the Secretary of State for Trade may petition for the winding-up of a company, under section 35 of the Companies Act, 1967, on the grounds of "public interest", although such an petition may in fact be founded, inter alia, upon the

alleged insolvency of the company, this is not invariably the case, and we regard such proceedings as very nearly falling outside our terms of reference; but we shall deal briefly with them in Chapter below.

2.12 The creditor, having satisfied himself and, where necessary, the Insolvency Court, will then file his Insolvency Application. There exists a most admirable practice in the Bankruptcy Courts, and we believe to a lesser extent in the Winding-Up Courts, that the court (that is to say, the Registrar) is to satisfy itself as to the petition being properly founded and supported by the necessary evidence, before allowing the petition to be presented and issued (see Bakruptcy Rule 151 and Winding-Up Rule 33), which we would wish to see preserved and where necessary strengrhened, having regard to our proposed increase in the facility for making an insolvency application; in winding-up, it is of course mandatory, as to the merits, in the case of petitions founded on contingent or propspective debts, - a procedure which we have preserved.

2.13. The Insolvency Application, when issued out of the Insolvency Court, will name a date, not less than, say 28 days for the hearing (a period which in the London Courts appears to result in practice) and will warn the debtor that at the hearing, or adjourned order (that term being our proposed substitution for "Receiving Order" and "Winding-Up Order") will be made, unless within a shorter specified time - we would suggest one week earlier than the hearing date, he gives to the applicant creditor, or to his solicitor and to the Court, notice of one (or more than one) of the following grounds for resisting the making of such an order.

2.14. The grounds there referred to will be the following:

(1) If the debt relied on be not a judgment debt, a defence to the claim for that debt;

(2)If the debt be a judgment debt, grounds for applying to "the court of judgment" to set aside the judgment, on somerecognised basis, e.g. as having been given by default or without trial;

(3) grounds for impeaching the debt on grounds of account of some substantial illegality or irregularity (not being a mere procedural defect) in the insolvency field;

(4) the existence of a right of set-off, counterclaim or cross-demand, of a sufficient amount and stated with sufficient particularity;

(5) willingness and ability to pay the applicant's debt, with interest if claimable, and costs, either at the first hearing, or within such longer period as the Court should allow. If the sum to be used for such payment is"third party money, this must be stated, with the name of the provider, and whether the provision be by way of loan, postponed loan or gift.

(Note: The fact that the money is that of a third party may be very material in the court's consideration of the the question whether the applicant creditor should be permitted to receive the sum so paid forthwith: see ( ) below;

The Hearing

3.1. The hearing will normally, at least in the first instance, be in Chambers. The Court will then consider such grounds as the debtor has stated under (1) to (5) above. In the course of its consideration, and at any stage of the hearing or any adjourned hearing, the Court may order the debtor to file a sworn statement of his affairs, and/or a statement of his means and/or earnings.

3.2. After hearing such evidence and arguments as it thinks just and necessary, the Court,may adjourn the matter, for such reason as it then states, or at that hearing or any adjourned hearing

may make one or more of the following orders, or have regard to any of the following matters, in adjudicating upon the application:

(1) Allow the debtor to pay the debt in full or by instalments either

(a) if the Court is satisfied as to the standing of the applicant creditor and as to his ability to repay if called upon to do so, to the applicant creditor or his solicitor/direct:

(Note: [1] Such direct payments will not of itself protect the creditor from being called upon to repay, whether the money paid be the debtor's property or third party money)

(b) on terms that the money be paid into the Insolvency Court for a specified period, not exceeding one month:

(Note: [2] Such payment in will not of itself create the sum paid in a security for the creditor)

(Note 3: An application shall not be withdrawn or dismissed by consent except with leave of the Court)

(2) Determine whether the alleged defence to the debt, if a non-judgment debt, has merits and direct how that defence be adjudicated upon; either by a trial in some other appropriate court, or in special cases before the Insolvency Court itself; in the former case, the Court will adjourn, or may dismiss, the application;

(3) In the case of a judgment debt, determine whether the debtor should have an adjournment to enable him to apply to the court of judgment;

(4) Adjudicate upon the alleged illegality or irregularity;

(5) Permit any creditor with a suitably qualified debt to be present at any hearing on such terms as the Courts thinks fit

3.3. If the debtor does not satisfy the Court by payment, resulting in the withdrawal or dismissal of the application, the Court will determine whether it should make a Protection Order or a Debts Arrangement Order (as to which, see Chapter below), or otherwise deal with the debtor's affairs in the interest of his or its creditors generally.

3.4. Implicit in the foregoing analysis and schedule of the

powers and procedure of the Insolvency Court as we propose that they should be are the consideration of, and our attempt to formulate just, expeditious and practicable answers to, a number of questions which were foreshadowed in our observations in the preceding paragraphs. The structure of the procedure is founded upon the current bacnkruptcy code, in that the proceeding is initially ona "one-to-one basis", as between the applicant creditor and the debtor, although there may be circumstances in which another interested and qualified creditor may be allowed to participate (which is not at present permitted in bankruptcy), while in winding-up all creditor may participate.

3.5. Within that "one-to-one" relationship, the Court may give its blessing to the payment off of the debt due to the applicant and terminate the proceedings, - subject to what is said below; During the "one-to-one" relationship, there is no advertisement of the commencement of the insolvency application, so that the debtor's credit and standing remain officially unimpaired; the only exception at this stage will be the use of advertisement to serve an evadive debtor, a rare situation. In this respect, we again maintain the bankruptcy practice, and depart from the winding-up practice.

3.6. Should the applicant creditor, who has applied to the Insolvency Court an the basis that the debtor is insolvent, be allowed to be paid off, to the detriment of the debtor's other creditors (if any), - pressing or not pressing? Should "the deligent creditor" be rewarded for his diligence? To what extent shoul the Court allow a debtor who has entered the zone of statutory insolvency to be "let loose" again on the community? If payment is to be permitted, must it be in full,or can it be by instalments? What protection should the other creditors receive by way of a right to require the paid creditor, in the event of a subsequent insolvency order being made, to refund the monies he has received? Should there be some form of "claw back" provision (a term we have borrowed from North America), so as to restore equality of treatment of all creditos? and if so, for how long should the creditor be vulnerable in this

respect? Finally, and perhaps most difficult to decide, how should the Court deal with payments off, in full or by instalments, out of "third party money"?

3.7. Answers to these questions mus be inspired, we believe, by the general philosophy of the legislature, and of the business community and of society generally, of which the legislature is the spokesman. It is the experience of a number of us, and in evidence from our consultees, that there is a widespread - and in general a socially valuable - practice for insolvency petitions to be paid off, although the law, procedure and practice of the respective bankruptcy and winding-up courts differ markedly from one another, as - we do not doubt - do different county courts exercising bankruptcy jurisdiction. We have no statistics readily available of the number of petitions in either set of courts which are "paid off", or of how many are so paid off out of the debtor's own money, as opposed to third party money. It is however well-established that the bankruptcy asks, and must be satisfied, as to that point, whereas no such question is required to be put, or is in practice put, in the winding-up court.

3.8. There is, of course, always the possibility that the alleged third party money is really that of the debtor himself or itself, passed through other hands or under the table.. It seems therefore desirable that the identity of the provider should be disclosed, although that identity might be protected from the eyes of other parties. It also makes a substantial difference, both in the realm of insolvency philosophy and in the realm of the other creditors' rights, whether the third party money is an outright gift, or a loan (the effect of which is is no way to improve the debtor's balance sheet position) or a postponed loan, i.e postponed to the other creditors' claims.

3.9. Having carefully weighed the various considerations to the best of our ability, and not without initial substantial differences of view between ourselves, we have finally concluded that it is desirable that insolvency applications should be disposed of by payment, whether in full or by reasonable instalments, so far as can be established to be consistent with the interest of other creditors, anf that this result should be achieved without any advertisement of the application, whereby the standing and viability of the debtor, - and the willingness of a third party to support him - might be impaired. It must be always borne in mind that the number of actual insolvency administrations should be reduced as far as possible, inter alia for the reduction of court time and fees, and of the parties' litigation costs, and for the reduction of the workload on the Official Receivers in Bankruptcy of the Insolvency Service to the extent that their services may be required in any actual administration, and to the extent that they themselves will continue in office in the foreseeable future.

3.10. If our proposals are enacted in legislation, and it be found that a greater facility for payment off without publicity is being abused, then the discretions which such legislation will have afforded to the court maight have to be restricted. Only experience can, we think, demonstrate the correctness of our diagnosis and our proposed treatment.

21(12)

INSOLVENCY LAW REVIEW

DRAFTING SUB-COMMITTEE

Muir Hunter
Peter Avis
David Graham
Edward Walker-Arnott

from Trevor Traylor

I see that although I sent you a "Note" of our meeting on 24 May, I did not do so in respect of the meeting on 19 June. Attached, therefore, are Notes both of the June meeting and of the meeting on 17 July.

So that I can prepare a redraft of Chapter 4, it would be helpful if you could kindly let me have your ideas on the changes which should be made; a spare copy is enclosed which you may care to amend and return to me.

Trevor Traylor

T H TRAYLOR
18.7.79.

INSOLVENCY LAW REVIEW

DRAFTING SUB-COMMITTEE

Note of Meeting on 19 June 1979

1 Members had received the first seven paragraphs of Chapter 5 from David and felt it was the right approach.

2 A suggested layout of the Report was discussed (see copy attached). It was thought that Part II might require five chapters, viz:

(1) Bringing the debtor within the jurisdiction of the court.

(2) Procedures for the individual debtor (Debts Arrangement Orders, Liquidation of Assets and Bankruptcy).

(3) Procedures for corporate debtors (Liquidation of Assets and Winding-Up).

(4) The debtor in receivership.

(5) Non-judicial procedures.

3 It was agreed that Part III would discuss the proposed procedures, including receiverships, in detail, probably a separate chapter for each procedure.

4 Part IV needed re-arranging as some items were concerned with the realisation of assets, and others were "mechanics". It was agreed that the layout should be as follows:-

Part IV - The realisation and distribution of assets.

Part V - Administration.

Part VI - Enquiries and investigation.

Part VII - Miscellaneous; to include jurisdiction and funding.

5 Remarks on Part I were as follows:-

(a) David said he would homogenise Chapter 2.

(b) Trevor still had Chapter 1 to look at again and was half way through Chapter 4.

(c) Chapter 5 should include a summary of recent trends.

(d) Chapter 6 should show in general where the principles were falling down, and should be backed by fact from written evidence. David would have a go at this chapter.

(e) Harmonisation might need more weight than it was likely to get in Chapter 7, though this might be all right if it is also referred to in Chapters 3, 4 and 5. Muir is preparing this chapter.

6 We should aim at letting the Main Committee have Part I for the September meeting, but let them have a draft layout of the Report in the meantime.

DRAFT REPORT

SUGGESTED LAYOUT

PART I 7 Chapters as already agreed.

PART II A relatively small part describing in summary form the new look procedures; possibly only three chapters:

(a) Chapter 1 - as already agreed, ie. initiatory procedures;

(b) Chapter 2 - procedures for non-corporate debtors; and

(c) Chapter 3 - procedures for corporate debtors.

PART III A number of chapters dealing with insolvency procedures in detail; a separate chapter for each procedure.

PART IV A number of chapters dealing with subjects which are common to all or most insolvency procedures, such as:

(a) Preferential creditors
(b) Secured creditors
(c) Retention of title
(d) Liquidators, trustees, receivers
(e) The Insolvency Service
(f) Antecedent transations
(g) Interest on debts, etc.

Subjects to slot in somewhere

The matrimonial home
"Delinquent" directors
Fraudulent trading
Provable debts
Compositions and arrangements
Jurisdiction as between England, Scotland and N. Ireland - any anomalies to put right?
etc.

INSOLVENCY LAW REVIEW

DRAFTING SUB-COMMITTEE

Note of Meeting on 17 July 1979

1 We considered the first draft of Part I, Chapter 4 and discussed costing, the manpower and judicial requirements; what might be acceptable to Govt. departments in increased costs of the new look procedures; could we obtain sample costs of the various existing procedures; do creditors get a better deal from public systems (ie. using the courts and the OR) or from private systems (voluntary liquidation, outside trustees).

2 It was suggested that over all, the proposed systems would result in a shift of the work of the OR's service into areas where they were most needed (the serious cases); also, that the DAO's might result in a requirement for more clerical staff in the county courts.

3 On statistics, it was thought that brief, very general statistics only, should be put in Chapters like Chapter 4, so as not to disturb the flow of the Chapter; detailed statistics should be at the end of a Chapter or in an appendix.

3 It was felt that a chapter should be the agreed thinking of the sub-committee before it went to the Main Committee. /What about the Reading Panel? /

4 On the draft of Chapter 4:-

(a) It was suggested that there might be an introductory paragraph giving the reason for the title.

(b) The style needed to be more colourful and "hotted up" with remarks and illustrations; eg. amend 4.1.7 to "the debtor having gone bankrupt", and 4.1.3. to "the procedure is much more complicated, highly technical and full of traps".

(c) Various points were put forward whereby under the wording of individual paragraphs could be amended, improved or expanded.

(d) The quasi-penal aspect of bankruptcy needed more emphasis; this would support our proposal to reserve full bankruptcy for the serious cases: David will fish out something on this re 1884. 3

(e) There should be a section on company schemes of arrangement.

(f) Winding-up under supervision could be compressed.

5 On Part I:

(a) David has the first 22 paras of Chapter 5 in outline.

(b) The Secretariat would sort out consultees' views for Chapter 6.

6 The next meeting would be on Thursday 16 August from 10.00 to 12.45 pm in Bunhill Row (Room 406).

CHAPTER 4

INSOLVENCY PROCEDURES

(1) Bankruptcy procedure

4.1.1. Bankruptcy applies only to individuals and partnerships; it does not apply to companies incorporated under the Companies Act 1948, which are subject to the winding up provisions of the Companies Acts. This is not so in many other countries; the bankruptcy laws of the Continental Members of the EEC, Canada and the USA (but not Australia) apply both to physical and to legal persons.

4.1.2. All bankruptcy proceedings start with a petition to the Court which may be presented by the debtor himself, by a creditor or creditors jointly, or by the legal representative of the estate of a deceased insolvent. Where initiation is by the debtor, the procedure is for him to file in the appropriate bankruptcy court his own petition in which he asks for a Receiving Order to be made against him and, almost invariably, for an order that he should forthwith be adjudicated bankrupt. A debtor's own petition must state that he is unable to pay his debts.

4.1.3. Where a creditor commences, the procedure is much more complicated. He must be able to point to the commission by the debtor of "an available act of bankruptcy", as prescribed in Section 1(1) of the Bankruptcy Act, 1914. Such an available act of bankruptcy constitutes a statutory recognition of the

debtor's insolvency, and its existence is a prerequisite for the presentation of a bankruptcy petition by a creditor. The most common act of bankruptcy met with in practice is the failure by the debtor to comply with the requirements of a Bankruptcy Notice, that is, a demand for payment served upon him by a creditor with an unsatisfied judgment. [I suggest we refer forward here to that part of the Report where we deal with complaints and recommendations about Bankruptcy Notices]. Other acts of bankruptcy are committed, for example, by a debtor who, with intent to defeat or delay his creditors, departs from his dwelling house or otherwise absents himself or, in the archaic language of the statute, begins to keep house.

4.1.4. Once an act of bankruptcy has been committed by a debtor, it remains "available" for the presentation of a petition by a creditor for a period of three months. During that period any creditor with an unpaid debt of £200 or more, or two or more creditors whose aggregated debts amount to at least £200, are entitled to present a petition against the debtor, relying upon any such available act of bankruptcy.

4.1.5. The crucial step on the road to bankruptcy is the making of the Receiving Order. Its effect is, on the one hand, to free the debtor in general from all further proceedings by any of his creditors but, on the other hand, to deprive him of the use of his assets, which are for the time being placed under the control of the Official Receiver; in the event of the debtor being adjudicated bankrupt a trustee in bankruptcy will be appointed to control the assets.

4.1.6. Under a Receiving Order the Official Receiver becomes the receiver of the debtor's property. At this stage his duties are to take custody of and protect the debtor's estate, interview the debtor to enquire into his financial affairs, and to call a meeting of the creditors.

4.1.7. The Receiving Order is advertised and is generally regarded by the public at large as tantamount to the debtor having been made bankrupt. This, strictly speaking, is not the case, the legislature having deliberately intended that there should be a short period between the Receiving Order and adjudication during which the debtor is to be at liberty either to apply to the court to rescind the Receiving Order on the ground that he is able to pay his debts in full, or to put before his creditors a proposal for a composition or scheme of arrangement which, if approved by the court, will also enable him to rid himself of the Receiving Order. In the absence of any technical objections to the making of the Receiving Order, such as for example, a defect in service of the creditor's petition, the processes of bankruptcy are fully launched once the Receiving Order has been made and, except in the limited circumstances described, they will lead inexorably to the making of an order adjudicating the debtor bankrupt.

4.1.8. The consequences which follow upon the making of a Receiving Order are the same irrespective of whether that order was made upon a debtor's own petition or a creditor's petition. The debtor is obliged to attend upon the Official Receiver and to give him a statement - generally known as "the preliminary narrative" - which deals with background information relating to

the history of the debtor and the causes of his failure. He is also required to fill in a standard form of questionnaire in which brief particulars of such matters as his principal assets and liabilities and his earnings are stated. Later, he is required to file in the court a full sworn statement of his assets and liabilities together with a deficiency or surplus account as the case may be.

4.1.9. Shortly after the Receiving Order has been advertised a first meeting of the creditors is held. The creditors' meeting considers any proposal by the debtor for settling his debts either in full or by way of composition or scheme of arrangement. In the absence of acceptable proposals and unless the debtor has already himself consented to adjudication, the creditors may decide to ask the court to adjudge the debtor bankrupt and to appoint a person of their choice as trustee of his estate. Any such application is in fact normally made by the Official Receiver, who is entitled to apply for such an order notwithstanding that the creditors have voted to the contrary. The creditors will also elect a Committee of Inspection from among their number.

4.1.10. The debtor is declared bankrupt by an order of adjudication which operates to divest him of all his property and to vest it in the trustee. The trustee is then in a position to realise the assets and to distribute the proceeds among the creditors in accordance with the priorities laid down in the 1914 Act. The remedies which are normally available to creditors are extinguished and their remaining right is to prove their claims in the bankruptcy.

4.1.11. Apart from its proprietary effects, adjudication involves several unpleasant and limiting constraints and consequences for the bankrupt which are designed to ensure his co-operation in the administration of his estate, to prevent him participating in many aspects of public life, and from engaging in activities involving a high degree of trust. The adjudication of the bankrupt undoubtedly brings about a change in his civil status and capacity to which he remains subjected until he obtains his discharge from bankruptcy and, in some respects, even beyond such discharge. It is this aspect of bankruptcy which has in the past given rise to the view that bankruptcy is of a quasi-penal nature. Thus, so long as a person remains bankrupt he may not obtain credit for £50 or over without disclosing his status, nor may he trade in a name other than that under which he was adjudicated without disclosing that name. He may not, without the leave of the court, act as a director of a company or be concerned directly or indirectly with a company's management. He is disqualified from being elected to or sitting in either House of Parliament. He cannot be elected to or act as a member of a local authority. He cannot act as a Justice of the Peace, hold a solicitor's practising certificate or act as a trustee in bankruptcy or of a trust estate. Furthermore, any property (with certain exceptions) which he acquires before he obtains his discharge belongs to his trustee in bankruptcy who, if he is able to intercept it, is entitled to it for the benefit of the bankrupt's creditors.

4.1.12. The Official Receiver has a statutory duty to investigate the manner in which the debtor has conducted his business and to report to the court whether the debtor may have committed a misdemeanour under the Bankruptcy Acts. This involves interviews with the debtor, examination of books of account and relevant papers and correspondence with those with whom he has had financial dealings. Until recently, a public examination of the debtor was held in open court to complete the examination of the debtor as to his conduct, dealings and property, and to set down the evidence and the circumstances leading up to and resulting in the failure. Under the Insolvency Act 1976 the court may, upon application by the Official Receiver, make an order dispensing with the public examination of the debtor.

4.1.13. A public examination is conducted, in the first place, by the Official Receiver who normally puts to the bankrupt in question and answer form the information, or much of the information, obtained in the course of the preliminary examination at the Official Receiver's office, though he is by no means confined to this information as the basis of his questions. The trustee in bankruptcy or any creditor present (who has proved a debt) are also entitled to question the bankrupt, but no-one else.

4.1.14. At any time after he has been adjudicated bankrupt, but not before conclusion of his public examination if not dispensed with, the bankrupt may apply for his discharge from bankruptcy. The effect of a discharge order is to release the bankrupt from all debts which were provable in the bankruptcy save for a

limited number of exceptions and to free him from virtually all of the restrictions and disqualifications of a bankrupt. The discharge must be sought by the debtor himself.

4.1.15. An application for discharge is heard in open court. Notification of the date of the hearing is given in advance to creditors, and at the hearing the Official Receiver is required to submit to the court a report in writing dealing with the history and causes of the bankruptcy, the bankrupt's conduct during the proceedings and also the results of the administration of the estate by the trustee in bankruptcy. One of the principal objects of the report is to disclose to the court any conduct of the bankrupt that falls within a specified category of "facts" which are contained in Section 26 of the 1914 Act, such as that the bankrupt's assets are not of a value equal to 50p in the £ on the amount of his unsecured liabilities or that he continued to trade after knowing himself to be insolvent. If any such facts are found to exist, then the court is precluded from granting an immediate discharge.

4.1.16. In practice a bankrupt usually allowed a fairly considerable period of time to elapse before applying for discharge, if he ever did so at all. Many bankrupts did not apply, either through ignorance of the procedures or reluctance to attract possible publicity. This meant that they remained under considerable civil disabilities.

4.1.17. However, Sections 7 and 8 of the Insolvency Act 1976 introduced automatic discharge and review provisions under which, when they were brought into force on 1 October 1977, anyone who was made bankrupt before 1 October 1967 and had not subsequently secured his or her discharge received an automatic discharge. It was expected that more than 60,000 people would benefit from this amnesty for 10 year old and longer bankruptcies.

4.1.18. The same section of the Act also provides that anyone declared bankrupt between 1 October 1967 and 1 October 1972 will receive an automatic discharge on the tenth anniversary of adjudication. Neither the court, nor creditors, can prevent automatic discharge in these cases.

4.1.19. In the case of bankruptcies occurring since 1 October 1977, the court, when it concludes (or dispenses with) the public examination, may decide that:

(i) automatic discharge will take effect on the fifth anniversary of the adjudication, or that

(ii) automatic review (but not automatic discharge) will take place during the year following the fifth anniversary of adjudication.

This automatic review in the year following the fifth anniversary will apply also to those who were made bankrupt between 1 October 1972 and 1 October 1977. Creditors can, of course, influence the outcome of reviews.

[Insert statistics on discharge applications.]

4.1.20. The trustee in bankruptcy is the person charged with the collection and distribution of the bankrupt's assets. He is, in the more substantial cases, usually a professional accountant but, where the estate is likely to be small the office is frequently left in the hands of the Official Receiver himself. The trustee is responsible to the Committee of Inspection (S.20, 1914 Act).

/ Insert here statistics on numbers of cases, annually, dealt with by OR's and non-official trustees./

4.1.21. The distribution of the proceeds of the bankrupt's assets is carried out by the trustee in accordance with a specified order of priorities. In brief, after satisfying the costs, charges and expenses of the administration, payment is made to the categories of preferential creditors principally enumerated in Section 33 of the 1914 Act and only when those debts have been paid in full, is any distribution made by way of dividend to the bankrupt's other creditors.

/ Possibly put in some statistics on deficiencies./

(2) Deeds of Arrangement

4.2.1. A deed of arrangement is an agreement by a debtor (an individual or partnership, not a company) with his or their creditors to arrange his or their affairs to avoid bankruptcy with its publicity and disabilities.

4.2.2. Deeds take the following forms:

(i) An assignment of property by a debtor to a trustee for the benefit of his creditors generally, or if the debtor is insolvent, for the benefit of any three or more of his creditors.

(ii) An agreement to pay to creditors a sum less than the full amount owing to them.

(iii) A deed of inspectorship for the carrying on or winding-up of a business under the supervision of the creditors.

(iv) A letter of licence by which the creditors give an extension of time for payment, authorise the continuance of the business and pay the net proceeds into a banking account operated by a committee of the creditors for distribution by them.

4.2.3. A meeting of creditors is called to consider the suggested arrangement, and if approved the deed is executed by the debtor and the creditors present at the meeting. The deed must then be registered at the Department of Trade within seven clear days of its execution, failing which it will have no effect. If the deed is expressed to be for the benefit of the creditors generally, in order to be effective it needs to have the agreement of a majority in number and value of the creditors within twenty-one days of its registration.

4.2.4. The execution of the deed being an act of bankruptcy, a creditor for more than £200 who does not assent to the deed may present a petition for bankruptcy within three months of its execution, and if a receiving order follows the deed is set aside.

4.2.5. A Register of Deeds is kept by the Department of Trade and local registers are kept by County Courts. Any person may search the register.

4.2.6. The deed trustee must submit accounts to the Department of Trade and Industry every twelve months, and statements should be sent to the creditors at six-monthly intervals. As soon as all the property included in a deed has been realised, and a final dividend or final instalment under a composition paid to the creditors, or in any case as soon as the obligations of the trustee are fulfilled, a final account must be immediately submitted to the Department of Trade. The trustee gets his discharge automatically when he has carried out the terms of the deed. Failure to lodge accounts can result in a trustee being committed for contempt of court.

4.2.7. Although a deed of arrangement is subject to the provisions of the Act, it is in fact a contract governed by the ordinary principles of the law of contract, and if one party fails to fulfil a condition of the contract the other party may be released from his liability. The rights and liabilities of the various parties under the deed depend upon the terms of the deed in the same way as any contract.

A deed has three parties, the debtor, the trustee and the creditors, and the advantage to the debtor to enter into a deed is that he rids himself of the burden of his debts without the stigma and publicity of bankruptcy. In the case of an inspectorship deed or letter of licence (both of which are almost obsolete) he retains the ownership of his property, although he restricts his own power of dealing with it. An assignment of property to creditors need not necessarily cover all the debtor's property.

(3) Administration Order procedure

4.3.1. County Court Administration Orders are made under the authority contained in Section 148 of the County Courts Act, 1959 and are governed by that Section, the following Sections 149 to 156 and Order 22 of the County Court Rules. These enactments provide that when a debtor

(a) is unable to pay forthwith the amount of a judgment obtained against him in a County Court, and

(b) alleges that his total indebtedness does not exceed £2,000 inclusive of the debt for which the judgment was obtained

the court may make an administration order providing for the administration of his estate.

4.3.2. The debtor's estate (if any) is not, in fact, administered in the same sense as in bankruptcy, the substantial purposes of the administration order being to ascertain details of the debtor's judgment creditors and non-judgment creditors and the

amounts owing to them, to give the debtor protection against further legal proceedings by them for the recovery and enforcement of their debts, and to arrange for the total or partial liquidation of all the debts by reasonable instalments.

4.3.3. The debtor's application to the court is made on a form of affidavit which sets out a list of all his creditors and the amount of their respective debts, his income, outgoings and personal circumstances and his proposals for payment of the whole or a part of the debts by instalments.

4.3.4. A notice of the application with the date and time of hearing is sent to all the creditors and the debtor. The creditors may inspect the list of creditors at the court office and provision is made whereby they can object to any debts included in the list or to the amount of the composition or instalments proposed by the debtor.

4.3.5. Pending the hearing of the application proceedings on any judgment order, execution, judgment summons or order of commitment may be stayed by a judge or registrar.

4.3.6. The debtor must attend the hearing unless the court otherwise directs and he must answer all questions put or allowed by the court. Provision is made for the attendance of creditors, for the admission of evidence and for the proof of debts.

4.3.7. The court, if making an administration order, will provide for the payments of the debts by instalments or otherwise, and either in full or to such extent as to the court in the circumstances of the case appears practicable and subject to any conditions as to his future earnings or income which the court may think just. There are no preferences and all debts therefore rank equally. The provision limiting the period over which instalment payments can be made to 10 years has been revoked and there is now no limit. When the order is made it is registered in the Register of County Court Judgments and posted on the notice board of the County Court; also, a copy is sent to every creditor.

4.3.8. Any person who becomes a creditor of the debtor after the date of the order may apply to be scheduled as a creditor for the amount of his proof of debt, but he shall not be entitled to any dividend until the creditors who are scheduled as having been creditors before the date of the order have been paid to the extent provided by the court.

4.3.9. The effect of the order is that no creditor will have any remedy against the person or property of the debtor in respect of any debt which has been notified or scheduled, except with the leave of the court, and proceedings pending in respect of any such debt are stayed.

4.3.10. When making an administration order the court appoints one of its officials to have the conduct of the order and in particular it is his duty, if default is made in the paying of

instalments, to apply for a judgment summons against the debtor or, if it appears that he is unable to pay for reason of illness or other unavoidable misfortune, to apply to the court for a suspension of the operation of the order or for a new order for payment by instalments. It is also his duty to bring to the notice of the court facts which might lead to the order being set aside or rescinded.

4.3.11. If the debtor can be shown to have property, not exempted from execution, which exceeds in value £10, the Registrar may be required by any scheduled creditor to issue execution against the property.

4.3.12. It is contemplated and prescribed that an administration order, which is designed for the benefit of a multiple debtor, should be set aside or rescinded if he fails to fulfil his part of the bargain. The effect of a recission is that the debtor ceases to have protection and is exposed to the risk of proceedings by any of his creditors.

4.3.13. On an application to rescind the court may

(a) set aside or rescind the order, or

(b) suspend the order or make a new order for payment by instalments, or

(c) make an order directing that the administration order shall be set aside or rescinded unless the debtor pays the sum in payment of which he has made default, either within a specified time or by instalments to be specified in the order.

4.3.14. In addition to the protection of the debtor and the orderly collection of instalments from him, the object of the administration order is the distribution of the monies collected from him amongst the creditors pari passu inter se, subject to the priority given to those creditors who are scheduled as having been creditors before the date of the administration order.

4.3.15. Under Section 11 of the Insolvency Act 1976 it is provided that if a debtor fails to make any payment under an administration order a court having bankruptcy jurisdiction may revoke the administration order and make a receiving order. In courts not having such jurisdiction the Registrar may refer the matter to such a court for consideration. A receiving order in a County Court will be made by a Judge, in the High Court it will be made by a Bankruptcy Registrar.

4.3.16. Mention should be made of two other ways in which an administration order may originate:

(i) Under Section 4 of the Attachment of Earnings Act 1971 it is provided that where, on the application for an attachment of earnings order to secure payment of a judgment debt, it appears that the debtor has other debts the court is required to consider whether the case be one for the making of an administration order. The court may order the debtor to furnish a list of his debts in a sworn

statement and such a list is deemed to be an application for an administration order.

(ii) On the Oral Examination of a debtor under Order 25 Rule 2 of the County Court Rules a debtor may be required to furnish to the court a list of creditors and the amounts owing to each and to give sufficient particulars of his resources and needs. If this is done it may be treated as a request for an administration order.

4.3.17. All monies paid or levied under an administration order have to be paid into court and they are appropriated

(a) in satisfaction of the costs of the plaintiff in the action in respect of which the order was made;

(b) next in satisfaction of the costs of the administration; and

(c) then in liquidation of debts in accordance with the order.

4.3.18. On payment of the whole amount payable under the order, the order is superseded and the debtor is discharged from his debt to the scheduled creditors. Save in these circumstances no provision for the discharge of the debtor similar to that provided in bankruptcy is contained in the Rules.

/Suggest we put in here some statistics on past performance of administration orders./

(4) Winding Up

4.4.1. The term "winding up" as applied to companies means the process of realising and collecting in the assets and distributing the proceeds to those entitled, with a view to bringing the legal existence of a company to an end. The term "bankruptcy" is not used in connection with the winding up of a company. A winding up order made by the court or a resolution for winding up by the company is the event which gives legal force to the process of winding up. A company being wound up can be described as being "in liquidation" and the process of winding up can be referred to as liquidation.

4.4.2. For England and Scotland, the winding up of companies is regulated by the Companies Acts, 1948 and 1967. For England, these Acts are supplemented by the Companies (Winding-Up) Rules, 1949 and in Scotland by the Act of Sederunt (Provisions under Companies Act 1948). For Northern Ireland, winding up is regulated by the Companies Act (Northern Ireland) 1960 and the Companies (Amendment) Act (Northern Ireland) 1963 supplemented by the relevant Rules contained in the Rules of the Supreme Court, Northern Ireland. For all companies, the rules governing the avoidance of certain preferences are those applicable in bankruptcy. In the case of insolvent companies the rules in force under the law of bankruptcy are applicable regarding the rights of creditors, as to debts provable and as to the value of certain claims.

4.4.3. A major difference in the administration of the winding up of companies in England on the one hand and Scotland and

Northern Ireland on the other is that in England there is an Official Receivers service (the "Insolvency Service"). Official Receivers are officers of the Department of Trade and are attached to the courts having jurisdiction in bankruptcy and to wind up companies. Their duties mainly comprise acting as provisional liquidators to preserve and protect assets of companies ordered to be wound up, pending the decision of creditors and members as to whom they wish to nominate for the office of liquidator, to call and act as Chairman of separate meetings of creditors and members for this purpose, and to arrange for and ensure submission of the Statement of Affairs of the company. The Official Receiver has a duty, also, to enquire into the conduct of a company's affairs to establish the causes of failure and to report to the appropriate authority if it appears that fraud or other wrong doing may have taken place. Although a civil servant, the Official Receiver is an officer of the court when carrying out his duties under the Companies Acts and responsible to the court as such.

[Suggest we refer forward, here, to the chapter on the Insolvency Service].

4.4.4. A company can be wound up in three ways:

(i) compulsorily by order of the court;

(ii) voluntarily, which will be a members' voluntary winding up if the company is solvent and able to pay its debts within a period of one year, otherwise it will be a creditors' voluntary winding up; or

(iii) under the supervision of the court, a method which is rarely used and which can take place only after a company has started to wind up voluntarily.

4.4.5. The date of the winding up order should not be confused with the date of the commencement of the winding up. The commencement of the winding up is the date of the presentation of the petition for winding up to the court, or of a previous resolution for voluntary liquidation. Where there is no petition to the court, it is the date of the resolution for voluntary liquidation.

(5) Compulsory Winding Up by the Court

4.5.1. The High Court has jurisdiction to wind up any companies which are registered in England, and if the paid-up capital does not exceed £10,000, the county court having bankruptcy jurisdiction of the district in which the company's registered office is situate has concurrent jurisdiction with the High Court to wind up the company.

4.5.2. A company can be wound up by the court in any of the following circumstances:-

(i) The company has passed a special resolution to wind up.

(ii) Default has been made by the company in delivering the statutory report to the Registrar of Companies or in holding the statutory meeting.

(iii) The company does not commence business within one year from incorporation and suspends its business for one whole year.

(iv) The number of members falls below seven or, in the case of a private company, below two.

(v) The company is unable to pay its debts. For this purpose, a company will be deemed to be unable to pay its debts if a debt exceeding £200 remains unpaid after written notice requiring payment has been served on the company or if any execution remains unsatisfied or if the court is satisfied that the company is unable to pay its debts.

(vi) The court is of the opinion it is just and equitable that the company should be wound-up. In England and Scotland, a company may be ordered to be wound-up on this ground if the court considers there is no other way in which to remedy the oppression of the minority: while in Northern Ireland this is specifically stated as a ground for winding-up. Examples of where a company has been ordered to be wound-up on just and equitable grounds are where the whole object of a company was fraudulent, where its substratum had gone, and where there was deadlock, that is the continued disagreement between two members each of whom controlled half the voting power.

4.5.3. Application for a winding up is by way of a petition presented to the court. A petition may be presented by the company itself, a creditor, a contributory, in certain circumstances by the Secretary of State, or by the Official Receiver. If the company is a charity, the Attorney General may petition, and the Chief Registrar of Friendly Societies can petition in the case of certain defaults of a Building Society.

4.5.4. The presentation of a petition gives the court competence to deal with the affairs of the company although no winding up order has been made. At any time after a petition has been presented, the court, on application by the company, a creditor or a contributory, may stay or restrain any action or proceeding against the company. A provisional liquidator may also be appointed, with such powers and duties as the court orders. In practice, the court only appoints a provisional liquidator when it can be shown that the company's assets may be in jeopardy, and the provisional liquidator's powers are usually restricted to preserving and protecting the assets.

4.5.5. The making of the winding up order places the company in liquidation but the winding up is deemed to have commenced on the date of the presentation of the petition, or if there is a previous resolution for voluntary winding up, from the date of the resolution. The date of commencement is important because it governs the application of certain retrospective provisions of the Companies Acts.

4.5.6. Any disposition of the property of the company, any transfer of shares or changes in the status of members after the commencement of a winding up are void unless the court orders otherwise.

Likewise, any attachment, sequestration, distress or execution put into force after the commencement of a winding up is void to all intents.

4.5.7. A floating charge created within twelve months of the commencement of a winding up is invalid unless the company was solvent immediately after the creation of the charge and except to the extent that cash was paid to the company at the time of or subsequently to the creation of the charge.

4.5.8. Any parting with or charging of property of the company in the period of six months prior to the commencement will be invalid if it would have been a fraudulent preference under the bankruptcy law.

4.5.9. The Official Receiver becomes the provisional liquidator. He has the duty of summoning and acting as chairman at separate meetings of creditors and contributories, which decide whether or not application is to be made to the court for the appointment of some person whom they nominate to be liquidator in place of the Official Receiver, and for the appointment of a Committee of Inspection. If for any reason no other person is acting as liquidator, the Official Receiver acts by virtue of his office. The Committee of Inspection consists of representatives of creditors and contributories although, if the company is insolvent, it usually comprises representatives of creditors only. The Committee of Inspection acts with the liquidator and its sanction, or that of the court, is required by a liquidator to do certain acts in the liquidation.

4.5.10. The winding up order has the further effect of terminating the employment of employees and other agents of the company. The directors are similarly dismissed and their powers to act on behalf of the company cease.

4.5.11. The liquidator is an officer of the court and subject to the control of the court. He should have regard to the wishes of creditors and the Committee of Inspection, although he is expected to use his own discretion. He can apply to the court for directions on any matters arising in the liquidation and any person aggrieved by the liquidator's actions has the right to apply to the court.

4.5.12. The liquidator's duties are to get in and realise the property of the company, to pay its debts according to the priority laid down by law and to distribute any balance among the contributories. His powers are those necessary to enable him to carry out his duties. They enable him to carry on the business of the company insofar as it is necessary for beneficial winding up.

4.5.13. When a liquidator has completed the winding up or has resigned or been removed from office, he can apply to the Department of Trade for his release from the office of liquidator. Until he is granted release, the liquidator remains liable to creditors for the conduct of the liquidation. In the absence of fraud or concealment of material facts, the release discharges the liquidator from all liability in respect of any act or default in the conduct of the liquidation.

(6) Voluntary Winding Up

4.6.1. Voluntary winding up is originated by the company itself in general meeting. If the company is solvent and able to pay its debts within a period of one year, the winding up will be a members' winding up, but in any other case it will be a creditors' winding up.

4.6.2. The scheme of voluntary winding up is not to involve the courts but to allow the company and its creditors to settle affairs between themselves with, however, recourse to the court in the case of difficulty or dispute. Most voluntary liquidations are carried out without any involvement of the court but if an application is necessary it should be to the court having jurisdiction to wind up the company compulsorily.

4.6.3. A company may be wound up voluntarily in any of the following circumstances:

(i) When the period, if any, fixed for the duration of the company by its Articles expires or the event, if any, occurs on the occurrence of which the Articles provide that the company is to be wound up; and the company in general meeting has passed a resolution requiring the company to be wound-up voluntarily.

(ii) If the company resolves by special resolution that the company be wound up voluntarily.

(iii) If the company resolves by extraordinary resolution to the effect that it cannot by reason

of its liability continue its business and that it is advisable to wind up.

4.6.4. A voluntary winding up commences and dates from the passing of the resolution which authorises it and thereafter the company ceases to carry on its business except for the purpose of beneficial winding up. After a resolution for voluntary winding up, transfers of shares without the sanction of the liquidator and any alteration in the status of members are void but the corporate state and powers of the company continue until it is dissolved. As in winding up by the court, floating charges created within twelve months prior to the commencement may be invalid and any parting with or charging of the company's property in the six months before commencement is invalid if it would have been a fraudulent preference according to bankruptcy law.

4.6.5. A members' voluntary winding up is available only if the company is solvent. A declaration of solvency has to be made by a majority of the directors of the company to the effect that, in their opinion, the company will be able to pay its debts in full within a period of one year. The declaration must contain a statement of the company's assets and liabilities.

4.6.6. A liquidator is appointed by the company in general meeting, whereupon the powers of the directors cease except insofar as the company in general meeting or the liquidator sanctions their continuance.

4.6.7. In any case where a declaration of solvency has not been made, the company must also call a meeting of creditors to be held

after the general meeting of the company at which the resolution for voluntary winding up is to be proposed. The creditors and the company in general meeting may each nominate a liquidator but, in the event of the meetings nominating different liquidators, the nomination of the creditors will prevail subject to an application to the court. The creditors may also appoint a Committee of Inspection to act with the liquidator. On the appointment of the liquidator, all powers of the directors cease except as the Committee of Inspection or, if there is no Committee, the creditors sanction their continuance.

4.6.8. The duties of the liquidator are broadly the same as in a compulsory winding up by the court; that is, to get in and realise the property of the company, to pay its debts according to the priorities laid down by law and to distribute any balance among the members.

4.6.9. The liquidator may exercise without sanction any of the powers given to a liquidator appointed by the court except that in regard to paying any class of creditors in full, making any compromise or arrangement with creditors, or compromise on calls or debts, he needs the sanction of the company in general meeting in the case of a members' voluntary liquidation, and the sanction of the court or the Committee of Inspection in the case of a creditors' voluntary liquidation.

4.6.10. As soon as the company's affairs are fully wound up, the liquidator must summon a final meeting of the members of the

company to which he submits an account showing how the winding up has been conducted and he secures his release. In a creditors' voluntary winding up, in addition to the meeting of members there must also be a meeting of creditors. The company is deemed to be dissolved at the end of three months from the receipt by the Registrar of Companies of notice that the final meetings have been held.

(7) Winding up under the supervision of the court

4.7.1. When a resolution has been passed to wind up voluntarily, the court may order that the winding up should proceed under the supervision of the court. The court may appoint a liquidator in addition to the liquidator already appointed by the company and he will have the same powers as if he had been appointed by the company. The liquidator may exercise all his powers without the sanction of the court as in a voluntary winding up, but subject to such restrictions as the court may direct.

4.7.2. The effect of an order for winding up under the supervision of the court is much the same as an order for compulsory winding up and is conducted in the same way, except that the Official Receiver is not involved, the powers of the Department of Trade in a compulsory winding up do not extend to the proceedings and the accounting provisions are not applied.

4.7.3. This method of winding up is rarely used and the Jenkins Committee recommended that the relevant provisions of the 1948 Act served no useful purpose, and that they should be repealed. A clause in the 1973 Companies Bill which, in the event, did not reach the Statute Book, gave effect to the Jenkins recommendation.

Only sixteen orders have been made in the 15 years ended 1977.

(8) Receiverships

4.8.1. A receiver of the property of a company may be appointed by the court, or under the powers contained in an instrument such as a mortgage debenture. A body corporate is not qualified for appointment as receiver and an undischarged bankrupt may not act as receiver or manager unless he has been appointed by the court.

4.8.2. The appointment of a receiver under hand takes effect when the document of appointment is handed to him in circumstances which indicate that the appointment is by an authorised person and it is accepted by the receiver.

4.8.3. The appointment of a receiver out of court will depend on the terms of the instrument creating the debt or charge and normally his powers, duties and liabilities are also defined in the document. Usually they provide that he is to take into his custody the property of the company, and to take any necessary action or proceedings to that end. This may entail carrying on the company's business, borrowing money on the security of the assets, selling the assets, compromising with creditors, and generally taking such actions as may be necessary in the interests of those who appointed him.

4.8.4. The Companies Acts contain special provisions in cases where a receiver or manager of the whole or substantially the whole of a company's property is appointed on behalf of a debenture-holder who is secured by a floating charge.

4.8.5. A floating charge is a security interest in the property of a company. Generally speaking, it exists over all the property for the time being belonging to the company, but while it is still floating it does not prevent the company disposing of its property in the ordinary course of business. Once the property has been disposed of by the company the floating charge ceases to affect it, but it does apply to any new property acquired by the company. The fact that the charge does not prevent the company from dealing with its property makes this a very useful security in the case of companies which have a large stock in trade which is constantly turning over. If the company is wound up the charge crystallises, that is, it becomes fixed and applies to all the property belonging to the company at that time. Debts secured by a floating charge take priority over ordinary unsecured debts, but not over preferential debts and not normally over a fixed charge. Floating charges must be registered and if they are unregistered they are void as against the liquidator and the other creditors.

4.8.6. The provisions relating to receivers or managers appointed under floating charges are designed to ensure that members and creditors of the company and the debenture-holders should have sufficient information about the financial position of the company after the appointment of the receiver. It is provided, therefore, that a statement of affairs must be submitted as at the date of the receiver's appointment similar to that required in the event of a winding up. Also, a summary of the receipts and payments in the receivership must be prepared at yearly intervals as well as a statement showing the position at the conclusion of the receivership.

4.8.7. Normally 14 days is allowed for the company to submit the statement of its affairs but this period may be extended by the court. The intention is that the receiver should receive the statement as soon as possible after his appointment so that he may check the assets at the earliest possible time. The receiver is required to send copies of the statement, together with his comments to the court (if he was appointed by the court) to the Registrar of Companies and to the debenture-holders. A copy of his comments, if any, is also sent to the company.

4.8.8. A receiver appointed under the terms contained in any instrument may apply to the court for guidance and this may be of considerable assistance in questions affecting contracts already entered into by the company before his appointment, or if, for any reason, he finds that he is unable to complete such contracts. He may of course enter into fresh contracts under which he will be personally liable and entitled in respect of that liability to indemnity out of the assets. If the assets are not sufficient to indemnify him, he has no other claim for an indemnity.

4.8.9. A receiver deals with the assets for all practical purposes as a liquidator until he has satisfied the claim of the debenture-holder. The ability with which he carries out his duties affects the interests not only of the debenture-holder on whose behalf he has been appointed, but also the interests of the unsecured creditors and the shareholders who hope to obtain any surplus which the assets of the company, after satisfaction of the claims of the debenture-holder, may realise.

4.8.10. The assets realised by the receiver are paid out as follows:

(i) in paying the receiver's expenses and remuneration;

(ii) in paying the costs of the debenture-holder or other person who brought the action for the appointment of the receiver;

(iii) in meeting preferential claims (eg. wages and salaries);

(iv) in paying the debenture debt itself with interest up to the date of payment.

11.7.79