THE CORK REPORT

CHAPTER 6

THE HARMONISATION OF INSOLVENCY PROCEDURES

6.1.1. As will be seen from the foregoing chapters, the development of the laws of insolvency, insofar as they affect individuals, or partnerships of individuals, or companies or other corporations, has been a long process, going back in the case of bankruptcy for several hundred years. It has developed not only in a fragmentary and piecemeal manner, but its legislation has also displayed a kind of "pendulum phenomenon", where one can see procedures moving first one way, for example towards a creditor-oriented procedure with the public interest little or not at all represented, and then the other way towards a more publicly-directed procedure, in which the creditors have less control. In the same way, one can perceive changes in the severity of the procedure towards the individual being modified by a more benevolent approach. We have taken the liberty of observing already that this committee appears to have been the first entrusted with the task of considering all insolvency procedures in one overall perspective, and of devising means of harmonising them so far as possible, so as to achieve thereby a less complex and more just administration of the estates of the various persons who to use our new terminology, are the "insolvents" of our society.

6.1.2. We have also already observed that it is our considered opinion that there should, so far as possible and practicable in judicial and commercial terms, be one general mode of dealing with the affairs of an insolvent, regardless of whether the insolvent be an individual, a partnership of individuals or a company. We have pointed out that in the circumstances of modern commercial life the question whether a person capable of becoming an insolvent is a human being or an artificial person such as a company or a corporation, may often be accidental or determined by the wishes of its promoters or proprietors to achieve tax advantages, social advantages or to comply with the requirements of the particular trade or business in which he they or it are engaged. For example, there are in the City of London now (particularly since the increase permitted by the Companies Act 1967 on the number of possible partners in a partnership) very large partnership firms indeed, engaged in the professions of solicitors and accountants. In the case of solicitors they would not professionally be permitted to carry on business as a company, and the same we believe is substantially true of persons practising as chartered accountants. We are acquainted with firms engaged in one or other of those professions who have a turnover running into nine figures, and with a number of partners which may exceed 50.

6.1.3. In the theoretically possible event of such a firm becoming unable to meet its obligations, the partners would all be made bankrupt, and it would constitute a "partnership bankruptcy" of an immense size. In comparable professions such as that of insurance broking, this is now substantially divided into partnership firms who carry on the business of insurance brokers, and companies who also carry it on, but in the case of underwriters at Lloyds, they are not permitted to write policies except through sydicates which are for practical purposes partnerships, whereas Lloyds brokers may be and usually are companies. In the event therefore of failures in this field, under

15(2.9)

INSOLVENCY LAW REVIEW COMMITTEE

NOTE TO MEMBERS

FINAL REPORT

Enclosed are two copies each of Chapters 6 and 7. It would be helpful if you would kindly let me have one copy of each with any proposed amendments for improving the draft thereon.

T H TRAYLOR
22 December 1980

INSOLVENCY LAW REVIEW

NOTE TO MEMBERS

GREEN PAPER - COMMENTS BY CONSULTEES

I enclose a copy of a further comment received - GP17. The Rating and Valuation Association.

E L REEVES
Assistant Secretary
7 January 1981

ILRC - 51st Meeting

Brief for Item 6 (Trust Property)

Edward comments as follows:-

> "I agree entirely, save that I doubt whether questions as to the proper distribution of a fund - as opposed to the proper administration of the estate of an insolvent company or an insolvent individual, is something into which we should allow ourselves to become enmeshed. I do not think it is an easy subject since so much depends on the character and origin of the fund."

Alfred supports the recommendation in ILRC 164 and, in particular would resist any suggestion of legislation, whether to assist the construction industry or any other sectional interest.

Assistant Secretary
9 January 1981

INSOLVENCY LAW REVIEW

NOTE TO MEMBERS

I enclose:-

(i) C229 - from the Committee of London Clearing Bankers

(ii) GP18 from the National Association of Trade Protection Societies, and

(iii) a copy of a report "The Insolvency Trap" from "Which?" (December 1980) - this was referred to the Committee by the Consumers Assqciation.

E L REEVES
Assistant Secretary
21 January 1981

the systems presently in force, some would be administered in bankruptcy and some would be administered in winding up. If we now go to the other end of the scale, a small shop carrying on the business of grocery or a small garage, with possibly an issued capital of no more than £2, the proprietors of which are in many cases husband and wife, and the directors and shareholders, when such an enterprise goes into a state of insolvency it will invariably be administered under the winding up code. If however the grocer's shop or the garage had remained a private business, owned by either the husband or the wife alone or by the husband and wife jointly, then it would be administered in bankruptcy.

6.1.4. There has been a further development in the complexities of this field in the recent revival to the commercial world of the "unlimited company". It will be recalled that until the introduction of limited liability in the early part of the nineteenth century, all those entities which we now call companies were, unless incorporated by statute with particular conditions to the contrary, liable to the extent of their debts through the pockets of their constituent members. It was to avoid the unlimited liability thereby imposed on the "merchant adventurers", as they were often called, that "limited liability" was invented. The return of the unlimited company (for which the Companies Acts will make provision) was inspired by the wish to avoid certain of the complexities, and what were felt to be injustices, created by the present fiscal regimes.

6.1.5. Faced with this extraordinary amalgam of trading entities capable of incurring debts to the extent of becoming insolvent, and yet being liable to be administered in that insolvency in totally different ways, it appears to us to be essential, as indeed our terms of reference contemplate, that some unified system should be evolved which should be sufficiently integrated to be applicable to all conceivable types of insolvents, and yet sufficiently flexible to deal with incidents in relation to any particular insolvent or class of insolvents. We also think it necessary to take into account the possibility not merely of harmonising those systems of insolvent administration which are specifically described today as "bankruptcy" and "insolvent winding up", but also those other systems for the administration of the assets of insolvents such as deeds of arrangement, receivers, receiverships under debtures, and the administration order procedure for small cases.

6.1.6. As we have already pointed out, some of the difficulties in analysing and tidying up the present systems have been created by a process of "borrowing" concepts or procedures from the old-established bankruptcy code for use in the field of winding up, and to a certain extent in others of the fields we have just mentioned, without sufficient thought being given to the applicability of the borrowed procedure in the context of the differences in structure which the different systems at present display. The process of borrowing arose of course from the introduction of the limited liability company in the nineteenth century as a largely ad hoc invention of the mercantile world by virtue of the fact that on the one hand the company enjoyed a "limited liability" and yet on the other hand was capable of incurring debts in trading, so as to require to have its assets administered, in the event of there being a deficiency, in accordance with some recognisable existing pattern. Accordingly when comparable situations had to be dealt with in the field of the administration in insolvency

of limited liability companies, there was a tendency merely to adopt en bloc provisions which related to the field of bankruptcy.

6.2. INCONSISTENCES IN THE SUBSTANTIVE LAW

6.2.1. Introduction. We propose to take a number of examples of inconsistencies or inapplicabilities between the two codes which should in our opinion be eliminated in a unified insolvency law.

6.2.2. Let us for example take the phenomenon described as a "fraudulent preference" (more particularly described in chapter below in the context of the existing law). This is a phenomenon as old as insolvency itself, where an insolvent unable to pay all his debts as they fall due chooses to pay one, or more than one, of his creditors to the prejudice of others, thereby preferring de facto the first and ensuring that they get paid all that they are owed, or at least more than the others. If, under the English law which has existed since the time of James I, this act of preferring de facto was done with the view, or the paramount view, with the most probable of the possible views, of preferring that creditor or those creditors, and was done within a specified period (which is now six months, in both bankruptcy and winding up), it will be set aside. This analysis of the phenomenon involves under the present law (in which we are recommending a change) a process of the subjective analysis of the "mind" of the insolvent, so as to determine whether he or it had the necessary "intent" to effect such a preference. To such an allegation of an intent to prefer, the recipient of the preference can raise his or its standard defences of pressure, ordinary course of business, etc. But the question that has to be examined is this, whether an analysis of the "mind" of an individual, or of the minds of a partnership of individuals, can adequately be performed in the same manner in the case of a limited company. The question which arises is this, whose is the "mind" which intended to enter into the transaction effecting a preference, was it the mind of one or more of its directors or managers, and how is the mind of a limited company in fact clearly to be ascertained - a problem which has troubled the criminal courts in recent years? For in the case of the Companies Act 1948, sections 320 and 321 simply import into the control and the setting aside of "fraudulent preferences" in winding up the law which would be applicable in bankruptcy.

6.2.3. In the field of "mutual credit and set off", that is to say, the setting off of one debt against another, the first being the debt being owed by the insolvent to his creditor and the other being the debt owed by that creditor to the insolvent (described in chapter below), it is plain that some control needs to be exercised, in the period immediately before the advent of insolvency, so as to ensure that the doctrine of the compulsory setting off of debt against debt (which has of course the effect of "preferring" the creditor who receives the benefit of the set off) so as to ensure fairness to creditors generally. The solution presently provided by the Bankruptcy Act (in section 44 of the present Act) has been to disallow such a set off where the other party, that is the creditor, had at the time of the giving by him of credit to the debtor notice of an available act of bankruptcy committed by the debtor. "Acts of bankruptcy" are clearly defined in section 1 of the Bankruptcy Act 1914, and have a long pedigree of construction behind them. A number of them, are only capable of being committed by an individual or individuals. When

however it was decided to apply to winding up the bankruptcy doctrine of set off as set out in section 31 of the Bankruptcy Act this imported the question whether there was to be a disallowance of set off and if so on what grounds. For the purpose of that section, it is necessary, in deciding whether a set off should be allowed or disallowed, to determine whether the creditor had notice of an act of bankruptcy. However, a limited company cannot commit an act of bankruptcy as such, or at least there are a number of acts of bankruptcy that no company could practically commit. In the event, in the only recently reported case on the subject, the Judge decided that by virtue of the fact that the company in winding up had summoned a meeting of its creditors for the purposes of considering its winding up on the ground that it was unable to meet its liabilities, it must be taken to have committed the act of "giving notice of suspension of its debts", which was to be comprehended within that act of bankruptcy comprised in section 1(1)(h) of the Bankruptcy Act. In our view this kind of patching over between the two codes is an unsatisfactory structure for a unified insolvency system to continue to operate.

6.2.4. There has been, since the time of James I, bankruptcy doctrine known as "reputed ownership" (which is described in chapter below). This doctrine provides that those goods, or those book debts which are found in the possession of the debtor or recorded in his books, and are his ostensible property in his capacity as a trader, are to be treated as assets in the bankruptcy capable of being distributed among his creditors, even though they in reality belong to another person for by virtue of that. By virtue of that other person having allowed the debtor to remain in possession of those goods or those book debts, he had created, or was capable of having created, a situation of "false credit" which should disentitle him to recover his goods or those book debts in the insolvency of the person to whom he had entrusted them, ahead of the other creditors. This doctrine although greatly whittled away by decisions of the Judges over the last century, is still part of the law of bankruptcy, and it has a certain rough justice about it; on the other hand, of course it has about it an atmosphere of the medieval shop in the City of London or elsewhere, standing open to the street, in which a person dealing with the merchant sitting there at the receipt of custom could see goods which were the merchant's ostensible property or, knowing him to be a merchant and dealing with him on credit would assume him to have persons indebted to him whose debts were part of his property available for his creditors. Whatever may be the rightness or wrongness of the retention, amendment or annulment of this doctrine, there is no reason whatsoever why, if it has any merits, it should not apply to companies in that same manner as it does to individuals and partnerships. The creation of "false credit" is as much a phenomenon of the operations of a company as it is of an individual trader. However, in the application to the winding up of insolvent companies of general principles of bankruptcy law, this doctrine of reputed ownership has never been applied; in fact, it is generally considered, for some reasons which are not very apparent, not to apply to limited companies at all.

6.2.5. However obsolete one may think the doctrine to be, its merits and the philosophy behind it may soon become very relevant again in the light of what has now become known as "Romalpa-type" trading. This type of trading, which is otherwise more academically known as "reservation of title", is discussed in chapter below;

but we mention it here because the essence of a "Romalpa-type" relationship between supplier and purchaser is that the purchaser although appearing to be in possession of so many components of a motor car under construction, or so many planks of wood or even, in one of the most recent cases, of so many pieces of wood composed of sawdust bound together by glue, has not yet paid the supplier of the components, of the planks or of the glue. If the contract of sale provides that the property in the items "bought" does not pass to the "buyer" until they are paid for, then the purchaser may not be in reality the owner of those things, and those things in his possession, should he become insolvent, are not to be available for the satisfaction of his creditors until they are paid for. Those things accordingly are to be held in trust for the benefit of the unpaid supplier, either physically or in the shape of the book debts which have been or will be created by the sale of those things, or of other articles containing those things. The law here is still in a state of development, and there have been only a few cases so far decided thereon; but it is obvious that one considering a situation of the creation of "false credit", it would be necessary to take into account the doctrine of reputed ownership as it has existed in bankruptcy for many years. However, as we have pointed out, the bankruptcy doctrine is not regarded as applicable to winding up at all and could only now be so applied, we assume, by legislation.

6.2.6. In the field of dealing with creditors, the bankruptcy code has long had a comprehensive and detailed system for regulating the rights of creditors, secured creditors, and the proof of their debts. When winding up legislation had to deal with those subjects, it simply adopted, or appeared to adopt, the whole of the bankruptcy procedures by the enactment of what are now sections 316 and 317 of the 1948 Act. One might therefore think that the two systems would for all practical purposes be identical; that is, however, not the case for there is one vital difference. In bankruptcy, if and when the creditors are all paid in full, and any assets remain in the estate of the bankrupt, the creditors are entitled to receive out of those surplus assets (and before the bankrupt or any successor or assignee entitled to receive any surplus) a sum by way of statutory interest at the current rate of four per cent from the date of the receiving order. However, in winding up, it has been held on several occasions that no statutory interest is payable to a creditor who although paid in full has been kept out of his money for what may have been a very long time; accordingly, after the creditors have been paid the whole of their debts in full, any surplus assets are not used for the distribution of statutory interest but are to be returned to the shareholders. Here again we see a curious discrepancy between the two codes, which is not merely unjust but it is, despite the observations of the learned Judges who have had to decide this matter, incapable of any intelligible explanation.

6.2.7. A similar disparity exists between the position, powers and responsibilities of the trustee in bankruptcy of the individual debtor or partnership in insolvency on the one hand, and those of the liquidator appointed by the court in a compulsory winding up, or by the members and creditors in a creditors voluntary winding up, on the other. These officers may be non-official, ie. accountants, or they may be officials in the shape of the Official Receiver, but in each form of insolvency administration they perform substantially the same functions and duties.

6.2.8. There exists however by statute a substantial difference in their real actual legal status. In the case of the trustee in bankruptcy, upon his appointment being perfected he becomes "vested with", ie. becomes the entire legal owner of, all the assets of the bankrupt past, present and future. However, by virtue of such "vesting" (which occurs after he has been appointed by the creditors and approved by the court or, in the case of the Official Receiver, by virtue of the order of adjudication) he also becomes personally liable for those liabilities which may attach to the legal ownership, being vested in him, of items of the bankrupt's property, such as an onerous lease of real or personal property, or an onerous contract; he also appears, under recent fiscal legislation, to be personally liable for certain taxes leviable on the realisation of the bankrupt's property in the bankruptcy, notwithstanding that (by virtue of it being mortgaged up to the hilt) the bankrupt's estate and the trustee himself receives no benefit from such realisation. In order to enable the trustee in bankruptcy to liberate himself from such onerous liabilities arsing from property (although not from the taxes mentioned above), a cumbrous procedure was constructed in the 1883 Act known as "disclaimer". This is discussed below at chapter and is in its present form not free from obscurity and difficulty of construction and operation. But the effect of it is to liberate the trustee from personal liability as from the time of his appointment and to leave the other party to the transaction relating to the property disclaimed to his remedy in damages for which he may prove but on terms that he substantially gets the property back.

6.2.9. The liquidator of an insolvent company, on the other hand, is not by law personally "vested" with the property of the company, nor (except in rare cases) can he be made personally liable for any liabilities attaching to that property, nor for the taxes mentioned above. He can apply to the court for an order vesting in him as liquidator the whole or part of that property (in which case his position would resemble that of the trustee in bankruptcy) if he needs to obtain this title for a particular purpose; but we believe this power to be very rarely used. The property therefore remains throughout the property of the company itself, and the location of its title does not shift.

6.2.10. When however the Companies Acts had to deal with the situation of a company possessing onerous property to which liabilities attach, the legislature again "borrowed" from the bankruptcy code substantially the same disclaimer procedure; but its necessity was in this case not to protect the liquidator personally, for he was not personally liable: the only objective could be to protect the other creditors in the winding up, on no very easily discernible basis. Since disclaimer in winding up can only be effected by leave of the court (unlike the position in bankruptcy), it has not been unknown for the court to refuse the liquidator leave to destrain, in the expectation that a surrender of the onerous property may result and thereby to solve the problem presented by the facts of the case. We see here again a curious discrepancy between the two codes.

6.2.11. Within the field of winding up itself, there are important differences between the "compulsory" procedure and the "voluntary" procedure. In the first case, the insolvency is initiated, in the great majority of cases, by an unpaid creditor or creditors applying for an order, contending that it is "just and equitable" that the company be wound up. This application is made by petition and is fought out in many cases between the company and the petitioning

creditors or between the petitioning creditors, supporting creditors and opposing creditors. Creditors voluntary winding up however, is initiated by a resolution passed by the members of the company and followed immediately by a resolution passed by those of its creditors who have received notice of the meeting at which the resolution is proposed and who appear, either personally or by proxy, for the purpose of voting there at. At those meetings, which are an extremely common feature of the administration of insolvent companies, a liquidator is elected, or joint liquidators are elected, and the administration of the insolvent company immediately swings into action. In the case of a winding up petition, however, there is the delay occasioned by the petition coming on for hearing, and by proceedings taking place thereon, and except where a provisional liquidator has been appointed pending the hearing of the petition (as already described in chapter above) the business of the company remains in a state of suspended or largely suspended animation for a period which may be crucial.

6.2.12. There are other curious anomalies between the two systems; in the first case simply by virtue of the choice of the creditor to proceed by way of petition, the Official Receiver is brought in as liquidator immediately by virtue of any winding up order that is made. He then performs the functions allotted to him not merely as liquidator but also in the field of the public investigation and control of, and if need be sanction against, the company and those who have conducted its affairs. In the case of voluntary winding up, Official Receivers play no part whatsoever, except in those rare cases in which a voluntary winding up is converted into a compulsory winding up which has the effect described above, or where the voluntary liquidator reports to the court that there are grounds for criminal proceedings against officers of the company, which may then come to the notice of the Official Receiver.

6.2.13. With regard to the position under deeds of arrangement, and the position under receiverships, or what is more common receiverships and managerships, the situation is a curious hybrid. Originally the receiver and manager was the "mortgagee's man" who was put in to realise the assets charged by the floating charge as part of the security of the mortgagee, and it was his duty to run the business and to wind it up or dispose of its assets to the best advantage of his "master" the mortgagee. However, the mortgagees soon found that it was an uncomfortable situation to be a "mortgagee in possession" so that it became the practice to insert in the instrument of mortgage which created the floating charge and conferred the power to appoint a receiver a declaration that any receiver so appointed should be "the agent of the company" whereby the mortgagee would not be (or would be thought not to be) responsible for any liabilities incurred by his receiver. This produced the absurd situation that the receiver was both the agent of the company and also in practice amenable to the directions of the mortgagee for the recovery of whose money he had been appointed to achieve. As if this were not a sufficiently confused situation, the legislature (as has already been indicated in chapter) soon became aware that the effect of the floating charge was to mop up the whole of the assets of the company and thereby possibly to leave the company with no assets whatsoever, or no ostensible assets, out of which it could pay its preferential debts due to the Government for taxes, to unpaid employees, etc. Accordingly, there was superimposed by statute upon the duties of the receiver and manager the duty to apply his first realisations towards paying the debts which would (if the company was in liquidation) have

been preferential, and thereby to ensure that a form of secured status was created for preferential debts which would not, by virtue of any other legislation, have enjoyed any security. As regards the deed of arrangement, the trustee under the deed for the purposes of his administration possesses no power of examination, either public or private, of the arranging debtor so as to ascertain what the arranging debtor has done with his assets or to investigate the nature of his transactions which may be unknown or obscure to the trustee. Furthermore, the distribution of the assets of the arranging debtor by the trustee is normally expressed to be "in accordance with the laws of bankruptcy", which is not at all a satisfactory description of a mode of administration which is essentially based on the position of trust. Accordingly, it seems to us that that form of insolvent administration which in reality deeds of arrangement do present should be controlled and harmonised with other forms, without necessarily losing the benefit of the "private arrangement" which is regarded as the virtue of the deed of arrangement today.

6.3. DIFFERENCES IN INITIATORY PROCEDURE

6.3.1. In the foregoing paragraphs we have attempted to give examples of anomalies and discrepancies between the substantive law which applies to the various forms of insolvent administration under the existing systems. We now wish to draw attention to what is the greatest anomaly of all, between the bankruptcy code on the one hand and the winding up code on the other, namely the mode of the initiation of proceedings and the procedure for determining whether or not the insolvent's affairs should be administered in the form of an insolvent administration.

6.3.2. As we have explained, in the case of bankruptcy, an individual creditor (or more than one if it be necessary so as to produce on the aggregate the minimum figure of £200) presents a petition to the court for the making of a receiving order against the debtor. This petition is not advertised (except in those exceptionally rare cases where it is the only possible form of substituted service of the petition on an absconding debtor) and is throughout handled right down to the making of the receiving order and its advertisement on an anonymous basis, wherein the debtor is referred to simply by number eg. "R a debtor (No. of 1970)". This petition comes on before a registrar in chambers, that is to say entirely in camera, and can be resisted by the debtor if he is so disposed, on the grounds that he is either not indebted or he is able to pay his debts, or that there is some other ground why a receiving order should not be made. It is not possible for any other creditor to insist on attending at the hearing of a petition, nor is it even considered proper that any other creditor should be allowed to attend. The hearing is therefore essentially on a "one-to-one" basis, but since the debtor will have committed an act of bankruptcy which is "available" to all his creditors, unless he succeeds in resisting the petition on some substantial grounds, the court is bound to have in mind that he is an insolvent person, and that he will therefore be deemed to have insufficient assets to discharge all his liabilities as and when they are known. On the other hand, his other creditors are not brought into the proceedings, either to support the petition or to oppose it on the ground that a receiving order would not be in their interests singly or collectively. It is of course possible for another creditor to present a "concurrent" petition, but only in the rarest cases is more than one petition heard at the same time.

When of course a receiving order is made the proceedings are "collectivised" and creditors will then get the benefit of the receiving order. The court may and frequently does "take a view" of the obvious insolvency of the debtor as a reason why a receiving order should be made, and will in general not permit the debtor to pay off the debt on which the petition is granted out of his own assets, although it will in general be unable to refuse to allow him to cause it to be paid off out of what is described as "third party money". If the debtor succeeds in paying off the petition out of third party money, or if he succeeds in disputing it on grounds peculiar to the petitioning creditor, although the debtor is in any event insolvent, yet the fact of his "general insolvency" is not material; the other creditors, whoever they may be and however large their debts may be, are not able to participate, and may indeed be injured by the petition being dismissed.

6.3.3. When however we consider the position in company winding up, in relation to which as we have already pointed out, the question whether the insolvent is an individual or a company is very largely an accidental matter, the procedure is wholly different. When the winding up petition is presented by an unpaid creditor it is advertised (now only after the expiry of seven days after it has been served). This period is intended to give the company an opportunity of disputing its validity before it is advertised; but when it is advertised the advertisement constitutes an invitation to all the creditors of the company to attend at the hearing of the petition in open court on a fixed date when they may either support or oppose the making of a winding up order. In many cases, of course no one appears other than the petitioning creditor and the company; in general unless the company can dispute the debt on some bona fide ground similar to those the debtor can raise in bankruptcy, it will have no defence. On the other hand, there are cases when the petition is opposed by creditors who do not consider making a winding up order to be in their interests; such creditors may include directors or officers of the company to whom the company is indebted for sums advanced unpaid remuneration etc, and whose debts may be "weighed" in different scales to those owing to wholly "outside" creditors.

6.3.4. The essential features of the system, which are so significantly differentiated from bankruptcy resemble a different insolvency world are that in the first place all the creditors are ostensibly consulted and are entitled to appear, if they choose, to throw their weight into one side or other of the scales, and secondly that the proceeding is heard in open court, and after advertisement, which of necessity must seriously affect the status and viability of the company petitioned against, and finally that the court is allowed, and in a significant number of cases has actually found itself obliged so to do, to consult the wishes of the majority of the creditors (whatever in this context "majority" means, depending on the sort of scales which are being employed to weigh the creditors on each side); so that we do not have here in the type of cases we have described and in the fundamental analysis of the system, anything approaching a "one to one basis", but essentially from the moment of the advertisement appearing, a "collectivised basis".

6.3.5. As to which basis should be adopted in any further code, we do not think it possible, and we have debated this at great length to avoid a decision in favour either wholly of the one to one basis or wholly of the collectived basis. It follows inevitably from the

adoption of the collectived basis that it requires the advertisement of the petition, and thereby the necessary impairment, if not indeed in some cases the destruction of the insolvent petitioned against. However, in the case of winding up if there is to be no advertisement then there can be nothing but a one-to-one basis. In our opinion, however, it would be possible to provide for a proceeding initiated on a "one-to-one basis" to be converted into a "collectivised basis" in the course of the hearing, if it appears to the court to be just so to do.

6.4.1. It will be seen in chapter 1 of part 2 of this report that we have sought to evolve a procedure for the initiation of all "voluntary" insolvency procedures, whether they be against individual partnerships or companies which shall be identical in all cases and which of necessity, according to the philosophy which we have sought to expound, will be on a one-to-one basis. We appreciate that this involves very great alterations, not only in the procedure of the courts but in the philosophies applicable to the two codes which we are seeking here to harmonise. Whether one-to-one or collectivisation is the correct approach must ultimately be a matter for political decision within the commercial field; but we emphasise that one cannot in our view adopt any halfway solution; there must either be an individual battle between the unpaid creditor and his debtor (whom we now call "the insolvent") or there must be a general battle between the insolvent and his creditors generally in which the court has to take a general view as to the merits and demerits of the insolvent and the interests of his creditors and of society at large as to what is to be done with him. This we feel is the crucial point of our enquiry and the crucial decision which society through the legislature must ultimately make.

Dictated 9.79
Re-edited 23.10.79

THE CORK REPORT

CHAPTER 6

THE HARMONISATION OF INSOLVENCY PROCEDURES

6.1.1. As will be seen from the foregoing chapters, the development of the laws of insolvency, insofar as they affect individuals, or partnerships of individuals, or companies or other corporations, has been a long process, going back in the case of bankruptcy for several hundred years. It has developed not only in a fragmentary and piecemeal manner, but its legislation has also displayed a kind of "pendulum phenomenon", where one can see procedures moving first one way, for example towards a creditor-oriented procedure with the public interest little or not at all represented, and then the other way towards a more publicly-directed procedure, in which the creditors have less control. In the same way, one can perceive changes in the severity of the procedure towards the individual being modified by a more benevolent approach. We have taken the liberty of observing already that this committee appears to have been the first entrusted with the task of considering all insolvency procedures in one overall perspective, and of devising means of harmonising them so far as possible, so as to achieve thereby a less complex and more just administration of the estates of the various persons who, to use our new terminology, are the "insolvents" of our society.

6.1.2. We have also already observed that it is our considered opinion that there should, so far as possible and practicable in judicial and commercial terms, be one general mode of dealing with the affairs of an insolvent, regardless of whether the insolvent be an individual, a partnership of individuals or a company. We have pointed out that in the circumstances of modern commercial life the ~~question~~ decision whether a person capable of becoming an insolvent is a human being or an artificial person such as a company or a corporation, may often be accidental, or determined by the wishes of its promoters or proprietors to achieve tax advantages, social advantages or to comply with the requirements of the particular trade or business in which he, they or it are engaged. For example, there are in the City of London now (particularly since the increase permitted by the Companies Act 1967 on the number of possible partners in a partnership) very large partnership firms indeed, engaged in the professions of solicitors and accountants. In the case of solicitors, they would not professionally be permitted to carry on business as a company, and the same we believe is substantially true of persons practising as chartered accountants. We are acquainted with firms engaged in one or other of those professions who have a turnover running into nine figures, and with a number of partners which may exceed 50.

6.1.3. In the theoretically possible event of such a firm becoming unable to meet its obligations, the partners would all be made bankrupt, and it would constitute a "partnership bankruptcy" of an immense size. In comparable professions such as that of insurance broking, this is now substantially divided into partnership firms who carry on the business of insurance brokers, and companies who also carry it on, but in the case of underwriters at Lloyds, they are not permitted to write policies except through syndicates which are for practical purposes partnerships, whereas Lloyds brokers may be and usually are companies. In the event therefore of failures in this field, under

the systems presently in force, some would be administered in bankruptcy and some would be administered in winding up. If we now go to the other end of the scale, a small shop carrying on the business of grocery or a small garage, with possibly an issued capital of no more than £2, the proprietors of which are in many cases husband and wife, and the directors and shareholders, when such an enterprise goes into a state of insolvency it will invariably be administered under the winding-up code. If however the grocer's shop or the garage had remained a private business, owned by either the husband or the wife alone or by the husband and wife jointly, then it would be administered in bankruptcy.

6.1.4. There has been a further development in the complexities of this field in the recent revival in the commercial world of the "unlimited company". It will be recalled that until the introduction of limited liability in the early part of the nineteenth century, all those entities which we now call companies were, unless incorporated by statute with particular conditions to the contrary, liable to the extent of their debts through the pockets of their constituent members. It was to avoid the unlimited liability thereby imposed on the "merchant adventurers", as they were often called, that "limited liability" was invented. The return of the unlimited company (for which the Companies Acts ~~will~~ make provision) was inspired by the wish to avoid certain of the complexities, and what were felt to be injustices, created by the present fiscal regimes.

6.1.5. Faced with this extraordinary amalgam of trading entities capable of incurring debts to the extent of becoming insolvent, and yet being liable to be administered in that insolvency in totally different ways, it appears to us to be essential, as indeed our terms of reference contemplate, that some unified system should be evolved which should be sufficiently integrated to be applicable to all conceivable types of insolvents, and yet sufficiently flexible to deal with incidents in relation to any particular insolvent or class of insolvents. We also think it necessary to take into account the possibility not merely of harmonising those systems of insolvent administration which are specifically described today as "bankruptcy" and "insolvent winding up", but also those other systems for the administration of the assets of insolvents such as deeds of arrangement, receivers, receiverships under debtures, and the administration order procedure for small cases.

6.1.6. As we have already pointed out, some of the difficulties in analysing and tidying up the present systems have been created by a process of "borrowing" concepts or procedures from the old-established bankruptcy code for use in the field of winding up, and to a certain extent in others of the fields we have just mentioned, without sufficient thought being given to the applicability of the borrowed procedure in the context of the differences in structure which the different systems at present display. The process of borrowing arose of course from the introduction of the limited liability company in the nineteenth century as a largely ad hoc invention of the mercantile world by virtue of the fact that on the one hand the company enjoyed a "limited liability" and yet on the other hand was capable of incurring debts in trading, so as to require to have its assets administered, in the event of there being a deficiency, in accordance with some recognisable existing pattern. Accordingly when comparable situations had to be dealt with in the field of the administration in insolvency

of limited liability companies, there was a tendency merely to adopt en bloc provisions which related to the field of bankruptcy.

6.2. INCONSISTENCIES IN THE SUBSTANTIVE LAW

6.2.1. Introduction. We propose to take a number of examples of inconsistencies or inapplicabilities between the two codes which should in our opinion be eliminated in a unified insolvency law.

6.2.2. Let us for example take the phenomenon described as a "fraudulent preference" (more particularly described in chapter below in the context of the existing law). This is a phenomenon as old as insolvency itself, where an insolvent, unable to pay all his debts as they fall due, chooses to pay one, or more than one, of his creditors to the prejudice of others, thereby preferring de facto the first and ensuring that they get paid all that they are owed, or at least more than the others. If, under the English law which has existed since the time of James I, this act of preferring de facto was done with the view, or the paramount view, or with the most probable of the possible views, of preferring that creditor or those creditors, and was done within a specified period (which is now six months, in both bankruptcy and winding up), it will be set aside. This analysis of the phenomenon involves under the present law (in which we are recommending a change) a process of the subjective analysis of the "mind" of the insolvent, so as to determine whether he or it had the necessary "intent" to effect such a preference. To such an allegation of an intent to prefer, the recipient of the preference can raise his or its standard defences of pressure, ordinary course of business, etc. But the question that has to be examined is this, whether an analysis of the "mind" of an individual, or of the minds of a partnership of individuals, can adequately be performed in the same manner in the case of a limited company. The question which arises is ~~this~~, whose is the "mind" which intended to enter into the transaction effecting a preference? Was it the mind of one or more of its directors or managers, and how is the mind of a limited company in fact clearly to be ascertained - a problem which has troubled the criminal courts in recent years? For in the case of the Companies Act 1948, sections 320 and 321 simply import into the control and the setting aside of "fraudulent preferences" in winding up the law which would be applicable in bankruptcy.

6.2.3. In the field of "mutual credit and set off", that is to say, the setting off of one debt against another, the first being the debt being owed by the insolvent to his creditor and the other being the debt owed by that creditor to the insolvent (described in chapter below), it is plain that some control needs to be exercised, in the period immediately before the advent of insolvency, so as to ensure that the doctrine of the compulsory setting-off of debt against debt (which has of course the effect of "preferring" the creditor who receives the benefit of the set off) so as to ensure fairness to creditors generally. The solution presently provided by the Bankruptcy Act (in section ~~43~~ 31 of the present Act) has been to disallow such a set off where the other party, that is the creditor, had at the time of the giving by him of "credit" to the debtor notice of an available act of bankruptcy committed by the debtor. "Acts of bankruptcy" are clearly defined in section 1 of the Bankruptcy Act 1914, and have a long pedigree of construction behind them. A number of them are only capable of being committed by an individual or individuals. When

however it was decided to apply to winding up the bankruptcy doctrine of set off as set out in section 31 of the Bankruptcy Act, this imported the question whether there was to be a disallowance of set-off and if so on what grounds. For the purpose of that section, it is necessary, in deciding whether a set off should be allowed or disallowed, to determine whether the creditor had notice of an act of bankruptcy. However, a limited company cannot commit an act of bankruptcy as such, or at least there are a number of acts of bankruptcy that no company could practically commit. In the event, in the only recently reported case on the subject, the Judge decided that by virtue of the fact that the company in winding up had summoned a meeting of its creditors for the purposes of considering its winding up on the ground that it was unable to meet its liabilities, it must be taken to have committed the act of "giving notice of suspension of its debts", which was to be comprehended within that act of bankruptcy comprised in section 1(1)(h) of the Bankruptcy Act. In our view, this kind of patching over between the two codes is an unsatisfactory structure for a unified insolvency system to continue to operate.

6.2.4. There has been, since the time of James I, a bankruptcy doctrine known as "reputed ownership" (which is described in chapter below). This doctrine provides that those goods, or those book debts, which are found in the possession of the debtor or recorded in his books, and are his ostensible property in his capacity as a trader, are to be treated as assets in the bankruptcy capable of being distributed among his creditors, even though they in reality belong to another person, for by virtue of that, ~~By virtue of that~~ other person having allowed the debtor to remain in possession of those goods or those book debts, he had created, or was capable of having created, a situation of "false credit" which should disentitle him to recover his goods or those book debts in the insolvency of the person to whom he had entrusted them, ahead of the other creditors. This doctrine, although greatly whittled away by decisions of the Judges over the last century, is still part of the law of bankruptcy, and it has a certain rough justice about it; on the other hand, of course also it has about it an atmosphere of the medieval shop in the City of London or elsewhere, standing open to the street, in which a person dealing with the merchant sitting there at the receipt of custom could see goods which were the merchant's ostensible property, or, knowing him to be a merchant and dealing with him on credit, would assume him to have persons indebted to him whose debts were part of his property available for his creditors. Whatever may be the rightness or wrongness of the retention, amendment or annulment of this doctrine, there is no reason whatsoever why, if it has any merits, it should not apply to companies in the same manner as it does to individuals and partnerships. The creation of "false credit" is as much a phenomenon of the operations of a company as it is of an individual trader. However, in the application to the winding up of insolvent companies of general principles of bankruptcy law, this doctrine of reputed ownership has never been applied; in fact, it is generally considered, for some reasons which are not very apparent, not to apply to limited companies at all.

6.2.5. However obsolete one may think the doctrine to be, its merits and the philosophy behind it may soon become very relevant again in the light of what has now become known as "Romalpa-type" trading. This type of trading, which is otherwise more academically known as "reservation of title", is discussed in chapter below;

but we mention it here because the essence of a "Romalpa-type" relationship between supplier and purchaser is that the purchaser, although ~~appearing to be~~ in possession of so many components of a motor car under construction, or so many planks of wood or even, in one of the most recent cases, of so many pieces of wood composed of sawdust bound together by glue, has not yet paid the supplier of the components, of the planks or of the glue. If the contract of sale provides that the property in the items "bought" does not pass to the "buyer" until they are paid for, then the purchaser may not be in reality the owner of those things, and those things in his possession, should he become insolvent, are not to be available for the satisfaction of his creditors until they are paid for. Those things accordingly are to be held in trust for the benefit of the unpaid supplier, either physically or in the shape of the book debts which have been or will be created by the sale of those things, or of other articles containing those things. The law here is still in a state of development, and there have been only a few cases so far decided thereon; but it is obvious that ~~when~~ considering a situation of the creation of "false credit", it would be necessary to take into account the doctrine of reputed ownership as it has existed in bankruptcy for many years. However, as we have pointed out, the bankruptcy doctrine is not regarded as applicable to winding up at all, and could only now be so applied, we assume, by legislation.

6.2.6. In the field of dealing with creditors, the bankruptcy code has long had a comprehensive and detailed system for regulating the rights of creditors, secured creditors, and the proof of their debts. When winding-up legislation had to deal with those subjects, it simply adopted, or appeared to adopt, the whole of the bankruptcy procedures by the enactment of what are now sections 316 and 317 of the 1948 Act. One might therefore think that the two systems would for all practical purposes be identical; that is, however, not the case, for there is one vital difference. In bankruptcy, if and when the creditors are all paid in full, and any assets remain in the estate of the bankrupt, the creditors are entitled to receive out of those surplus assets (and ~~before~~ ahead of the bankrupt or any successor or assignee entitled to receive any surplus) a sum by way of statutory interest at the current rate of four per cent from the date of the receiving order. However, in winding up, it has been held on several occasions that no statutory interest is payable to a creditor who, although paid in full, has been kept out of his money for what may have been a very long time; accordingly, after the creditors have been paid the whole of their debts in full, any surplus assets are not used for the distribution of statutory interest but are to be returned to the shareholders. Here again we see a curious discrepancy between the two codes, which is not merely unjust but ~~it~~ is, despite the observations of the learned Judges who have had to decide this matter, incapable of any intelligible explanation.

6.2.7. A similar disparity exists between the position, powers and responsibilities of the trustee in bankruptcy of the individual debtor or partnership in insolvency on the one hand, and those of the liquidator appointed by the court in a compulsory winding up, or by the members and creditors in a creditors voluntary winding up, on the other. These officers may be non-official, ie. accountants, or they may be officials in the shape of the Official Receiver, but in each form of insolvency administration they perform substantially the same functions and duties.

6.2.8. There exists however by statute a substantial difference in their real actual legal status. In the case of the trustee in bankruptcy, upon his appointment being perfected, he becomes "vested with", ie. becomes the entire legal owner of, all the assets of the bankrupt, past, present and future. However, by virtue of such "vesting" (which occurs after he has been appointed by the creditors and approved by the court or, in the case of the Official Receiver, by virtue of the order of adjudication), he also becomes personally liable for those liabilities which may attach to the legal ownership, being vested in him, of items of the bankrupt's property, such as an onerous lease of real or personal property, or an onerous contract; he also appears, under recent fiscal legislation, to be personally liable for certain taxes leviable on the realisation of the bankrupt's property in the bankruptcy, notwithstanding that (by virtue of it being mortgaged up to the hilt) the bankrupt's estate and the trustee himself receives no benefit from such realisation. In order to enable the trustee in bankruptcy to liberate himself from such onerous liabilities arising from property (although not from the taxes mentioned above), a cumbrous procedure was constructed in the 1883 Act known as "disclaimer". This is discussed below at chapter and is in its present form not free from obscurity and difficulty of construction and operation. But the effect of it is to liberate the trustee from personal liability as from the time of his appointment, and to leave the other party to the transaction relating to the property disclaimed to his remedy in damages for which he may prove a debt but on terms that he substantially gets the property back.

6.2.9. The liquidator of an insolvent company, on the other hand, is not by law personally "vested" with the property of the company, nor (except in rare cases) can he be made personally liable for any liabilities attaching to that property, nor for the taxes mentioned above. He can apply to the court for an order vesting in him as liquidator the whole or part of that property (in which case his position would resemble that of the trustee in bankruptcy) if he needs to obtain this title for a particular purpose; but we believe this power to be very rarely used. The property therefore remains throughout the property of the company itself, and the location of its title does not shift.

6.2.10. When however the Companies Acts had to deal with the situation of a company possessing onerous property to which liabilities attach, the legislature again "borrowed" from the bankruptcy code substantially the same disclaimer procedure; but its necessity was in this case not to protect the liquidator personally, for he was not personally liable: the only objective could be to protect the other creditors in the winding up, on no very easily discernible basis. Since disclaimer in winding up can only be effected by leave of the court (unlike the position in bankruptcy), it has not been unknown for the court to refuse the liquidator leave to disclaim, in the expectation that a surrender of the onerous property may result and thereby to solve the problem presented by the facts of the case. We see here again a curious discrepancy between the two codes.

6.2.11. Within the field of winding up itself, there are important differences between the "compulsory" procedure and the "voluntary" procedure. In the first case, the insolvency is initiated, in the great majority of cases, by an unpaid creditor or creditors applying for an order, contending that it is "just and equitable" that the company be wound up. This application is made by petition, and is fought out in many cases between the company and the petitioning

creditors or between the petitioning creditors, supporting creditors and opposing creditors. Creditors' voluntary winding up, however, is initiated by a resolution passed by the members of the company and followed immediately by a resolution passed by those of its creditors who have received notice of the meeting at which the resolution is proposed and who appear, either personally or by proxy, for the purpose of voting thereat. At those meetings, which are an extremely common feature of the administration of insolvent companies, a liquidator is elected, or joint liquidators are elected, and the administration of the insolvent company immediately swings into action. In the case of a winding up petition, however, there is the delay occasioned by the petition coming on for hearing, and by proceedings taking place thereon, and except where a provisional liquidator has been appointed pending the hearing of the petition (as already described in chapter above) the business of the company remains in a state of suspended or largely suspended animation for a period which may be crucial.

6.2.12. There are other curious anomalies between the two systems; in the first case simply by virtue of the choice of the creditor to proceed by way of petition, the Official Receiver is brought in as liquidator immediately by virtue of any winding up order that is made. He then performs the functions allotted to him not merely as liquidator but also in the field of the public investigation and control of, and if need be sanction against, the company and those who have conducted its affairs. In the case of voluntary winding up, Official Receivers play no part whatsoever, except in those rare cases in which a voluntary winding up is converted into a compulsory winding up which has the effect described above, or where the voluntary liquidator reports to the court that there are grounds for criminal proceedings against officers of the company, which may then come to the notice of the Official Receiver.

6.2.13. With regard to the position under deeds of arrangement, and the position under receiverships, or what are more common receiverships and managerships, the situation is a curious hybrid. Originally the receiver and manager was the "mortgagee's man" who was put in to realise the assets charged by the floating charge as part of the security of the mortgagee, and it was his duty to run the business and to wind it up or dispose of its assets to the best advantage of his "master", the mortgagee. However, ~~the~~ mortgagees soon found that it was an uncomfortable situation to be a "mortgagee in possession", so that it became the practice to insert in the instrument of mortgage which created the floating charge and conferred the power to appoint a receiver a declaration that any receiver so appointed should be "the agent of the company" whereby the mortgagee would not be (or would be thought not to be) responsible for any liabilities incurred by his receiver. This produced the absurd situation that the receiver was both the agent of the company and also in practice amenable to the directions of the mortgagee, ~~for~~ the recovery of whose money he had been appointed to achieve. As if this were not a sufficiently confused situation, the legislature (as has already been indicated in chapter) soon became aware that the effect of the floating charge was to ~~mop up~~ absorb the whole of the assets of the company and thereby possibly to leave the company with no assets whatsoever, or no ostensible assets, out of which it could pay its preferential debts due to the Government for taxes, to unpaid employees, etc. Accordingly, there was superimposed by statute upon the duties of the receiver and manager the duty to apply his first realisations towards paying the debts which would (if the company was in liquidation) have

been preferential, and thereby to ensure that a form of secured status was created for preferential debts which would not, by virtue of any other legislation, have enjoyed any security. As regards the deed of arrangement, the trustee under the deed for the purposes of his administration possesses no power of examination, either public or private, of the arranging debtor so as to ascertain what the arranging debtor has done with his assets, or to investigate the nature of his transactions which may be unknown or obscure to the trustee. Furthermore, the distribution of the assets of the arranging debtor by the trustee is normally expressed to be "in accordance with the laws of bankruptcy", which is not at all a satisfactory description of a mode of administration which is essentially based on the position of trust. Accordingly, it seems to us that that form of insolvent administration which in reality deeds of arrangement do present should be controlled and harmonised with other forms, without necessarily losing the benefit of the "private arrangement" which is regarded as the virtue of the deed of arrangement today.

6.3. DIFFERENCES IN INITIATORY PROCEDURE :

6.3.1. In the foregoing paragraphs we have attempted to give examples of anomalies and discrepancies between the substantive law which applies to the various forms of insolvent administration under the existing systems. We now wish to draw attention to what is the greatest anomaly of all, between the bankruptcy code on the one hand and the winding up code on the other, namely the mode of the initiation of proceedings and the procedure for determining whether or not the insolvent's affairs should be administered in the form of an insolvent administration.

6.3.2. As we have explained, in the case of bankruptcy, an individual creditor (or more than one if it be necessary, so as to produce on the aggregate the minimum figure of £200) presents a petition to the bankruptcy court for the making of a receiving order against the debtor. This petition is not advertised (except in those exceptionally rare cases where it is the only possible form of substituted service of the petition on an absconding debtor), and is throughout handled, right down to the making of the receiving order and its advertisement, on an anonymous basis, wherein the debtor is referred to simply by number, eg. "Re a debtor (No. of 1970)". This petition comes on before a registrar in chambers, that is to say entirely in camera, and can be resisted by the debtor if he is so disposed, on the grounds that he is either not indebted or he is able to pay his debts, or that there is some other ground why a receiving order should not be made. It is not possible for any other creditor to insist on attending at the hearing of a petition, nor is it even considered proper that any other creditor should be allowed to attend. The hearing is therefore essentially on a "one-to-one" basis; but since the debtor will have committed an act of bankruptcy which is "available" to all his creditors, unless he succeeds in resisting the petition on some substantial grounds, the court is bound to have in mind that he is an insolvent person, and that he will therefore be deemed to have insufficient assets to discharge all his liabilities as and when they are known. On the other hand, his other creditors are not brought into the proceedings, either to support the petition, or to oppose it on the ground that a receiving order would not be in their interests, singly or collectively. It is of course possible for another creditor to present a "concurrent" petition, but only in the rarest cases is more than one petition heard at the same time.

When of course a receiving order is made, the proceedings are "collectivised" and creditors will then get the benefit of the receiving order. The court may and frequently does "take a view" of the obvious insolvency of the debtor as a reason why a receiving order should be made, and will in general not permit the debtor to pay off the debt on which the petition is granted out of his own assets, although it will in general be unable to refuse to allow him to cause it to be paid off out of what is described as "third party money". If the debtor succeeds in paying off the petition out of third party money, or if he succeeds in disputing it on grounds peculiar to the petitioning creditor, although the debtor is in any event insolvent, yet the fact of his "general insolvency" is not material; the other creditors, whoever they may be and however large their debts may be, are not able to participate, and may indeed be injured by the petition being dismissed.

6.3.3. When however we consider the position in company winding up, in relation to which, as we have already pointed out, the question whether the insolvent is an individual or a company is very largely an accidental matter, the procedure is wholly different. When the winding up petition is presented by an unpaid creditor, it is advertised (now only after the expiry of seven days after it has been served). This ~~period~~ is intended to give the company an opportunity of disputing its validity before it is advertised; but when it is advertised, the advertisement constitutes an invitation to all the creditors of the company to attend at the hearing of the petition in open court on a fixed date when they may either support or oppose the making of a winding up order. In many cases, of course, no one appears other than the petitioning creditor and the company; in such cases, in general, unless the company can dispute the debt on some bona fide ground similar to those which the debtor can raise in bankruptcy, it will have no effective defence. On the other hand, there are cases when the petition is opposed by creditors who do not consider the making of a winding-up order to be in their interests; such creditors may include directors or officers of the company to whom the company is indebted for sums advanced, unpaid remuneration, etc, and whose debts may be "weighed" in different scales to those owing to wholly "outside" creditors.

6.3.4. The essential features of the system, which are so significantly differentiated from bankruptcy as to resemble a different insolvency world, are that in the first place all the creditors are ostensibly consulted and are entitled to appear, and if they choose, to throw their weight into one side or other of the scales, and secondly that the proceeding is heard in open court, and after advertisement, which of necessity must seriously affect the status and viability of the company petitioned against, and finally that the court is allowed, and in a significant number of cases has actually found itself obliged so to do, to consult the wishes of the majority of the creditors (whatever in this context "majority" means, depending on the sort of scales which are being employed to "weigh" the creditors on each side); so that we do not have here in the type of cases we have described and in the fundamental analysis of the system, anything approaching a "one to one basis", but essentially, from the moment of the advertisement appearing, a "collectivised basis".

6.3.5. As to which basis should be adopted in any further code, we do not think it possible, and we have debated this at great length to avoid a decision in favour either wholly of the one to one basis or wholly of the collectived basis. It follows inevitably from the

adoption of the collectived basis that it requires the advertisement of the petition, and thereby the necessary impairment, if not indeed in some cases the destruction, of the insolvent petitioned against. However, in the case of winding up, if there is to be no advertisement, then there can be nothing but a one-to-one basis. In our opinion, however, it would be possible to provide for a proceeding initiated on a "one-to-one basis" to be converted into a "collectivised basis" in the course of the hearing, if it appears to the court to be just so to do.

6.4.1. It will be seen in chapter 1 of part 2 of this report that we have sought to evolve a procedure for the initiation of all "voluntary" insolvency procedures, whether they be against individual partnerships or companies, which shall be identical in all cases and which of necessity, according to the philosophy which we have sought to expound, will be on a one-to-one basis. We appreciate that this involves very great alterations, not only in the procedure of the courts but in the philosophies applicable to the two codes which we are seeking here to harmonise. Whether one-to-one or collectivisation is the correct approach must ultimately be a matter for political decision within the commercial field; but we emphasise that ~~one~~ cannot ~~in our view~~ adopt any halfway solution; there must either be an individual battle between the unpaid creditor and his debtor (whom we now call "the insolvent"), or there must be a general battle between the insolvent and his creditors generally, in which the court has to take a general view as to the merits and demerits of the insolvent and the interests of his creditors and of society at large as to what is to be done with him. This we feel is the crucial point of our enquiry and the crucial decision which society through the legislature must ultimately make.

Dictated 9.79
Re-edited 23.10.79