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T. H. Traynor.

THE COLLEGE OF JUSTICE IN SCOTLAND

MEMORANDUM OF COMMENTS UPON

THE E.E.C. PRELIMINARY DRAFT CONVENTION ON BANKRUPTCY

presented by

A COMMITTEE OF THE COLLEGE APPOINTED BY THE LORD PRESIDENT OF THE COURT OF SESSION

in response to

A CONSULTATIVE PAPER ISSUED BY THE DEPARTMENT OF TRADE ADVISORY COMMITTEE

MARCH 1975

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PREFACE

This Memorandum has been prepared by a Committee of the College of Justice in Scotland. The Committee was appointed by the Lord President early in 1975 for the particular purpose of considering the E.E.C. Preliminary Draft Convention on Bankruptcy, and responding to the Consultative Paper issued thereon by the Department of Trade Advisory Committee.

The College of Justice in Scotland comprises the Judges of the Court of Session (who are the Senators of the College), the members of the Faculty of Advocates, and the members of the Society of Writers to the Signet. The members of this Committee are the following:-

The Honourable Lord Keith (Chairman)
Liquidation Judge in the Court of Session.
J.W.G. Blackie, Esq., Advocate
J.J. Clyde, Esq., Q.C.
Ian B. Inglis, Esq., W.S.
G.W. Penrose, Esq., C.A. Advocate.

The Committee is very conscious that in the time available it has been unable to consider and discuss in as much depth as it would have liked the many problems which arise upon the Draft Convent Further, it has felt itself somewhat handicapped by lack of knowledge of the various systems of bankruptcy law operated in other Contracting States. It would be of great assistance in future consideration of the Draft Convention if a synopsis of each of these systems were to be made available. With a view to promoting knowledge of the Scottish system there is appended to this Memorandum (as Appendix I) an outline of Scots Bankruptcy Law. Appendix II sets out in tabular form the law relating to reduction of gratuitous alienations made by a bankrupt, and Appendix III the law relating to reduction of fraudulent preferences. These tables are reproduced from "Scottish Bankruptcy Manual" by John B. Wardhaugh, by permissio of the publishers, Messrs W. Green & Son Ltd., Edinburgh.

One problem which the Committee has not touched upon in depth i the Memorandum is the operation, in the context of the Draft Convent of the law relating to floating changes and receivership, which wa

ntroduced in Scotland comparatively recently. This matter is not aised in the Consultative Paper but will obviously require careful consideration in the future.

P R E A M B L E

The Preliminary Draft of a convention on Bankruptcy, winding-up arrangements, composition and similar proceedings upon which the comments of this Committee have been sought opens with a recital expressing the intention of the proposed convention The desire there stated is to implement the provisions of Article 220 of the Treaty establishing the European Economic Community by virtue of which the contracting parties undertook to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals. Article 220 states: "Member states shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of other nationals ..... the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals ....." Two points fall to be noted at this stage: 1. The ends to be secured by negotiation under Article 220 are to be secured by Member States "for the benefit of their nationals". and 2. The scope of the intended negotiation appears to be in the realm of private international law rather than in the domestic laws of bankruptcy of each member state.

The following two paragraphs of the recital carry this secon consideration a little further. The contracting parties conside that for the purpose of strengthening in the community the legal protection of persons therein established it is necessary "to determine the jurisdiction of their courts with regard to bankruptcy, winding-up, arrangements, compositions and similar proceedings and to facilitate the recognition and enforcement of judgments given in such matters".

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The Committee readily accepts that a clear agreement on the rules of private international law on the recognition and enforcement of judgments on bankruptcy matters is desirable within the Community and that agreement to that extent would be "for the benefit of" the nationals of that part of the United Kingdom which is subject to Scottish law. But it is a separate and distinct matter to seek to vary the domestic law of Scotland relating to bankruptcy. That law has evolved over a long period of time and works with reasonable success. Fundamental alteration of it should not be lightly undertaken. There may be room for improvement on certain aspects and this matter is currently under review by the Scottish Law Commission. The eventual achievement of having the same rules applying in every member state is one which this Committee recognises as a desirable aim but it is not one which can be realised overnight. Moreover the imposition of some unified rules into a domestic system can well lead to difficulties of reconciliation and create more problems than it solves. This Committee would not regard with enthusiasm attempts at piecemeal unification.

Yet it is just such an exercise that the convention is carrying out. The uniform law contained in Annex 1 which the contracting states are obliged under Article 76(1) to incorporate into their domestic systems is not a complete system of bankruptcy law. Moreover it is recognised as not universally acceptable because express reservations by member states are permitted in Article 76(5). This Committee is opposed to the attempt to add to domestic systems some special provisions distinct from their existing law and applicable only to such bankruptcies as are within the scope of the convention. It is considered that this course will only lead to confusion.

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The approach which this Committee take in principle to the proposed Convention is accordingly this: it welcomes the attempt to achieve a unanimity upon rules for reciprocal recognition and enforcement of judgments in accordance with Article 220, it recognises the desirability of achieving a unification of bankruptcy law throughout the Community but it is strongly of the view that this cannot be undertaken in a piecemeal manner nor in any short space of time, that any attempt to compromise between the extremes of a complete unification of the domestic law of all member states on the one hand and the agreement of all member states to give full recognition to the present domestic law of each state including its domestic rules of jurisdiction on the other hand will only add complexity and expense to the administration of bankruptcy proceedings.

TITLE I

SCOPE OF THE CONVENTION AND GENERAL PROVISIONS

Article 1 (1) and (2)

The problem of determining what proceedings under Scottish law should or should not fall within the convention illustrates the practical difficulties which can arise by attempting some unification without a complete unified domestic law. Judicial sequestration and winding-up by the Court would be within the scope, but extra judicial proceedings are evidently excluded. Thus notour bankruptcy could occur without sequestration and leave its effect on preferences and diligences without being touched by the Convention. But if a judicial sequestration was to follow the proceedings could under the Convention be taken in another country and with a different effect on preferences and diligences. It is possible that similar disruption could occur when judicial proceedings are started in a case where a receiver has been appointed and has been administering a company's assets or where a voluntary winding-up is turned into a winding-up by the Court.

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This Committee do not see that the Convention in its present form can be readily extended to cover extra-judicial bankruptcies or dissolutions and feel that its application to Scotland would require to be limited to judicial sequestration, winding-up by the Court and winding-up under supervision. But this will result in a considerable degree of practical difficulty in the co-existence of different provisions applicable to the different classes of case and of practical confusion where proceedings in the extra-judicial category are converted in judicial proceedings or involve recourse to the Court (e.g. under section 245 of the Companies Act 1948).

The particular case of a deceased debtor also requires consideration. Provided that there is agreement between the member countries that the jurisdiction in the matter of administration of a deceased's estate is the same as that applicable in bankruptcy we feel that the case of the deceased bankrupt should fall under the Convention. But if there is no such agreement then the case should not be included.

Article 1(3)

As regards the persons who may be subject to bankruptcy proceedings for the purpose of the Convention Scottish law does not admit the sequestration in bankruptcy of an unincorporated association and such bodies should not fall within the scope of the Convention. We feel that the Convention should state explicitly to which persons it is intended to apply. The problem here again illustrates the difficulty of a premature attempt at unification. Without a unified law of persons it is the less easy to conceive a unified all embracing law of bankruptcy. We suggest that it may be desirable to limit at least at the outset the categories of persons to which the Convention is to be applicable. And we refer in this connection to our comments on Article 3. Certain undertakings are excluded from the scope of the Convention in respect only of proceedings opened in particular contracting states but not of proceedings opened in other states (Title I Article 3 Protocol/

Protocol Article II). The acceptance of different rules for special cases in relation to separate states seems to us to give rise to an undesirable complication and we suggest that if certain kinds of organisation are to be excluded from the Convention this should be done on the terms that they should be completely excluded wherever proceedings are opened.

Article 2

The provisions of Article 2 of Title I whereby one bankruptcy proceeding excludes any others in other states is considered in relation to Jurisdiction.

TITLE II
JURISDICTION
SECTION I - GENERAL PROVISIONS

Article 3

This Article is of fundamental importance introducing as the test of exclusive jurisdiction in bankruptcy matters the situation of the "centre of administration" of the debtor. "Centre of administration" is defined as meaning "the place where the debtor usually administers his main interests". In the case of a private individual who is not engaged in trade or commerce, it seems highly improbable that he would usually administer his main interests elsewhere than at his only or principal place of residence which could be more appropriately regarded as the basis of jurisdiction. The case of an individual or company engaged in trade or commerce is, however, much more important for present purposes. If the "centre of administration" happens to coincide with the centre of business activity, no problem arises. But the point of the proposed new test is that, in the case where there is no such coincidence, the centre of administration is selected as the basis of exclusive jurisdiction in/

in bankruptcy in preference to the centre of business activity. It is thought that the disadvantages of this greatly outweigh the advantages. In the first place the "centre of administratio may be difficult of ascertainment by persons who do not have the intimate knowledge possessed by the debtor himself regarding the administration of his affairs. In the second place, the centre of business activity is likely to be the place where the bulk of his fixed assets and a substantial part of his moveable assets are situated, and indeed there may be no assets of significance situated at the centre of administration (though records are likely to be kept there). Further, the probability is that all or most of the creditors will be resident or carrying on business in the country where the centre of business activity is situated. They will have dealt with the debtor on the basis of what is apparent to them, having no reason to know or anticipate that his centre of administration may be located in some other country. They may have relied upon the law of the country where the centre of business activity is located as giving them valid rights of security or preferences. It is considered damaging and inequitable that such persons, in the event of bankruptcy, should suddenly discover that the nature and validity of their rights is to be subjected to laws of a different country, of which they are ignorant, and to the decision of a court of whose procedures they know nothing and in which they may not have confidence. In addition, a creditor can present an application for a bankruptcy order only on the basis of facts known to him. The facts establishing the proposed new test may be known only to the debtor and his advisers. It is thought/

thought undesirable that a creditor should be presented with a denial of jurisdiction based upon such facts, which he may have little means of verifying. If the denial of jurisdiction is established, the creditor may be found liable in expenses with consequent hardship. There is the further consideration that inquiry into the matter of jurisdiction may involve considerable passage of time, and delay in situations where in the interests of creditors a speedy appointment of a trustee or liquidator is highly expedient. The opportunity for deliberately dilatory tactics on the debtor's part would appear to be considerable.

This Committee considers it preferable that the test of jurisdiction should be based on facts which are public or readily ascertainable, rather than on facts which are essentially private and subjective. In the case of concerns which have a registered office, that office is presumed, by Article 3(2), to be the centre of administration until the contrary is proved. The situation of the registered office is an objective fact, but the door is left open to the debtor to make out, on the basis of circumstances which may be known only to himself, that he usually administers his main interests at a place in some other contracting state, in which event the undesirable consequences already mentioned may again follow. Assuming the presumption to have been rebutted, the situation will arise in which a liquidato is faced with the problem of winding up a concern incorporated under the laws of some country other than his own. The interaction and possible conflict between the law governing the bankruptcy and the law governing the incorporation of the debtor could lead to very serious difficulties.

Lord Kilbrandon's Committee on the European Judgments Convention, in paragraph 100, recommended that "for purposes of validity, nullity and dissolution, the forensic domicile of a corporation or other association should be regarded as being exclusively/

"(a) in the case of company incorporated under the Companies Acts, in the territory where it was incorporated, and
(b) in the case of any other corporation or association, at the place where it has its single principal place of business or other essential activity as the case may be (not more than one such place being possible for this purpose)".

It is thought desirable that the test of jurisdiction for purposes of the bankruptcy of a registered company or an association should be the same as that for the purposes of validity, nullity or dissolution. However, paragraphs 103 and 106 of the Report of Lord Kilbrandon's Committee indicate that "principal place of business" is intended to involve an element of central management and control. Thus the idea underlying "single principal place of business" seems basically the same as that involved in "centre of administration" in the Bankruptcy Convention, and to give rise to similar problems to those discussed above.

It may be that the best course, for the time being at least, would be to confine the application of Article 3 of the Convention to companies and associations which have a registered office, and to make the situation of such registered office the sole and final test of jurisdiction, instead of being merely the subject of a rebuttable presumption. This test has the advantage of certainty and objectivity.

Consideration should be given to the desirability for this purpose of providing by the Convention for the introduction in all Contracting States of legislation requiring all persons, firms or associations carrying on any trade, commerce or other essential activity in one or more to have a registered office in one of the Contracting States.

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If the present provisions of Article 3 are to stand a further possibility deserving consideration is that all concerns engaged in international dealings should be required to register their "centre of administration" and to state the situation of it on all letters, invoices or other communications.

In general, there seems much to be said for leaving private individuals not engaged in trade or commerce entirely outside the scope of Article 3 of the Convention, particularly as in some member states non-traders are not in any event liable to bankruptcy proceedings, and in Italy small traders are similarly exempt. The practical disadvantages of such an exclusion are unlikely to be significant and the theoretical desirability of having the widest scope for the concept of unity of bankruptcy is not considered to be of importance in this respect.

Article 4

It is considered preferable that the term "establishment" should be rejected and that the fact of residence of carrying on business in a Contracting State should be the ground of jurisdiction. This basis of jurisdiction is familiar in Scotland (and it is believed in England also) and has been operated successfully for many many years. If the use of the word "establishment" is intended to introduce a new and different conception, it is considered undesirable as likely to give rise to uncertainty as to its meaning. If it is not intended to introduce any new and different conception there seems no point in departing from familiar language.

Article 5

This Article is considered unobjectionable, though if the term "establishment" is retained it will be doubtful whether or not the Scottish Court retains jurisdiction to declare a debtor bankrupt in any case other than that where the debtor has within one year of the application to the Court had a dwelling house or place of business in Scotland.

Article 6

If the test of "centre of administration" is to be retained this Article is considered to be reasonable, except that it is suggested that a period of one year rather than six months should be adopted for the retention of jurisdiction in the Contracting State where the centre of administration was originally situated.

Article 7

Presumably it is intended that the Court of the Contracting State where the centre of administration was previously situated should retain exclusive jurisdiction in the situation envisaged. This should be clarified. The same comment as is made in relation to Article 6 applies to this Article.

Article 8

This Article seems reasonable (subject to the same comment regarding the period for retention of jurisdiction) where the establishment is transferred to another Contracting State. Where the transfer has been to a non-Contracting State it seems that Article 5 would apply. It may be of course that the effec of Articles 6 and 7 would be to limit the application of Article 5 in such a situation. That is considered undesirable. The intention of Article 8 in this respect should be clarified.

SECTION II - SPECIAL PROVISIONS

Article 9

The presence of this Article is presumably dictated by political considerations in the Contracting States where non-traders or small traders are not liable to be declared bankrupt. The practical consequences seem to require further consideration Presumably in the Contracting State in which the debtor cannot be declared bankrupt his creditors (from everywhere) will be in

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a position to have recourse to any of the debtor's assets situated there on a "first come, first served" basis. If that were to happen some provision would be required to sort out the nature and extent of such a creditor's claim in another Contracting State where the debtor had been declared bankrupt.

Article 10

The principle underlying this Article is considered acceptable. It is, however, possible to envisage cases where difficulties could arise under circumstances not apparently covered by Article 15 (relating to conflict of jurisdiction). For example, two firms each having its centre of administration in a different Contracting State might have a common partner having his own personal centre of administration in a third Contracting State. Each of the two firms would be liable to bankruptcy proceedings in a separate Contracting State. If Article 15(2) applies to this situation so that jurisdiction over the common partner exists only in the Contracting State where the proceedings against one of the firms were earlier instituted (which is not altogether clear), it is uncertain what would be the position, as regards claims on the assets of the common partner, of creditors of the other firm in the other bankruptcy proceedings.

Article 11

This Article deals with a situation which, as regards the law of obligations, has nothing to do with the matter of joint and several liability and it introduces a concept alien to the law of Scotland. It appears to be contemplated that the perso mentioned in Article 1 of Annex 1 may be declared bankrupt notwithstanding that they are perfectly solvent and fully capab of paying any sums due by them to the company etc. whose bankruptcy is to involve their own. Under the law of Scotland the company/

company etc. under various branches of the law of obligations, would have a valid claim against any person mentioned in Article 1(1) of Annex 1 who could be proved to have done any of the acts there described. The amount of the claim would be quantified according to recognised principles of law and when recovered would be available to creditors of the company etc. Of course if the individual concerned were unable to meet the claim in full owing to deficiency of assets, he would be liable to be rendered bankrupt. This is considered to be satisfactory state of affairs and one which enables the rights and liabilitie of persons concerned to be clearly ascertained according to law. The principle of Article 11, as read with Article 1 of Annex 1, is not considered to be satisfactory. In the first place it could have the effect of rendering bankrupt a person who is ready, willing and able to meet all claims made against him. In the second place, no provision is made as to principles of law under which the person in question is to be made liable. Article 1(3) of Annex 1 the Court is to determine for what part or amount of the assets of the company etc. the person in question is to be liable. So far as the text indicates, this might be determined on a purely arbitrary or discretionary basis.

It would at least surely be preferable that the Court should determine, not for what part or amount of the debts of the company etc. the person should be liable, but what sums he should be liable to pay to the liquidator for inclusion in the assets of the company available for its creditors.

The position of personal creditors of the person in question also requires consideration, in the event that he is in fact insolvent. It is not clear whether they are to have the advantage of any securities or preferences, or whether, in so far as they are unsecured creditors, their claims are to rank equally with those of the debtors of the company etc. on whether they can have recourse only to what is left after

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any judgment under Article 1(3) of Annex 1 has been satisfied.

For these reasons this Article is not considered acceptable in its present form.

Article 12

The general principle of this Article is considered acceptable, but it would be preferable if Article 2 of Annex 1 were confined to the case where a person has been ordered to compensate the company etc.

Article 13

Presumably Article 13(1) covers only exceptions to the generality of Articles 1 and 2 of Annex 1, since it is understood that the generality of the latter is required to be adopted in each Contracting State. The desirability of such exceptions is a political matter, but accepting that it exists, the provisions of Article 13(1) are unobjectionable.

Article 13(2) is considered acceptable.

Article 14

This is considered to be sound and useful provision.

SECTION III - CONFLICTS OF JURISDICTION

Article 15

Paragraph 1 of this Article necessarily involves that a court which proposes to declare that it has no jurisdiction or to stay proceedings should have carried out an investigation not only into the grounds upon which it is itself claimed to have jurisdiction, but also, in some cases into the possible grounds of jurisdiction in the court of another Contracting State. There may be dispute as to the State in which the "centre of administration" is situated, or as to whether what is said to be the "centre of administration" in another Contracting State is merely an establishment. The resolution of/

of such dispute might be a very difficult and complicated matter even where it is tried inter partes and it is considered that it might be quite impossible in cases where the debtor does not appear to challenge jurisdiction and the court has to consider whether or not to disclaim jurisdiction or stay proceedings ex proprio motu. The courts of Scotland are accustomed to the adversary procedure and do not have available means of conducting any elaborate investigations at their own hand. The practicable difficulties in the way of operating this provision successfully are considered to be extremely serious and it is very dubious whether it could be achieved.

Paragraph 2 does not present such problems since in cases of concurrent jurisdiction it should be capable of ready verification whether or not proceedings had already been opened before the court of another Contracting State.

Article 16

The same problems as described above in relation to Article 15(1) appear to exist in relation to the first paragraph of this Article.

As regards paragraph 2 this appears to leave open the possibility that the court of "the other Contracting State" may have to disclaim jurisdiction simply on the ground that the facts before it do not establish any basis of jurisdiction. It may be, however, that this would not in practice present a serious problem, since it may not be possible for a debtor to establish that the courts of a particular Contracting State do not have jurisdiction without at the same time necessarily establishing that a court which has disclaimed jurisdiction does in fact have it.

SECTION IV - ACTIONS ARISING FROM THE BANKRUPTCY

Article 17

(1) It is considered undesirable that this provision should extend to immoveable property. The resolution of problems concerned/

concerned with title to such property could present great difficulty to a foreign court. It is perhaps worth considering whether some provision might be made enabling the court of the bankruptcy to obtain the opinion of the court of the situs under an encactment similar to the Foreign Law Ascertainment Act 1861.

(2) As regards immoveable property, similar considerations as mentioned in relation to paragraph (1) apply to this paragraph.

(3) It is considered undesirable that acts done by a debtor which are not vulnerable under the bankruptcy law should be liable to be set aside by virtue of this paragraph.

(4) This paragraph is considered unobjectionable in principle.

(5) This paragraph also is considered unobjectionable in principle.

(6) It is considered undesirable that this paragraph should be accepted so long as there is no uniformity of domestic law regarding the conditions under which claims against the spouse o the bankrupt may be valid. It could be productive of much inequity and hardship if transactions, good under a particular system of domestic law were to be invalidated as a result of the application of a foreign bankruptcy law.

(7) The principle of this paragraph is considered to be acceptable although, as mentioned in paragraph 3.26 of the Consultation Paper, it might be better expressed.

(8) This paragraph concedes in the case of certain excepted debts, that the courts "normally having jurisdiction" should determine the amount of such debts and the extent of any preference. It is thought desirable that this concession should also be extended to the case of all rights of preference and security as to which by Articles 41 and 43 the lex situs of the relevant assets is to be applied.

(9) This paragraph is considered unobjectionable.

The omissions from this Article mentioned in paragraph 3.30 of the Consultative Paper are considered appropriate. This Committee does not consider that there are any other matters which should be included.

Article 18

It is proposed that the Court having jurisdiction in accordance with the Convention shall determine the requirements for the opening of a bankruptcy. This seems acceptable if there is no substantial difference between the domestic laws of the member states upon the grounds for sequestration and provided that different rules of law on procedure do not have the result that the rights of creditors are materially affected. But where there are differences the provision for an exclusive jurisdiction for the Courts of the member state where the debtor's centre of administration is situated can have inequitable results; for example where a company registered and operating in Scotland can be wound up by the Scottish Court on a ground recognised in Scotland, which if the company was registered in Germany but was operating in Scotland, liquidation might be avoided because the ground in question is not recognised in German bankruptcy law. Scottish law provides specific requirements for a sequestration petition (section 11 of the Bankruptcy (Scotland) Act 1913) and for a winding up petition (section 222 of the Companies Act 1948). We believe that there may well be substantial differences between these requirements and those to be found in the domestic law of other member states. If this is the case then we consider that the Convention could have inequitable effects in its operation but the cause of this is not in the rule that the Court of the bankruptcy should apply its own law but in the rule that the Court of the centre of administration of the debtor is to have exclusive jurisdiction.

Article 19

A similar criticism falls to be made in relation to the general rule set out in this article whereby the procedure and the effects of the bankruptcy are to be governed by the law of the state in which the bankruptcy has been opened. Again the core of the criticism lies in the provision on jurisdiction.

But in addition to that point this Committee find the failure to achieve a unification at the least unsatisfactory.

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In relation to the conditions qualifying for bankruptcy special recognition is made of cases of small traders (Article 9) and certain legal persons (Article 13) to meet the provisions of particular domestic systems. Again, the general rule on the law governing the effects of the bankruptcy is subject to an extensive list of particular provisions which may or may not accord with that law. It is the kind of partial supersession of domestic law which we feel will give rise to confusion and practical difficulty. These exceptions are contained in Title IV.

TITLE IV

GENERAL EFFECTS OF THE BANKRUPTCY

SECTION 1 - EFFECTS OF THE BANKRUPTCY INDEPENDENTLY OF ADVERTISEMENT

Article 20

The effect of this Article is to dispossess the Debtor of the administration and disposition of his property. This provision is more appropriate to the Bankruptcy of individuals rather than to the liquidation of companies. In Scotland the property of the bankrupt wherever situated is vested in the Trustee by virtue of his Act and Warrant (Section 97 of the Bankruptcy (Scotland) Act 1913) whereas the property of a company vests in the liquidator only if he applies to the Court for a Vesting Order (Section 244 of the Companies Act 1948). This Committee agrees with the Advisory Committee that this Article requires re-consideration.

Article 21

It is provided by Article 21 (1) that in Contracting States other than that in which the Bankruptcy has been commenced, the Bankruptcy Order shall preclude any Creditors commencing actions against the Bankrupt. This provision is however qualified by the remaining paragraphs of the Article. This Committee shares the view of the Advisory Committee that the underlying policy of the Article will be implemented more satisfactorily by allowing a Community Bankruptcy to invalidate such measures retrospectively.

Article 22

Article 22 provides that, independent of advertisement, the Bankruptcy will operate to stay enforcement measures already commenced against the Debtor in accordance with the Law of the Contracting State in which those measures were commenced, as if the Bankruptcy had been opened in that State. This provision seems to conflict with Article 26 which deals with the effects of the Bankruptcy as against Third Parties. The Advisory Committee quite properly say that it is not easy to see how, irrespective of whether a Community Bankruptcy has been brought to the notice of the Creditor by advertisement or other means, it can as a practical matter operate to stay measures of enforcement. The Advisory Committee's suggestion that provision should be made for cutting down measures of enforcement against the Bankrupt's property effected within a specified period before the date of the Bankruptcy should be pursued.

It appears that the Scottish Clearing Bankers are concerned that they will have difficulties in identifying their own customers in the Official Journal of the European Communities and that the effective date should be the Fifteenth day following advertisement. The Committee does not share this view. Each of the Scottish Banks has a computer and a programme could be arranged whereby all names of new Bankrupts extracted from the Journal could be fed in and the computer would do a search and issue a print-out within a relatively short period of time.

Article 23

Article 23 would appear to be limited to Creditors in States other than that in which the Bankruptcy has commenced. This Committee consider that the terms of this Article are not unreasonable.

Article 24

The Advisory Committee have reviewed the terms of this Article at Paragraphs 4.5 to 4.8 of the Consultative Paper. They consider that the intended scope of the Article will require elucidation.

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One construction which occurs to this Committee is that where the Bankrupt has neither his centre of administration, his domicile nor his residence in the State in which the Bankruptcy has been opened but has one of these in another Contracting State, any application to have the Bankruptcy Order set aside must be made within 31 days. So far as Scotland is concerned this Article is unnecessary and unduly restrictive. Sections 30 and 31 of the Bankruptcy (Scotland Act 1913 deal admirably with such applications. This Committee consider that the terms of this Article require re-consideration.

SECTION II.- ADVERTISEMENT

Under the existing Scottish scheme of bankruptcy law the statutory notice of the award of sequestration appears in the Edinburgh and London Gazettes. All other notices appear exclusively in the Edinburgh Gazette. Where a company is being wound up by the Court the appropriate notices usually appear in the Edinburgh Gazette and in at least one local newspaper circulating in the district where the registered office or principa place of business of the company is situated. In the case of the first meeting of creditors in a Creditors Voluntary Liquidation the notice of such meeting must, by virtue of Section 293 (2) of the Companies Act 1948 appear once in the Edinburgh Gazette and once at least in two local newspapers circulating in the district where the registered office or principal place of business of the company is situated. In relation to third parties the date of commencement of the sequestration is the date of the first deliverance; that of a winding up by the Court is the date of the presentation of the Petition to the Petition Department of the Court of Session (not the date of the first Interlocutor); that of a Creditors Voluntary Winding Up is the date of the meeting of Creditors at which the appropriate resolution to wind up is passed.

Article 25

Article 25 prescribes additional rules for advertising. The Advisory Committee's concern that advertisements in the Official Journal may not bring the fact of the bankruptcy to the notice of interested persons is well founded (Paragraph 4.12 of the Consultative Paper). It may be that Article 25 (2) should be amended to require the Liquidator to advertise the bankruptcy judgment in the Official Gazettes of those Contracting States where the bankrupt has either (a) assets situate or (b) been in contractual relationship with third parties. However, with a view to reducing costs, the first advertisement might well provide that all future advertisements relating to the bankruptcy should be published in the Official Journal alone. This suggestion is founded upon the example set by Schedule B of the Bankruptcy (Scotland) Act 1913.

If the principle of unity of bankruptcy is to be preserved then the question of logistics should be ignored. The Advisory Committee's concern in this respect may be minimised by the adoption of the foregoing suggestion that there should be "first advertisement" in the Official Journal and Official Gazettes and thereafter in the Official Journal alone.

Article 26

This Article deals with the effects of the bankruptcy as against third parties and is commented upon elsewhere in this Paper. (Articles 22 and 27).

Article 27

It is understood that because the legislations of the Contracting States differ considerably on questions such as noting the bankruptcy or noting a general prohibition (against disposing of property) in public registers where property rights are registered it was agreed that, rather than attempt to vary the legislations in this matter, it would be better if the law of the Contracting/

Contracting State where "registered" property is situate should apply to the noting of the bankruptcy upon the register and the consequences of any failure to make such notation.

This Committee is concerned that a Liquidator may be unaware of the existence of assets situate in another Contracting State and may not take steps to note the bankruptcy judgement in the Property Register in that State within the prescribed period. The result of the Liquidator's failure may well be prejudicial to the general body of Creditors. It is conceivable that a bona fide purchaser may acquire a good title after bankruptcy yet such a result would appear to conflict with Article 26 (1) which nullifies all acts done after the expiry of eight days following the advertisement in the Official Journal. It is therefore submitted by this Committee that Article 27 should be deleted. Whilst the National Law should continue for domestic bankruptcies, a Liquidator in a Bankruptcy commenced elsewhere should be entitled to found on the terms of Article 26.

SECTION III - POWERS AND FUNCTIONS OF AUTHORITIES ADMINISTERING THE BANKRUPTCY

Article 28

This Article prescribes the powers of a Liquidator. In particular Article 28 (3) permits the Liquidator to have himself assisted for acts to be accomplished abroad by one or more co-liquidators chosen from persons who practice as such in the country concerned or the Liquidator can delegate certain of his powers in so far as the law of the State in which the bankruptcy has been opened permits. There can be no doubt that this provision will be of considerable assistance to a Liquidator in fulfilling his duties abroad. It should enable him to over-come problems which would understandably arise from his limited knowledge of the legal systems of other Contracting State

Article 29

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The breadth of Article 29 causes the Advisory Committee some concern. In brief the Postal Authorities of Contracting States other than that in which the bankruptcy has been commenced can be required by the juge-commissaire or if none by the Court which has opened the bankruptcy to redirect the bankrupt's mail to the Liquidator. Such an order would be made by the juge-commissaire or by the Court only on the application of the Liquidator. A time limit may be imposed (Article 29 (2)). The Advisory Committee feel that any power of re-direction should be vested in the Courts of the State where the bankrupt is resident and that a time limit should be imposed. This Committee respectfully disagrees. It is admitted that the re-direction of mail might cause some delay in delivery to the bankrupt. Against this it can be argued that the Liquidator by applying to the Court making the bankruptcy judgment will avoid the costs of an application elsewhere and consequently the costs of the winding up should be reduced. There is no doubt that the Scottish procedure to which the Advisory Committee make reference at Paragraph 4.58 of the Consultative Paper has considerable merit. On the other hand it would be extremely costly to the Liquidator if he had to appear or be represented before a Judge of another State for each opening of the mail. This Committee agree that a time limit should be imposed.

Article 30

Under the existing Scottish scheme of bankruptcy law, to entitle a creditor to vote or draw a dividend, he is bound to produce an oath and the account and vouchers necessary to prove the debt referred to in such oath (Section 45 of the Bankruptcy (Scotland) Act 1913). In striking contrast Article 30 enables creditors living in other Contracting States to lodge their claims by writing informally to the authorities of the State in which the bankruptcy has been opened. The claim does not require to be in the language of the State of the bankruptcy; the "authorities"/

"authorities" in that State will bear the cost of translation. It is understood that the "authorities" in this country are likely to be the Trustee in Bankruptcy, the Liquidator or the Official Receiver. Accordingly the costs of translation will fall to be borne by the Bankrupt Estate. The claim requires to state the amount of the debt, whether or not the debt is preferential or secured and shall be accompanied by a copy of such supporting documents as exists; the authority may require production of document of title or a certified true copy thereof. Creditors residing in other Contracting States are entitled to dispute claims in a similar fashion. (Article 30(2)). This Committee considers that all claims should be submitted by Affidavit sworn before a Magistrate or Notary Public and not by ordinary letter. There is no reason why a standard form of claim should not be devised.

Article 31

Under this Article, the Liquidator is unable to continue the business without the authority of the competent authority in the State where the bankruptcy has been opened. The Convention does not appear to cover a Creditors' Voluntary Winding Up and amendments thereto will be necessary to include this form of bankruptcy.

Article 32.

The Liquidator is authorised to take protective measures and effect such disposals of the assets of the bankruptcy estate as are within the scope of his powers. Whilst the form of the realisation is determined by the law of the State of the Bankruptcy its execution is regulated by the law of the situation of the assets. Whilst Article 32(3) enables a Debtor, a Creditor or a Third Party to make an application to the local Court for an order sisting execution to enable that party to apply to the Court of the State where the Bankruptcy has been opened for a determination of any objection it should be borne in mind that he will be put to additional expenses in pursuing his complaint in another State. This Committee feel that this

provision/

provision should be reconsidered.

SECTION IV - EFFECTS OF THE BANKRUPTCY ON THE ESTATE OF THE DEBTOR

Article 33

This Article provides that a Community Bankruptcy is to take effect with respect to the whole of the debtor's assets situated in the Contracting States. The Advisory Committee at Paragraph 4. 18 of the Consultative Paper feel that it is not clear whether the reference merely to the debtor's assets in the Contracting States is intended to prejudice the present law of Member States in so far as, like those of the United Kingdom, they provide that bankruptcy vests in the trustee the bankrupt's property wherever situated. This Committee does not consider that this is the intention because Article 41 provides that for the purposes of the distribution of the proceeds of the realisation of the assets and the ranking of claims the proceeds of assets recovered in a non-contracting State shall be aggregated with those situated in the State where the bankruptcy has been opened.

Paragraph 2 of Article 33 excludes assets acquired by the debtor subsequent to the commencement of the bankruptcy where the law of the State in which the bankruptcy has been opened so provides. The Scottish provisions relating to acquirenda are fair in that they allow the bankrupt to retain bedding, clothing, tools of trade and earnings so far as required for his support etc. This Committee considers that a person resident in this country but made bankrupt in another should, in relation to acquirenda, be no worse off than if he had been made bankrupt here.

Article 34

At first sight Article 34(1)of the Convention would appear to be inapplicable in the Law of Scotland. This Committee cannot conceive of a situation whereby the Law of Scotlnad presumes that the property of the spouse has been acquired with the/

the funds of the bankrupt. The Advisory Committee however feel that the mixing of the wife's assets with those of the husband may fall within this category. This Committee respectfully disagrees with this view. It is understood that in some Contracting States the law provides that property acquired by a bankrupt's wife since the date of the marriage for valuable consideration is presumed to have been acquired by her with the bankrupt's money and consequently is included in the bankrupt's assets. A situation could arise where a Scotsman resident in this country has made gifts of money to his wife over many years and with which his wife has purchased shares. After a number of years the husband decides to set himself up in business operating from say Belgium. Although spending say two days per week in Belgium conducting the business he continues to reside in Scotland. Under the Convention he could be made bankrupt in Belgium and Belgian Law would apply. His wife's investments acquired with the money provided by way of gift would fall into the bankrupt's estate. This would not happen in Scotland. Only those gifts made at a time of insolvency would be reduced as gratuitous alienations. This Committee consider that representations should be made with a view to excluding gifts made at a time of solvency.

Similar consideration apply to Article 34(2) which seeks to make marriage contract settlements and conveyance subject to the law of the State of Bankruptcy.

SECTION V - EFFECTS OF THE BANKRUPTCY ON PAST ACTS AND ON CURRENT CONTRACTS

Article 35

In terms of Article 76 of the Convention a Member State is required to incorporate into its own legislation the Uniform Law as laid down in Annex I of the Convention.

Article 35 provides that the questions of voidability of the bankrupt's actions prior to bankruptcy and the admissibility of set-off in bankruptcy are to be governed by Articles 4 and 5 of Annex I.

Article 35(2) however provides that if the Liquidator seeks to/

to reduce any of the acts of the bankrupt covered by Article 4 of Annex I the law applicable to the proceedings shall be the law of the Contracting State where the bankruptcy has been commenced.

The object of the Uniform Law is to standardise the categories of antecedent transactions which may be attacked in the course of the bankruptcy and to standardise the periods which the effects of the bankruptcy may operate. In the case of gifts and other dispositions without consideration the period is one year.

Under the Uniform Law certain acts are void or voidable if done by the debtor during the period between the date of "cessation of payments" and the opening of the bankruptcy. Cessation does not necessarily mean the date when the debtor in fact suspended payments. It appears that in France, Belgium and Luxembourg, that date is fixed by the Court with reference not merely to the time when he did in fact suspend payment, but also to the time when the debtor ought to have suspended payment, or when he was otherwise conducting himself in a manner prejudicial to his creditors. In Germany the date is fixed not at the commencement of the bankruptcy but as the occasion arises in judicial proceedings so that it is theoretically possible for different dates to be selected. The attempt to introduce a "Uniform Law" accordingly fails. In any event it appears that certain Member States have reserved the right to prescribe periods of time which shall not on the one hand be shorter than six months nor on the other be longer than two years in the case of acts done without consideration or one year in the case of acts done for valuable consideration. If there is to be a Uniform Law then it should be uniform. Annex I of the Convention should be rejected in its entirety and completely renegotiated relating the question of voidability to insolvency instead of cessation of payments. The Scottish system/

system relating to the reduction of gratuitous alienations and fraudulent preferences is superior to that prescribed by Annex I. Summaries of the provisions relating to the reduction of gratuitous alienations and fraudulent preferences are contained in Annexes hereto.

Reverting to Article 35 of the Convention, the admissibility of set-off is to be governed by the Uniform Law. The Advisory Committee review Article 5 of the Uniform Law at Paragraphs 4, 46 to 4.49 of the Consultative Paper. The Advisory Committee are correct when they say at Paragraph 4.48 that Article 5 does not deal with certain special aspects of set-off. The provisions are however more in line with the Law of Scotland than the law of England. It would appear that the English Law relating to set-off will require to be amended.

Articles 36 - 37

This Committee has no comments to make on Article 36 (Contracts of Employment) or Article 37 (Contracts of leases and hiring).

Article 38

This Article deals with the effects of bankruptcy upon a contract of sale. It provides for the application of the law of the Contracting State in which the centre of administration of the bankrupt is situated if the contract was entered into with that centre of administration, but by the law of the Contracting State in which an establishment of the bankrupt is situated if the contract was entered into with that establishment The rule does not appear to deal with the possibility that a contract might have an express condition that its terms should be governed by and construed in accordance with the law of another State.

Article 39

Article 39 would appear to be mandatory in that it provides that the law of Member State shall recognise clauses containing

a/

a reservation of title and prescribes that reservation may be evidenced by simple writing made before delivery.

There is no doubt that the scope of Articles 38 and 39 will require to be ascertained during the negotiations. Moreover the position of a Trustee in bankruptcy should be ascertained. Article 6 of the Uniform Law would appear to preclude the Trustee from repudiating liability thereby making him personally liable. Whilst in Scotland he has a right of relief against the trust estate the claim may be one for damages, the amount of which may exceed the sum total of the bankrupt estate. It is accordingly essential that the extent of the Trustee's liability should be accurately defined.

SECTION VI - PREFERENTIAL AND SECURED CREDITORS

Articles 40 to 46

These Articles introduce provisions which are quite alien to the existing Scottish scheme of Bankruptcy Law. The basic principle introduced by these Articles is that of territoriality and as Messieurs Noel & Lemontey comment in their Report on the Convention "it certainly strikes a blow at the principle of unity of the Bankruptcy" (Page 136).

The existing Scottish scheme of Bankruptcy Law does not differentiate between Scottish and non-Scottish creditors. Having ingathered the assets whether situate in Scotland or elsewhere and realised same a Liquidator proceeds to adjudicate on the claims which have been lodged. Creditors resident abroad are entitled to be ranked.

This Committee has had the benefit of considering the excellent paper on these Articles prepared by the Insolvency Section of the Department of Trade. It is evident that a Scottish Liquidator will no longer be entitled to pool all assets no matter where situate at the date of the bankruptcy and apply the Scottish rules of ranking to the creditors' claims. In terms of Articles 40 to 46 he is required to establish sub-groups of assets on a territorial basis, that is to say that he/ .

he must ascertain the free estate of the bankrupt in each Member State including the state of the bankruptcy, after secured creditors are satisfied to the extent of their security and after the expenses of the winding up have been met. It is assumed that the expenses of winding up will be met on a pro rata basis. Article 41 provides that any assets situate outwith the Member States will be aggregated with those situate in the State of the bankruptcy. The Liquidator must then examine each creditor's claim and designate whether and to what extent it can be regarded as a preferential claim under the law of any one or more of the Member States. Paragraph 5.11 of the Consultative Paper unfortunately gives the impression that preferential creditors in a Member State has a "first charge" on the assets situate in that State at the date of the bankruptcy. This is not in fact the case. If the preference is recognised in a number of the Member States where assets are situate at the date of the bankruptcy the claim must be satisfied from each of the "sub-groups of assets" not in equal parts but on a proportional basis e.g. if the free assets in Scotland, France and Germany amount to £1,000, £2,000 and £3,000 respectively and a creditor has a claim for wages of £150 (which is recognised as preferential in all of these countries) the proportions of the claim admitted to the "list of preferential claims" in each of these countries is calculated as follows:-

A. Scotland $\frac{1000}{1000 + 2000 + 3000}$ x £150 = £25

B. France $\frac{2000}{1000 + 2000 + 3000}$ x £150 = £50

C. Germany $\frac{3000}{1000 + 2000 + 3000}$ x £150 = £75

It may be that the claim as apportioned in the foregoing manner will not be met in full out of the free assets in any one/

one or more of these countries. This result can emerge if (a) the total preferential claims exceed the sum total of the free assets or (b) other preferential claims have prior ranking rights in accordance with the law of that country and exhaust all or most of the free assets. In that event the Liquidator must ascertain whether any surplus assets remain in the other Member States which accord the same preferential entitlement. If there is a surplus the short-fall is met in proportion to these surpluses.

It is evident that a Liquidator will require to carry out complicated mathematical exercises. It is submitted by this Committee that such exercises may be mathematically impossible where a Creditor holds a Floating Charge over the property and undertaking of a bankrupt company. It may be that this difficulty can be overcome by amending Section 319 of the Companies Act 1948 and in particular sub-sections 5(c) and (6) thereof.

Although fiscal debts and social security debts would appear to be generally entitled to preferential ranking in all Member States Article 42 restricts the claim to a preferential ranking against the free assets situate in the Member State where the debt has been incurred. Public Authorities, Government Departments and other Public Agencies of a Contracting State shall in every other Contracting State be unsecured creditors to the extent that they have not obtained full satisfaction in their own State (Article 42). Article 42 conflicts with currently accepted rules of private international law in that it allows the Revenue Authorities of Member States to rank as unsecured creditors in United Kingdom bankruptcies and liquidations and the United Kingdom Revenue Authorities similarly to rank in bankruptcies and liquidations in other Member/

Member States. As the Advisory Committee state at Paragraph 5.12 of the Consultative Paper this is clearly an advantage to the Revenue Authorities but at the expense of the general body of creditors.

The rules prescribed by Articles 40 to 46 were formulated to pay homage to the status quo of the National Laws by deciding to submit all securities to the law of the situation or localisation of the property. To do this a certain amount of damage has been done to the principle of unity of bankruptcy. In principle it would be desirable to have a uniform code of preferential claims. There would be no need for the Liquidator to "sub-group assets" on a territorial basis and the complicated mathematical exercises would be eliminated. However it would have to be borne in mind that the claims of Revenue Authorities would be admitted to a preferential ranking against the general pool of "free assets". As there is a tendency to proliferation of preferential claims of the Revenue Authorities the set-up envisaged by Articles 40 to 46 is probably more acceptable. Whilst it is recognised that Article 42 conflicts with the currently accepted rules of private international law, to reject the claim of a Revenue Authority of another Member State, even to an unsecured ranking, would be contrary to the principle of unity of bankruptcy.

In this country the Crown no longer possess, after a bankruptcy or winding up has commenced, its former extensive rights of direct recovery from its debtors, by prerogative or other executive action. In this respect the situation in the United Kingdom differs from that in certain Member States. Articles 21(3) and 42(1) of the Convention seem to envisage that such direct rights of recovery will continue to be exercisible by these Member States notwithstanding the opening of the bankruptcy proceedings. These rights are referred to in/

in the Consultative Paper as "rights of self help". It would appear that these rights of self help are not consistent with the basic philosophy of the Convention. The question may be academic , particularly if the claim of the Revenue Authority has a prior ranking in relation to the other preferential claims in its own State.

It is the opinion of this Committee that the terms of Article 43 require to be renegotiated to recognise the rights of Floating Charge Creditors particularly in relation to property situated abroad.

Neither the Convention nor the Report legislate for or refer to the case of the subrogated creditors for wages advances. This preferential right only applies in this country in the winding up of Companies (Section 319(4) of the Companies Act 1948). The right of subrogation does not appear to be recognised in any of the other Member States and accordingly would not in the opinion of this Committee be admitted to a preferential ranking in these States. This Committee does not consider that a debt claimed by a subrogated creditor would be construed as a "debt arising out of a contract of employment" within the meaning of Article 17(8). Having borrowed the money and paid the wages the debt under the Contract of Employment has been extinguished. This Committee agrees that the subrogated claims of bankers and others who have advanced wages or holiday remuneration are extremely important. In the interests of commerce and industry it is respectfully suggested that the rights of a subrogated creditor should be recognised by all Member States.

SECTION VII - EFFECTS OF THE BANKRUPTCY ON THE PERSONAL CAPACITY OF THE DEBTOR

Article 47

This Committe has no comment to make on this Article which leaves it to the Law of each Contracting State to determine whether/

whether and to what extent the opening of the bankruptcy in the other Contracting States is to entail the disabilities, disqualifications and restrictions of rights which would result on bankruptcies opened in that State.

SECTION VIII - SPECIAL PROVISIONS APPLYING TO CERTAIN PROCEEDINGS OTHER THAN BANKRUPTCY

Article 48

Article 1(2) of the Convention provides that "insofar as is not otherwise provided, the provisions relating to bankruptcy shall apply by analogy to the arrangements, compositions and other proceedings listed in Article 1(b) of the Protocol".

Article 48 qualifies this provision by establishing that preferred or secured creditors in Contracting States other than that in which the bankruptcy has been commenced shall not be bound by any arrangement whereby the debtor is allowed an extension of time or where there is a compounding of debts. Preferred or secured creditors in the State where the bankruptcy has been commenced may or may not be bound depending on the law of that State.

Whilst one can appreciate the operation of the rule in relation to creditors secured by a charge over property it is far from clear how in practice a preferred creditor in a State other than that in which the bankruptcy has been commenced, will receive payment. It is assumed that notwithstanding say, an extension of time, the Liquidator will require to carry out the mathematical exercises imposed by Article 41(1) to (3) and apportion the preferential claims against the "notional sub-groups" of assets including those situate in the State where proceedings have been commenced. It appears to this Committee that this Article will require elucidation in the course of the negotiations

TITLE V
RECOGNITION AND ENFORCEMENT

Article 49

This Article is considered satisfactory so far as it goes. In Scotland, however, certain matters are adjudicated upon in the first instance by the trustee in bankruptcy or liquidator (in particular, the admission and ranking of claims) and the matter comes before the Court only if there is an appeal against his deliverance. It is for consideration whether such deliverances should be included in the definition of "judgment"

SECTION I - RECOGNITION

Article 50

(1) It is considered that specific provisions should be made for uniform methods of authenticating judgments other than thos appointing a liquidator or trustee and for their translation. The reference to "judgments concerning the freedom of the individual" is thought to be badly expressed. A reference to the liberty of the subject would be more appropriate.

(2) This paragraph is considered unexceptionable. We refer to our comments on Article 62 as to the desirability of introducing a system of registration of bankruptcy judgments.

Article 51

It is considered that specific provision should be made f the protection of persons who have mistakenly acted on the bas of the validity of a certain judgment. This might occur where a person has acted in ignorance that another judgment is in existence, or being unaware that it is the prevailing one.

Article 52

The necessity of this Article is recognised and its terms are considered to be satisfactory.

Article 53

This Article is considered satisfactory in principle but it is considered that its provisions should be extended to afford protection to persons against whom the liquidator may h enforced a judgment which is rendered ineffective.

SECTION II - ENFORCEMENT OF BANKRUPTCY JUDGMENTS

Article 54

This article is considered to be unexceptionable in the context of the general object of the Convention.

SECTION III - PROCEEDING TO CHALLENGE THE BANKRUPTCY

Articles 55 and 56

The exclusion of challenge on the ground that the court of origin lacked jurisdiction would not be objectionable if, as suggested in our comments upon Article 3, the primary basis of jurisdiction were made more precise and more capable of ready ascertainment. If, however, the concept of "Centre of administration" is to remain and is to cover such a wide field of persons as is proposed, the exclusion is considered undesirable.

If it is further considered that it should be a specifically admitted ground of challenge that the judgment was obtained by fraud. This ground appears in section 4 of the Foreign Judgments (Reciprocal Enforcement) Act 1933. It may be that this ground would be covered by that of "public policy", but this is not clear, and, in our view, the matter should be made specific. Public policy is treated as a ground of challenge distinct from fraud in section 4 of the 1933 Act.

Article 57

It is considered that in Scotland the appropriate Court for challenge should be specified as the Court of Session exclusively.

Article 58

(1) We see no objection to the Lord Advocate in Scotland being empowered to bring an action to challenge the bankruptcy. The Lord Advocate is in fact the chief "public prosecutor" in Scotland, although that is not his sole function. For general purposes we agree that "the appropriate government official" would be a more suitable form of wording.

(2) This provision is considered to be unexceptionable.

Article/

Article 59

The greater part of this Article is considered to be unexceptionable. As regards the last sentence of paragraph 4, however, we think it desirable that the same protection as is given to the liquidator acting under a bankruptcy judgment which is later successfully challenged should be extended to persons who have dealt with the liquidator on the faith of that judgment.

Article 60

This Article is considered to be acceptable.

SECTION IV - ENFORCEMENT OF JUDGMENTS IN BANKRUPTCY MATTERS

Article 61

This Committee agrees in principle with the proposal to provide a simple procedure for the enforcement of judgments in bankruptcy matters. The designated authority in Scotland for this purpose should be the Court of Session. It is obviously desirable to have a single Court in Scotland through which all such applications should be channelled and the Court of Session which alone has a jurisdiction throughout Scotland is the appropriate choice.

The reference to "instruments for the purposes of levying execution delivered to creditors" does not seem to this Committee to be wholly clear or happy translation of a process which does not seem to correspond with any part of Scottish bankruptcy law where the responsibility for collection of the debtor's assets lies with the trustee or the liquidator. It is suggested that a clearer description of the particular instruments here intended shall be given.

Article 62

The procedure for enforcement of bankruptcy judgments is more akin to that operated under the Foreign Judgments (reciprocal Enforcement) Act 1933 than that of the Judgments Extension Act 1868. Again it is in its general approach like that prescribed in the European Judgments Convention of

September 27th 1968, from which bankruptcies, composition and similar proceedings were expressly excepted (Article 1). The Committee do not see any particular advantage or necessity in the making of separate rules for the enforcement of bankruptcy judgments as against other judgments and on the contrary feel that it is desirable in the interests of clarity and simplicity that the same set of rules should govern the enforcement of all judgments.

The pattern of the Act of 1933 with its more elaborate procedure is doubtless preferable in the early days of the operation of the Convention to that of the Act of 1868. But both to assist in that procedure and to anticipate a more direct system it is suggested that each member state should have an official register available for all bankruptcy judgments from which official extracts of the judgments could be provided for the purpose of execution. Such an extract from the foreign register together with a translation should satisfy the requirements of Articles 62(1)(a). So far as requirement (b) is concerned (which echoes part of Article 47(of the European Convention on Jurisdiction and Enforcement) the document in question could also be issued by the authority in charge of such an official register and if such a procedure was adopted then there would be less room to question the authority of the document required under Article 62(1)(b). This is the more important since under Article 62(2) the enforcing Court is only to be concerned wit the formality of the documentation. It is to be observed that the procedure for the enforcement of European Community Judgments presently in operation in Scotland is one of registration in a special Register.

The Committee note that the order for enforcement must be granted provided the formal documentation is in order and it is left to the defender to appeal against the order if he is concerned to resist it. This in accordance with the general/

general approach taken in the Foreign Judgments (Reciprocal Enforcement) Act 1933 where provision is made for the party against whom a registered judgment may be enforced to apply for the registration to be set aside (section 4). The Committee agree that the like approach is proper in the context of European judgments in bankruptcy.

Under Article 62(4) service on the person against whom the judgment is to be enforced is to be made after the order for enforcement has been granted. It is appreciated that the risk of such a person taking steps to avoid compliance with the order has to be considered but the Committee is concerned that he should have adequate notice of his liability and time to investigate the matter and make such reply as may be open to him. This is particularly important if there is no complete uniform law of bankruptcy. However, under Article 67 the party holding the order is to be entitled to attach sufficient assets to satisfy the decree any risk on his part could be avoided and adequate time could then be given to the other party to consider his position. Moreover if that party has had notice of proceedings in the other state alleging his liability then there is the less prejudice to him. It will be important to confirm that the procedures in all the member states will require intimation of such proceedings to such a person before judgment. On the assumption that this is the case the Committee feel that there is no necessity for service before the granting of the enforcement order.

The Committee considers that the fact that the party against whom enforcement is sought has had notice of the proceedings against him should be made an essential item of proof for the obtaining of the enforcement order. This appears to have been recognised in the European Judgment Convention where in Article 46 relating to judgments by default proof of service of the Summons on the defaulting party is required and in Article 47 proof that service of the judgment has been made. The Committee feels that like provisions are appropriate in the context of bankruptcy judgments. Indeed as suggested earlier it would be desirable to bring the whole procedure for enforcing bankruptcy judgments into closer alignment with the terms of the European Judgments Convention.

Finally, on a point of detail, the Committee sees no justification for the non-imposition of any tax, duty or fee for the grant of the order.

Article 63

The grounds for challenging enforcement are restricted to those listed in Article 56 (absence of timeous knowledge of the proceedings and inconsistency with public policy subject to the exceptions there set out). The Committee notes that the corresponding provisions in the European Judgments Convention (Articles 27, 28 and 34) are wider in their scope and suggest that here again there is no need to differ from the terms of that Convention. We also refer to our observation on Article 56 above.

Again the periods for commencing a challenge of the enforcement order are half as long as those provided in the Convention (Article 36). While the Committee accept/

accept the convenience of having the periods stated and so made of universal application to all member states we find no justification for this difference from the periods stated in the Convention and again suggest the application of the provisions of that Convention.

Article 64

We are of the view that the Court to be designated here for appeals in Scotland should be the Court of Session as the central Court in Scotland and the one to which the application for enforcement falls to be made.

Article 64(2) corresponds with the last part of Article 32 of the European Judgments Convention but refers to "habitual residence" instead of "domicile" which is the expression in Article 32. We do not consider that this difference is necessary and if domicile as it is understood in the Judgments Convention is to be the generally recognised criterion for personal jurisdiction then we feel that that expression should be used here.

Article 65

We have no comments on this Article.

Article 66

This Committee accepts the proposal to have one appeal only and in the Scottish context suggests that this should be to the Inner House of the Court of Session.

Article 67

We have no comments on this Article.

SECTION V - GENERAL PROVISIONS

Articles 68 and 69

We have no comments on these Articles.

TITLE VI
TRANSITIONAL PROVISIONS

Article 70

We have no comments on this Article.

TITLE VII

Articles 71, 72 and 73

We have no comments on these Articles.

TITLE VIII
FINAL PROVISIONS

Article 74

By this article the convention is made to apply to the European territories of the contracting states, to the French overseas departments and to the French overseas territories. In this connection we must draw attention to the special provision which holds with regard to the United Kingdom in that the bankruptcy law of Scotland is separate and distinct from that of England, Wales and Northern Ireland and the Courts in Scotland have a distinct and separate jurisdiction. Reference accordingly to the law of the state have in relation to the United Kingdom to be read as references to the appropriate country comprised in the United Kingdom. Recognition of this should be expressly incorporated in the Convention to avoid the possibility of, for example,the Scottish Court obtaining exclusive jurisdiction over the bankruptcy of an English partnership.

We are uneasy at the proposed application of the convention to territories outside Europe unless it can be demonstrated that the domestic bankruptcy law is as fully developed in law and in practice as in the countries of Europe. Because of that anxiety we feel that the scope of the convention should be limited at the outset to the member states. We also feel that expressprovision for the addition of the Isle of Man by declaration should be made.

Article 75/

Article 75

We have no comments on this Article.

Article 76

Each contracting state is required to incorporate provisions in conformity with the Uniform Law into its own legislation relating to the relevant forms of bankruptcy proceedings, except to the extent mentioned in or allowed by this Article. This committee anticipate that the most important exceptions are likely to be those permitted by Article 76(5) which provides that at the time of signing or ratifying the Convention Contracting States may make reservations in respect of the matters mentioned in Annex II, to the Convention. As Annex II is presently drafted it indicates, and could only indicate, the reservations proposed by the original six. Nevertheless the reservations are extensive. Substantial inroads would be made on the uniformity of the bankruptcy laws of the contracting States. Article I as a whole may be excluded by The Federal Republic of Germany so far as concerns bankruptcies opened in its own courts, for example. This Committee has already drawn attention to the view that piecemeal alterations in domestic bankruptcy laws will only add complexity and expense to the administration of bankruptcy proceedings (see our comments on the Preamble). It is thought that progress towards unification must be hindered by acceptance of the possibility of reservations in the convention, and that Article 76(5) should not be accepted. If the provisions of the Uniform Law cannot be made generally acceptable to the Contracting States the failure to achieve agreement must reflect on the validity of the overall approach of the Convention.

Articles 77, 78, 79, 80, 81 and 82

We/

We have no comments on these Articles.

ANNEX I

THE UNIFORM LAW

Article 1

(General considerations and Article 1.3)

This Article provides for the extension of the bankruptcy of firms, companies, or legal persons to the persons directing or managing them. It would incorporate novel propositions into the domestic bankruptcy law of Scotland. In certain circumstances managers of limited companies may, as Scots law now exists, be required to contribute to the assets of the company. In other circumstances they may be personally liable for the company's debts. In each case a manager could, in course of recovery of the sums for which he is liable, be sequestrated. However the sequestration would proceed on the manager's personal bankruptcy: it would not be an incident of the company's bankruptcy. This has an important bearing on the degree of protection extended to, and the general treatment of managers, and the relevant provisions of the Companies Act 1948 require more detailed review. Section 332 provides that any persons who were knowingly parties to the carrying on of the business of a bankruptcy company with intent to defraud the creditors of the company (or of any other person) or for any fraudulent purpose may be declared liable for the debts or liabilities of the company in whole or in part as the Court may direct. Section 333 gives power to the Court to require certain persons to repay or restore money or property to the company, or to contribute of sum to the assets of the company. The persons are: "any person who has taken part in the formation or promotion of the company, or any past or present director, manager or liquidator or any officer of the company" who has misapplied or retained or became liable

or/

or accountable for any money or property of the company, or has been guilty of any misfeasance or breach of trust in relation to the company. The proceedings necessary to establish the manager's liability under either of these provisions will in the case of a winding up by the Court, be taken in the course of the company's bankruptcy proceedings. In other cases new proceedings will be required. In any event a particular application will be made to the Court, will be served upon the manager in question, and, if he is held liable, that fact, and, in general, the amount of his liability will be fixed as a particular matter affecting him. If he cannot pay he may be sequestrated but that would involve different proceedings. These are no equivalent provisions affecting managers of firms or legal persons other than incorporated companies. However in view of Sections 332 and 333 of the Companies Act, 1948, this Committe make no observations on the introduction or extension of liabilities of managers and others. In principle if a manager of an incorporated company can be liable, there is no reason why the manager of a firm which might carry on the same trade should not be under similar liability. The Committee wishes to stress what it regards as the fundamental difference between the existing position under the Act of 1948, and this Article. That is that in Scotland at present any manager who is held liable by the Court will have had his personal responsibility individually examined, and the extent of his liability determincd (other than in the quite exceptional case ofaa person held liable for the whole debts of a company under Section 332), and any sequestration which follows will be a personal bankruptcy in which the company in liquidation will simply be one of his general creditors. Under this Article there is no separate personal sequestration of the manager.

This Committee would anticipate that if this Article were incorporated/

incorporated into Scots law in its present form, Rules of Court would be required and that such Rules might provide procedures which approximate to those now applicable to Section 332 and 333 procedures, involving, briefly, an application to the Court, notice to the alleged delinquent, answers, and a hearing. However, it is appreciated that such procedures while familiar to practitioners in Scotland might be novel to persons outside Scotland. The Committee are apprehensive that most Scots practitioners would suffer from an equivalent lack of familiarity with the basic procedural requirements of other systems. In its international application this Article only has significance for a manager resident in, for example, Scotland, employed by a company having its centre of administration in, say, France. Upon the bankruptcy of the company such a manager will wish to be advised what can happen to him, and how it can happen. In the view of this Committee the answer to the procedural question cannot be left entirely to the rules of the Courts of the State having jurisdiction. Two particular matters require to be provided for in any uniform law: a clear statement of the onus of proof and of any presumption against the manager and a clear and positive requirement of intimation or notice to any manager against whom the relevant Court is to be asked to pronounce an order. It is also felt that no manager should be liable to be declared bankrupt unless his liability has first been determined and he had had an opportunity to pay.

The question of onus is largely one of policy and no form of words is proposed. Otherwise, Article 1.3 might be drawn along the following lines to achieve these objects: "Before making a declaration of bankruptcy under this Article, the court shall.....for what amount of such debts that person shall be held liable, and shall afford any person alleged to have acted in any manner stipulated in this Article notice of/

of the allegations made against him, and the opportunity to answer such allegations, and the Court shall not proceed to make a declaration of bankruptcy under this Article until the person held liable shall have had the opportunity to make payment of the amount or amounts for which he has been held liable.

This Committee accordingly considers that the principle embodied in this Article is unsatisfactory in its present form, and that it should be a prerequisite of liability to bankruptcy under this Article that the claim should be quantified and that there should have been a failure to pay. The terms of the question posed in paragraph 7.7 of the Consultative Paper raise doubts on another issue, namely whether the claim should be regarded as a claim of the company, or only of its creditors. It is possible that the problem is again procedural. Article 1.3 provides that the Court may determine that the manager shall be liable for all or part of the debts of the principal debtor. It does not make clear to whom the manager is liable, but it is probable that he will be liable to the liquidator. It is thought that this should be the case, and there may be advantage in specifically so providing, as a matter of machinery. The more basic issue is whether the liability should so operate as to benefit members as distinct from creditors of the company. An extreme example might identify the problem: assume three shareholder-directors and a manager who holds no shares are held liable to contribute a sum in respect of creditors' claims. They do so and all of the creditors are paid. Any amount thereafter falling to the company would be applied for the benefit of the shareholder-directors to the exclusion of the manager. This would hardly be fair. The problem arises because Article 1.3 is drawn in terms of liability for the debts, or some of the debts of the company. It would be more satisfactory to define the liability under this Article in terms of a contribution towards the/

the company's net deficiency, or in some other way that avoided the possibility of providing indirectly a benefit to the members of the company. It may be that such an approach might meet the arguments mentioned in paragraph 7.8 of the Consultative Paper.

(Article 1.1)

In the view of this Committee Article 1.1 is unacceptably vague. It is not the object of the Uniform Law as presently drawn to specify with any precision the provisions which each contracting State is to introduce into its own law. Some degree of imprecision is inevitable unless the Uniform Law were drawn as a definitive provision requiring only translation. Even so the scope for variation in the present Article is excessive. The Article requires three tests to be satisfied: (a) the person must have, openly or secretly, directed or managed the bankrupt firm (b) he must have acted in one of the ways set out; and (c) his conduct must have led or contributed to the fact that the firm ceased to pay its debts. The difficulties relate to the second test. It is not difficult to envisage examples of conduct which could prima facie fall within the scope of each head thus:

Head (a): This might apply where a person has hived off a high risk element of his total business activities, incorporated a company to carry on that element, and withdrawn all profits while there were profits, leaving the company with no assets to meet losses when they accrue.

This example probably involves "surreptitious" conduct inevitably The individual would not usually inform the creditors of the high risk company of his overall activities.

Head (b): A trivial example of this head might be if a manager used a company car for private purposes in defiance of a Board decision, and outwith the scope of the firm's insurance, and had an accident which damaged the vehicle.

Head (c)/

Head (c): Any situation in which a loss making activity is carried on while the manager draws an income could fall within this head if "wrongful".

The problem, in each case, is to know the limits of the intended scope of the Article and, more particularly, to anticipate what limit will be given to each head in each of the Contracting States' legislation.

Head (a) might be intended to apply where a person has used the company as a front for some personal activity. This implies conduct which would in all probability be fraudulent. To that extent the provision is surely unnecessary. There can be no country which does not penalise fraud. In the example suggested it has been assumed that a much broader interpretation is appropriate. Immediately this causes difficulties. To some extent every manager, in part, manages the firm for his own benefit. Accordingly "surreptitiously", "for his own account" and "under cover" of the firm must each contribute materially to the scope of the provision. If they are given the full restrictive interpretations which they could bear, the provision could be as restrictive as suggested above and apply only to some sort of near criminal conduct involving false pretenses. This Committee do not know what interpretation other Contracting States may put on this provision. It is impossible to give the terminology content in the context of Scottish bankruptcy law. Head (b) is more easily understood. The word "wrongfully" is perhaps unnecessary: the act of dealing with the firm's property as if it were personal property would be unlikely to be other than wrongful. However the fact that the word is used, must have significance, and this casts doubt on the interpretation proposed, as one likely to have much acceptance among the other parties to the Convention. The same applies to head (c). The words "surreptitiously " and "wrongfully" used to qualify the provisions appear to point to a lack of common understanding of the legal system into which the Uniform Law/

Law is to be incorporated. Without very much greater definition it is, in the view of this Committee, impossible to be confident that acceptance of Article 1 would involve any step towards unification. Internally there would almost certainly be great doubt as to the meaning of the domestic rules framed on the basis of the Article.

(Article 1.2.)

The effect of this provision is to make the date of cessation of payments of the person covered the same as that of his employers. Criticism of "cessation of payments" as a concept has been made elsewhere in this Report. Whatever definition of cessation of payments is ultimately provided, or whatever substitute is provided therefor, it would probably be the case that the Uniform Law would seek to identify the event as does Article 1.2. The interests of the personal creditors of the manager, and those of the firm's creditors are in conflict and it appears that the acceptability of Article 1.2 depends primarily on the policy decision as to which interests should prevail. In the typical case the declaration of bankruptcy of the manager will follow some time after the opening of the bankruptcy of the firm. The date on which the firm ceased to make payments will, again, inevitably have been some time before its bankruptcy opened. The identification of the cessation of payments of the manager with that of the firm would be prejudicial to the interests of all who had dealings with the manager between the date of the firm's cessation of payments and the date on which the manager himself would otherwis be held to have ceased to make payments. Since in most cases the issue of the manager's liability to bankruptcy will not be determined until there have been judicial proceedings which will involve a considerable measure of discretion, the personal creditors of the manager will not have been in a position to take any steps to protect their interests, or to regulate their conduct towards the bankrupt as they would do in the case of/

of a trader becoming progressively insolvent. On the other hand, to postpone the date could prejudice creditors of the firm. Since the manager's bankruptcy is derived from the insolvency of the firm, however, the firm's creditors will be likely to be in a position to form their own judgment of the solvency of the firm. In the view of this Committee article 1.2. is more likely to do substantial injustice to the general and personal creditors of the manager, than would be done to the firm's creditors if the date of cessation of payments of the manager were independently determined (in whatever basis). It is considered accordingly that Article 1.2. should not be approved in its present form.

(General Conclusion)

Even if, as proposed earlier, the scope of the Convention as a whole is limited in the first instance to incorporated bodies it is the view of this Committee that Article 1 requires to be much more specific than in the present draft. However, in that limited application, the Article would not be so novel, compared to Sections 332 and 333 of the Companies Act 1948, that the difficulties would be insuperable. But the position would be different with individuals partnerships, trusts, unincorporated associations are as principal debtors. In the view of this Committee it would be impossible to incorporate provisions based on this Article, given the present scope of the Convention, into Scots law without a fairly radical review of other branches of the law than bankruptcy. This leads to a consideration of the question of reservations raised in paragraph 7.11 of the Consultative Paper. This Committee considers that as a matter of principle reservations are unacceptable. If, however, a Uniform Law subject to reservations is the most that can be achieved the questions posed in paragraph 7.11 must be answered. There is, in the view of the Committee, no objection to the reservation proposed by/

by the Federal Republic of Germany. The Uniform Law would only be relevant as between Germany and Scotland in a situation in which a German firm had a branch operated by a manager in Scotland. The Scots resident manager would require no protection. So far as Scots Law is concerned, if the Convention is to apply to persons other than incorporated companies a wide reservation is essential, and the reservation of the Federal Republic appears to this Committee to reflect the most that would be likely to be achieved.

Article 2.

This Article prompts the question whether Article 1 in its present form is necessary at all. If Article 1 were limited to providing grounds on which a manager could be found liable to compensate the firm, the two Articles could be made to operate to advantage, Beyond this this Committee has no comment to make on this Article itself.

Article 3.

The following comments are made with reference to the Consultative Paper:

At Paragraph 7.21 the Advisory Committee propose a suggested definition of "cessation of payments". The definition appears to contain the element of insolvency and this Committee would be in favour of it provided the words "Unless it be proved.....rather than permanent" are deleted. The concept only requires consideratic in the event of bankruptcy. If the debtor was insolvent at the time of the "act" that should be sufficient. If he has become bankrupt his temporary solvency was probably freakish or perhaps deliberately designed.

The Advisory Committee at Paragraph 7.30 invite comments on Article 4(B)(1)(a) of the Uniform Law. Whilst the rule has analogues in Scotland this Committee would prefer to see the Scottish/

Scottish system retained. The same comment applies to Articles 4(B)(1)(b) and (c).

In view of the fact that "cessation of payments" has different meanings in different countries Article 4(b)(2) of the Uniform Law is certainly unacceptable. The Scottish system is more equitable to creditors who have received securities within the "suspect periods". On the face of it Article 4(B)(2) appears to exclude NOVA DEBITA.

The comments of the Advisory Committee at paragraphs 7.33 to 7.37 relating to Articles 4(C) and 4(D) of the Uniform Law are appropriate. Article 4(D) in its present terms should certainly be rejected. The underlying principle is unreasonable and would certainly conflict with the existing Scottish system whereby securities executed by the bankrupt prior to the bankruptcy may in certain cases be registered post-bankruptcy and yet be effective. This Committee has no comment to make on this Article as such.

Article 4

(General Considerations)

The Consultative Paper, in paragraph 7.13 quotes from the Report that:

"The true importance of the Uniform Law lies not so much in the unification of the rules of substance in regard to relation-back (since it is largely the same acts which are struck at in different systems) as in the unification of the periods which start from very different points."

This Committee is not sufficiently versed in the detail of the bankruptcy laws of the Contracting States to be able to comment on the opinion expressed in the Report. However the emphasis on unification of periods appears less than sympathetic to the principles on which Scots law has developed. In Scots law finite periods of time are subordinate to states of absolute or practical insolvency and the timing of a payment, or a gift, is less important than the financial context in which it is made. The Committee are inclined to the view that the emphasis

of/

of Scots law is realistic. Insolvency can arise in quite unforseen circumstances, which reflect no fault on the bankrupt. On the other hand careful manipulation can often postpone practical insolvency. There is a danger that in the one case an innocent gift might be unjustly set aside: in the other a transaction which is less than justifiable may stand. The answer, if a finite period is to be provided, must be that in the interests of uniformity a simple definite period of time is and must be the preferred test. If this is so, then, in the view of this Committee it is not unreasonable to require that the provisions of the Uniform Law be uniform and certain.

(Opening of bankruptcy)

It is against such a background that the terms of this Article are to be considered. There is, in the opinion of this Committee unacceptable vagueness in the provisions of the Article. The suspect periods are related to "the opening of the bankruptcy". In terms of Article 18 of the Convention the opening of the bankruptcy will depend on the law of the state having jurisdiction over the bankrupt. No doubt such an approach can be justified on the basis that procedural rules are normally left to the law of the forum. But much of the law of bankruptcy is procedural in character and the formulation of apparently procedural rules can vary the substantive effect of provisions which have a true element in their make up. It is the view of this Committee that there should be uniformity among the Contracting States on the key points of procedure, and that the opening of the bankruptcy is one such point. There are difficulties in domestic law as matters stand Sequestration in the bankruptcy of an individual involves an award of the Court. If that were to be the test in Scotland it would be definite and clear. However it would follow other procedure which, though normally brief and uncontentious, can be protracted.

In/

In the winding up of companies incorporated under the Companies Acts there are several possible periods for the commencement of the liquidation. In the case of voluntary liquidations a resolution is the beginning of the winding up. Winding up by the Court commences on the presentation of the petition - provided that a winding up order is subsequently pronounced. The period of uncertainty can be considerable. The resolution of these differences in the domestic law would be a matter for the United Kingdom. What is important at this point is that they indicate part at least of the scope for differences of approach between States. If any state makes the bankruptcy order the commencement of the bankruptcy order, fixed periods for reference back would be of little significance if the bankruptcy proceedings could conceivably absorb the whole or a major part of the period. This Committee are of opinion that in the interests of effective and uniform operation of the law the opening of the bankruptcy requires to be defined in the Uniform Law or in Article 18 of the Convention.

("Cessation of payments")

Cessation of payments is not defined, but may be before the Convention is signed. It most certainly requires definition. Since the concept is novel so far as Scots law is concerned any United Kingdom or Scottish legistation giving effect to the Uniform Law would require to define the term. Continental Countries appear at present to differ widely in their interpretation of the concept (Consultative Paper para. 7.16). There does not exist, so far as this Committee is aware, a single common basis on which a United Kingdom definition could be framed. The common use of terminology, it is thought, would make no contribution to uniformity if there is scope for far reaching difference of opinion as to the meaning of the words used. In the view of this Committee, it would be idle to incorporate/

incorporate the words "cessation of payments" into any uniform provision without a uniform definition. This committee fully support the Advisory Committee's suggestion that a uniform d definition is required, and that no State should be permitted to make reservations. The proliferation of examples might not be helpful. However the importance to a creditor of being able to apply for his own purposes money received from a debtor is clearly important, and he must be able to ascertain from his own advisers whether he would be allowed to keep the money.

(Article 4.A)

Attention has been drawn to the scope for uncertainty in Article 4.A. Argument could be advanced that a test based on time would be illogical. But accepting the general position thus far, views are sought as to the general principles in Article 4.A.

(A.1°):-

Paragraph 7.29 of the Consultative paper draws attention to safeguards possibly required. The reference to the MWPA (Scotland) Act 1880 requires careful thought. It is highly unlikely that the European States would appreciate tha special treatment accorded to MWPA policies. But two more important points arise:

a. if the policy is a view policy - that is one effected within the period of relation back, it would probably be ineffective anyway (under 1880 Act).

b. if the policy is an old policy it might be covered by proviso.

This leads to the most difficult aspectof A.1°: the scope of the proviso. On would expect the provision to apply to normal expenditure gifts: but, no obvious upper limit is obvious in the terms of the provision.

There is considerable doubt whether the approach is acceptable at all. It is probably necessary only because there is no qualitative/

qualitative element in the principal provision. Given rules such as the Scots rules the scope for exceptions is limited. On the other hand given strict rules, wide exceptions are necessary. Of the exceptions suggested by the Committee the most important is that in favour of a purchaser for value and is clearly necessary.

(A. 2°)

The text requires revision (page 113 of the Consultative Paper). Subject to those revisals the provision is fairly harmless.

Article 4.B.

1°. The main objections to this provision are the general ones arising from the ideas of cessation of payments and opening of the bankruptcy. Otherwise no particular observations.

2°. There are greater objections to the second part of B. in respect that there is no saving for securities granted under prior subsisting obligations. This may be a problem peculiar to Scots law. It is difficult to do more than speculate. But it would be pertinent to ask whether a binding contract to provide a specific security such as could be enforced here, would not be per se a security under some of the jurisdictions involved. In any event the peculiarities of Scots law would require special provision for prior obligations to grant specific securities.

(Article 4.C.1)

The purpose of this provision is fairly clear. In the position of pressure created by cessation of payments, the debtor will be easy prey for any person minded to take an unfair advantage even without such encouragement the debtor himself will be tempted to dispose of his assets at less than their proper values. I cannot see the objections to this provision suggested by the Committee, since our Courts at least should/

should be well able to exercise the discretion required.

(Article 4.C.2.)

We have no comments on this part of the Article, which involves questions which appear to us appropriate for those with experience of banking.

(Article 4.D.)

This part of the Article is considered to be acceptable.

(Article 4.E.)

This part of the Article is considered to be acceptable.

(Article 4.F.)

In current Scots procedure the creditor has considerable initiative. If this provision were enacted he would have none. In this there is no basic wrong provided that the creditor can compel the liquidator to act in normal course.

Articles 5 and 6.

We have no comments on these Articles.

APPENDIX I

AN OUTLINE OF THE LAW OF BANKRUPTCY AND LIQUIDATION IN SCOTLAND

GENERAL

The law of Bankruptcy in Scotland provides broadly (1) for the preservation of the assets of an insolvent person for his creditors and (2) a mechanism for ingathering these assets and dividing them equitably amongst the creditors. In addition it provides for certain criminal sanctions where insolvent personsact improperly.

The first aspect is governed by a variety of common law and old statutory rules; the second is principally regulated by the provisions of the Bankruptcy (Scotland) Act 1913. Registered companies are dealt with under the provisions of the Companies Acts relating to winding-up. Many aspects of the law relating to the bankruptcy of persons other than registered companies are incorporated into the Companies Acts. Registered companies are thus only to a limited extent a special case.

The law is complicated by the fact that it defines a person's insolvency differently in different areas of the law. Thus with the rules for the preservation of the estate, some apply only to the situation where the debtor's liabilities exceed his assets. Generally, however, the law is concerned with debtors who have reached a state known as "notour bankruptcy". This is a state where the debtor is unable to pay his debts (although he may have sufficient assets), and certain diligence has been done against him, i.e. his property has been attached to enforce payment.

THE PRESERVATION OF THE DEBTOR'S ASSETS:

The law starts from the general proposition that once a debtor is insolvent in the sense that his liabilities excee his assets he must act as a trustee for his creditors. The practical/

practical effect of this is that the debtor may continue to trade but certain actions taken by him with regard to his assets are open to subsequent challenge by his creditors. There are two grounds of challenge, namely that there has been a gratuitous alienation, or that a preference has been created in favour of a particular creditor. Both of these grounds are based on common law rules which stand alongside rules of seventeenth century statutes designed to facilitate the challenge. As a result this area of the law is complex, involving a consideration of two separate sets of rules. These are broadly as follows:

(a) Gratuitous Alienations: At common law gratuitous alienations to any person may be challenged if it can be established (1) that the alienation was voluntary and gratuitous. This excludes e.g. alienation for value of alienations in implement of natural obligations. (2) that the debtor's liabilities exceed his assets at the time of challenge and the time of the alienation and (3) that the challenger has been prejudiced. The Bankruptcy Act 1621 makes challenge easier in that in provides that, if the debtor's liabilities exceed his assets at the date of challenge there is a presumption that this was so at the date of the alienation and that it was gratuitous. The Act is limited, however, to situations where the alienation was to a relation (broadly defined) or a person in a relation of confidence to the debtor, covering e.g. employers and partners.

(b) Illegal Preferences: The common law rules are again restricted to situations where the debtor's liabilities exceed his assets. The statutory rules, contained in the Bankruptcy Act 1696 are less limited than those concerning gratuitous alienations and form the basis of the law for practical purposes. The giving of a preference to one particul creditor is challengable. This covers e.g. the giving of any form of security for an unsecured debt or abandoning a defence

to/

to an action. It is established that three types of transaction are definitely not open to challenge on this ground, namely cash payment of accounts due, transactions in the course of ordinary business, and transaction for value. Here, however it is only the state of "Notour Bankruptcy" that must be proved. Any such preference within six months of that state occurring is open to challenge so long as the challenger's debt is prior to the transaction or the challenger is trustee in a subsequent sequestration.

Tables showing the detailed requirements for reduction of gratuitous and illegal preferences are included in Appendix II.

The law also preserves the bankrupt's estate by providing for the equalisation of diligences done against it by creditors. Diligence is a highly technical branch of the law. In general, however, creditors are prevented from racing each other to attach the assets of the debtor to satisfy their individual debts. All diligences within sixty days of "Notour Bankruptcy" and within four months after rank pari passu.

THE MECHANISM FOR INGATHERING THE DEBTOR'S ASSETS AND FOR DISTRIBUTING TO CREDITORS

Scots law permits the debtor and his creditors to make private agreements for the transfer of the debtor's assets to the creditors. There are two common methods, the Trust Deed and the extra-judicial composition contract. The former involves the debtor in transferring his estate to a trustee for his creditors, the trustee thereafter making up his title to the various assets and distributing them in accordance with the creditors' claims. The latter involves the debtor in making an agreement with the creditors that they will accept a certain proportion of their debt in satisfaction/

satisfaction of the whole. Both methods are not binding on creditors who do not accede. Despite this, these arrangements, particularly Trust Deeds, are often made. Questions of jurisdiction that arise in connection with such private arrangements are determined by the normal rules appropriate to contracts.

The law also provides a judicially controlled process known as sequestration. This has been authoritatively defined as "a process by which the whole property of a bankrupt is ingathered by a trustee for the purpose of division pari passu among the creditors". It is initiated by petition to the court.

The jurisdiction of the court is defined by statute in section 11 of the Bankruptcy (Scotland) Act 1913, unfortunately a section "of considerable obscurity". (Anton Private International Law, p. 432). It lays down a prior requirement and further specific residential and business activity requirements. The prior requirement is that the debtor must be subject to the jurisdiction of the Supreme Courts of Scotland. This may be constituted by possession of immovable property in Scotland, by forty days residence in Scotland or by Scottish domicile. The further requirements of residence or carrying on business are: (1) that the debtor must have within one year before the presentation of the petition resided or had a dwelling house or place of business in Scotland or (2) in the case of a "company" (i.e. partnerships and corporate bodies other than companies registered under the Companies Acts "if it have within such time carried on business in Scotland, and any partner have so resided or had a dwelling house or if the company have had a place of business in Scotland". If jurisdiction is established there are no classes of exempted debtors, although unincorporated associations/

associations cannot be sequestrated, and the appropriate procedure with companies registered under the Companies Acts is winding up under these Acts. The court assumes jurisdiction in respect of all the debtor's assets, including those situated abroad.

Although the requirements for jurisdiction are defined in relation to the Supreme Courts a very large number of bankruptcies are dealt with by the Sheriff Court. A particular Sheriff Court has jurisdiction if the general requirements for jurisdiction are met and the debtor has either resided or carried on business in the Sheriffdom (the area of the Sheriff's jurisdiction) within one year of the presentation of the petition.

The Court has a discretion to deduce to exercise its jurisdiction where equivalent proceedings are taking place in another jurisdiction. There is also specific statutory provision for recalling a sequestration where the majority of creditors in number and value reside in England and the debtor is effectively an English bankrupt. A petition may be presented in the case of a living debtor (1) by the debtor himself with the concurrence of a duly qualified creditor (i.e. one whose debt amounts to at least fifty pounds), so long as the debtor is subject to the jurisdiction of the court or (2) by a qualified creditor if the debtor is "notour bankrupt" and the court has jurisdiction as defined in section 11 of the Bankruptcy (Scotland) Act 1913. Unless the debtor concurs the petition must be within four months of "notour bankruptcy". In the case of a deceased debtor they must be subject to the jurisdiction of the court at death but "notour bankruptcy" is not necessary. In these cases there is a safeguard in that no awards of sequestration may be made till six months after death. The petition may be presented to the court/

Court of Session or to an appropriate Sheriff Court. Even in cases where the petition is presented in the Court of Session the case is remitted to the appropriate Sheriff who controls the subsequent procedure.

Following the petition the Court issues a deliverance which sequestrates the debtor's estate. The debtor is given opportunity to appear and object. Once an award is made, however, it can only be recalled by petition to the Court of Session. The effect of an award is to declare the estate to belong to the creditors. The title to it, however, does not pass until the appointment of a trustee which is made at the first meeting creditors. In the interim the court may appoint a Judicial Factor (a person who acts as an officer of the court) to preserve the estate.

A trustee, together with commissioners who advise and assist him, is elected by the creditors. Election is by a majority in value of the creditors, the value of a creditor's claim being arrived at after deduction of the value of any security held by him and also deduction of the value of certain other rights. The trustee is confirmed by the Sheriff and must find caution. His active title is then constituted by an "Act and Warrant" issued by the court. Its effect is to transfer to him as at the date of the sequestration the whole of the debtor's property including future and contingent interest. He takes the estate tantum et tale for behoof of the creditors. He may prosecute actions raised by the bankrupt and adopt obligations undertaken by him. In these cases he incurs a personal liability. He takes earnings of the bankrupt as they arise leaving him a reasonable allowance.

The bankrupt remains under certain obligations. He must produce a full statement of his affairs. He must attend a public examination to ascertain the extent of his estate. He is not, however, prevented from carrying on business or entering a new trade, although he cannot hold public office. He may be discharged and obtain his release from his obligations by application to the court. The earliest this may be done is after the/

the second statutory meeting of creditors, so long as the creditors all agree. At various times thereafter this may be done with the concurrence of a gradually diminishing number of creditors, and without the concurrence of any after two years. Before discharge is given the trustee must make a report on the bankrupts actings.

Once vested in the estate the trustee realises it. There is also provision for the creditors to accept a composition from the bankrupt at this stage. He makes up an inventory and valuation. He proceeds to convert the estate into money. Heritable estate may be sold by private bargain, with the concurrence of a majority of creditors in number and value, any heritable creditors and the accountant of court. Otherwise it is sold at public auction, the upset price being sufficient to cover any heritable creditors' principal debt. Moveables may be sold with the consent of the commissioners or may be sold at auction.

The realised estate, after deduction of the trustee's fee is divided amongst the creditors. Claims are made by way of affadavit supported with sufficient proof. Sequestration does not affect the rights of security holder who must put a value on their security and deduct it ranking only for the balance of their debts. Double ranking is prohibited. Accordingly if a principal debtor and his cautioner are both bankrupt, the creditor can rank on each estate but the cautioner's estate cannot rank on that of the debtor.

The law recognises that some classes of creditor hold higher rights that others. Creditors are accordingly ranked in classes, taking equally within their class, but taking nothing until the class or classes with higher claims have been satisfied. Classes are ranked in order as follows:

(1)/

(1) Preferred Creditors: These include the secured creditors who are entitled to their securities ap to the value of their debts and a variety of priviliged creditors who are defined in s. 118 of the Bankruptcy (Scotland) Act 1913. They are the local authority for one years local rates, the crown for one year's taxes and National Insurance contributions for the year preceeding sequestration, servants for unpaid wages, restricted to four months prior to sequestration and a maximim of £200 in each case, and also for certain sums due as compensation. It has been suggested that the principle behind the class of priviged creditors is that they have given credit involuntarily (Scottish Law Commission Memorandum on Bankruptcy).

(2) Ordinary Creditors: These include all the other direct creditors, and contingent creditors where the contingency is satisfied.

(3) Postponed Creditors. These are creditors with a limited claim, e.g. the bankrupt's wife where her funds are intermingled with those of the bankrupt.

The method of payment is by dividend. The trustee adjudicates on the creditors' claims and pays in accordance with his adjudication. Periods are laid down at which payments are made, the first being six months after the deliverance awarding sequestration. Acceleration of payment may be made with the consent of the Accountant of Court.

Sequestration is concluded with the discharge of the trustee. This is granted by the court on petition by the trustees who is first bound to call a final meeting of creditors and place before them his accounts. Discharge exonerates the trustee and is registered in a public register, the Register of Sequestrations.

LIQUIDATION.

The law regarding insolvent registered companies is in many ways the general law of bankruptcy. As however, it depends entirely on the provisions for winding-up in the Companies Acts it/

it requires some separate consideration.

Winding up is available to creditors in situations that fall short of the 'notour bankruptcy' required for sequestration. Generally speaking if a company cannot pay its debts, or will not pay its debts, the creditors are able either to petition the Court for winding up or can seek a creditors' voluntary liquidation.

As an alternative to winding up many insolvencies of registered companies may be dealt with by the appointment of a receiver where a floating charge has been granted over the Companies Assets. This is a relatively recent introduction into Scots Law.

(1) Winding-up By The Court

The court will wind up a Company that it unable to pay its debts. Specifically it will do so if a sum exceeding fifty pounds is due, a letter demanding payment has been served on the company and no payment has been made within three weeks. It will also do so if the time for payment under an extract decree, bond or protesthas expired without payment. The process is started by petition to the court. The petition may be by any creditor, the company itself or a contributory.

Jurisdiction to wind up companies is entirely statutory (Companies Act 1948 s.s. 220, 399 and 400). The court has jurisdiction to wind up any company registered in Scotland wherever it carries on business of has its assets. It may wind up any unregistered company having its principal place of business in Scotland and it may wind up an unregistered company a company incorporated outside the United Kingdom which having carried on business in Scotland has ceased to do so.

The court grants a winding up order which is deemed to commence at the time of presentation of the petition. It's effect is that any disposition of the company's property, transfer/

transfer of shares or alteration of status of members thereafter is void. Illegal preferences are treated as in bankruptcy and diligences are equalised.

The Court appoints a liquidator who has similar powers to a trustee in bankruptcy. The assets of the company do not, however, vest in him but remain vested in the company. The Court may appoint a committee of inspection to act with him. By section 318 of the Companies Act 1948 the rules in bankruptcy applicable to the creditors' rights to vote and the ranking of claims apply.

The liquidator acts under the control of the court, realises the assets, recovering any money due by contributories and pays the creditors' claims. The process is completed by the liquidator applying to the court for an order dissolving the company when its affairs are completely wound up.

(2) Creditors' Voluntary Winding-Up

This is a method of voluntary winding up of an insolvent company, initiated by the company but controlled by the creditors. The directors of the company call a meeting of creditors when a resolution to wind up is proposed. A full statement of the position of the company's affairs and an estimate of creditors' claims is made. A liquidator is appointed by the company and the creditors, and there may also be appointed a committee of inspection. The liquidator may then proceed without a court order to realise and distribute the assets of the company. It is open, however, to a creditor to apply to the court to have the process conducted under the court's supervision.

APPENDIX II

REDUCTION OF GRATUITOUS ALIENATIONS

	Under Common Law	Under Act of 1621 [5]
Subject	Every kind of document by which property is transferred and every transaction reducing the value of the estate, or even a simple delivery of goods or money.	
Nature of conveyance	Whether direct or indirect.	Whether direct or indirect.
To whom	To any person (proof of collusion or knowledge of debtor's insolvency is not necessary) (*M'Cowan* v. *Wright* (1852) 14 D. 901, 908).	Conjunct or confident persons *only*.[6]
Who can challenge	Any onerous creditors (posterior or prior) (*Edmond* v. *Grant* (1853) 15 D. 703; *Wink* v. *Speirs* (1867) 6 M. 77, *per* Lord Justice-Clerk).	Prior onerous creditors [7] to date of alienation only (*ibid.*) (or trustee in a sequestration whether he represent prior creditors or not) (*Galbraith* v. *B. L. Co.* (1893) 30 S.L.R. 139).
What challenger has to *aver* or *prove*	1. That transfer was *gratuitous*, or that consideration materially inadequate. 2. That the debtor was *insolvent at and subsequent* to date [8] of making it. 3. That the alienation was made to the *prejudice* of lawful creditors. 4. That he is an *onerous creditor*. NOTE.—The above must be proved, but in transactions of a latent description or where parties are conjunct or confident, the onus of proof may be shifted to the maker (Bell's *Com.*, ii, 184).	1. That receiver of deed is *conjunct* or *confident*. 2. That the deed is *without true, just and necessary cause*. 3. That the debtor was *insolvent at the date* [9] *of granting* the deed. 4. That the debtor is bankrupt or *insolvent at date of raising the action*. 5. That the challenger (except where he is a trustee in sequestration) is a *prior onerous creditor* or a trustee for prior onerous creditors. NOTE.—1, 4, and 5 must be proved; 2 and 3 are presumed. Onus lies on defender to disprove.
Onus of Proof: Non-onerosity [10]	Proof required (Bell's *Com.*, ii, 184).	Presumption of non-onerosity (Bell's *Com.*, ii, 179).
Onus of Proof: Insolvency [11]—1. At date of granting	Proof required (*M'Cowan* v. *Wright* (1852) 14 D. 901). The insolvency must have continued down to date of challenge.	Presumption of insolvency (Bell's *Com.*, ii, 180).
Onus of Proof: 2. At date of challenge	Proof required.	Proof required (Bell's *Com.*, ii, 180).
Onus of Proof: Fraudulent intent	Fraud presumed (Bell's *Com.*, ii, 184).	Fraud presumed (Bell's *Com.*, ii, 175).
Examples	(*a*) Voluntary discharge of a debt (*Laing* v. *Cheyne* (1832) 10 S. 200). (*b*) Granting of a bill or promissory note gratuitously (*Thomson* v. *Thomson* (1863) 5 M. 1160). (*c*) Giving up a good defence to an action (*Wilson* v. *Drummond* (1853) 16 D. 275). (*d*) Where property is conveyed direct by a seller to a conjunct person, the insolvent paying the price.	
Points of difference between the common law and the statute	(*a*) To any person except a creditor. (*b*) Prior or posterior creditor may challenge. (*c*) Challenger has to prove debtor insolvent at date of gift. (*d*) Challenger has to prove that no consideration given.	(*a*) To conjunct or confident persons only. (*b*) Only prior creditor (or trustee in sequestration) may challenge. (*c*) Insolvency at date of gift presumed. (*d*) Non-onerosity presumed under Act.

[5] The statute refers to deeds in writing, but this distinction has not always been observed in practice.

[6] *i.e.* wives, children, kinsmen, allies and other confident interposed persons (see Preamble to Act). The principle of the rule applies to every situation of intimate and confidential intercourse. It seems to comprehend partners in trade, servants, factors, confidential men of business, *per* Lord Dundas in *Bank of Scotland* v. *Gardiner & Ors.*, 1906, 14 S.L.T. at p. 147. But not the relationship of "insured" and "insurer" (*Todd* v. *Anglian Insurance Co.* (O.H.) 1933 S.L.T. 274).

[7] *Prior Creditors.*—TRUST DEED.—Trustee, provided (*a*) deed confers power; and (*b*) prior creditors accede to deed.
LIQUIDATORS OF PUBLIC COMPANIES, provided they represent prior creditors.
BANKRUPT.—Only recognised when (*a*) reinvested in estate or contracting to pay a composition; and (*b*) if notice has been given to preferred creditor that challenge intended; and also (*c*) bankrupt has stipulated for and received an assignation from other creditors of their right to challenge.
THIRD PARTIES, who may have obtained a prior disposition of subject alienated, whether their right fully completed or not.

[8] See note 14.

[9] See note 14.

[10] *Onerous consideration* means "a true, just, or necessary cause or a just price," . . . *e.g.* (*a*) value in money or money's worth (*Renton & Gray's Tr.* v. *Dickson* (1880) 7 R. 951); (*b*) prior legal obligation (*Horne* v. *Hay* (1847) 9 D. 651; *Taylor* v. *Jones* (1823) 15 R. 328); (*c*) obligation undertaken in counterpart, *e.g.* marriage contract (Bell, *Com.*, ii, 176; *Mackenzie* v. *Catton's Trs.* (1677) 5 R. 313; *M'Lay* v. *M'Queen* (1899) 1 F. 804); (*d*) natural obligation of provision and maintenance, *e.g.* husband's obligation to wife, parent's obligation to child. The last mentioned has been held sufficient to validate a provision granted by a husband *during solvency* if irrevocable, and to take effect after the death of the granter, but to extent of a reasonable provision only (*Craig* v. *Galloway* (1841) 4 Macq. 267). [See effect of Married Women's Property (Scotland) Act, 1920, section 5 *infra*, p. 76, as to donations within a year and a day of donor's sequestration.] If granted during *insolvency*, it is thought that such cannot compete with or exclude proper contract creditors (*Queensberry* v. *Monscastell* (1677) M. 961; Gordy, 4th ed., p. 30). As to special provisions *in re* policies of assurance, see p. 75. A post-nuptial provision for *children* granted *during solvency* is effectual if property actually transferred or a *jus crediti* constituted (*Morrice* v. *Sprot* (1846) 8 D. 918; *Geddes* v. *Wadsell* (1836) 14 S. 1004). If granted *during insolvency* it is ineffectual *Jameson* v. *Thorburn* (1888) 15 R. 891).

[11] Must be absolute insolvency; but it seems sufficient that alienation itself has been cause of this (Bell, *Com.*, ii, 228; *Mackenzie* v. *Fletcher* (1712) M. 924; *cf. per* Lord M'Laren in *M'Lay* v. *M'Queen* (1899) 1 F. at p. 811, *Abram Steamship Co. Ld.* (*in Liqn.*) and *Liqr.* v. *Abram* (O.H.) 1925 S.L.T. 243).

APPENDIX III

REDUCTION OF FRAUDULENT PREFERENCES

	Under Common Law	The Act of 1696
Subjects	Every transaction by which a preference can be conferred on a creditor, *except* [12]— (*a*) Cash payments of debts actually due (*M'Cowan* v. *Wright* (1853) 15 D. 503, *per* L. J.-C. Hope; *Coutts' Tr.* v. *Webster* (1886) 13 R. 111, *per* Lord Young; *Whatmough's Tr.* v. *British Linen Bank*, 1934 S.C. (H.L.) 52. A cheque handed to a bank for collection and application in payment of an overdraft was deemed a "cash payment"). (*b*) *Nova debita* [13] (*Miller's Tr.* v. *Shiehl* (1862) 24 D. 821). (*c*) Transactions in ordinary course of trade (*Thomas* v. *Thomson* (1866) 5 M. 198). (*d*) Implement of prior obligation to grant a specific security (*Taylor* v. *Farie* (1855) 17 D. 639).	
Nature of conveyance	Whether direct or indirect, but must be *voluntary* (*Stiven* v. *Scott*, *infra*).	
To whom	To any Creditor. Apparently collusion or knowledge of debtor's insolvency need not be proved (*M'Cowan* v. *Wright* (1852) 14 D. 901, 968; (1853) 15 D. 494).	Proof of collusion or knowledge of debtor's insolvency unnecessary.
Who can challenge	Any creditor (Goudy, Chap. IV, 5).	Prior creditors [7] to date of preference only, or trustee in sequestration whether representing prior creditors or not (*Galbraith* v. *B. L. Co.* (1898) 36 S.L.R. 139).
What challenger has to *aver* or *prove*	1. That the deed is *voluntary*, and in satisfaction or further security of a *prior debt*. 2. That the debtor was *insolvent at and subsequent to the date* [14] *of making it*. 3. That the debtor was conscious of his insolvency (*Galbraith* v. *Ironside*, 51 S.L.R. 144). 4. That the preference was given to the *prejudice* of his lawful creditors.	1. That the debtor is *notour bankrupt*. 2. That the deed is voluntary, and in satisfaction or further security of a *prior debt*. 3. That it has been granted [14] at or *after*, *or within six months* [15] before, notour bankruptcy. 4. That (except where by a trustee in a sequestration) the challenge is made by or on behalf of *prior creditors*.
Onus of Proof: Non-onerosity	Must prove transaction is voluntary and in satisfaction or further security of a prior debt.	
Onus of Proof: Insolvency—1. At date of granting	Proof required (debtor must have been conscious of insolvency). This may be inferred from circumstances (*M'Cowan* v. *Wright* (1853) 15 D. 498; *cf.* (1852) 14 D. 970, a case of gratuitous alienation), and insolvency must have continued down to date of challenge.	Presumption of insolvency.
Onus of Proof: 2. At date of challenge	Proof required.	Notour bankruptcy must have been constituted at or before, or within six months [15] of preference.
Onus of Proof: Fraudulent intent	Fraud presumed, transaction being (1) voluntary; (2) during insolvency; (3) while debtor conscious of latter.	Fraudulent intent not necessary, unless transaction comes under excepted cases stated at top of page.
Examples	Direct— (*a*) Security given to a creditor previously unsecured (*e.g. Miller* v. *Phillip & Son* (1883) 20 S.L.R. 862). (*b*) Endorsation of a bill or cheque to an unsecured creditor (*Carter* v. *Johnstone* (1886) 13 R. 698, but not endorsation of a bank-order which is deemed a cash payment (*ibid.*)). (See also *Whatmough's Tr. supra* as to cheque endorsed to a bank for collection.) Indirect— (*a*) Paying a claim prematurely, before the due date under the contract (*Rose* v. *Falconer* (1868) 6 M. 960). (*b*) Facilitating proceedings by the creditor to obtain decree or to execute diligence (*Matthew's Tr.* v. *Matthew* (1867) 5 M., *per* L.P. Inglis at p. 963; *Strang* v. *M'Intosh* (1821) 1 S. 1). (*c*) Abandoning a good defence to an action (*Wilson* v. *Drummond* (1853) 16 D. 275; *Laurie's Tr.* v. *Beveridge* (1867) 6 M. 85). (*d*) Selling goods to a creditor so that he may set off the price against an existing claim (Bell's *Com.*, ii, 199; *Marshall's Tr.* v. *Provan* (1794) M. 1144).	
Points of difference between the common law and the statute	(*a*) Any creditor, whether prior or posterior. (*b*) Challenger has to prove debtor insolvent at date of preference. (*c*) No restriction as to time. (*d*) Trust deed for creditors is not reducible at common law.	(*a*) Only a prior creditor or trustee in sequestration. (*b*) Insolvency at date of preference presumed. (*c*) At or after or within six months [15] prior to notour bankruptcy. (*d*) Trust deed for creditor is reducible under statute.

[12] These can only be reduced on proof of fraudulent contrivance between debtor and creditor (see *Angus' Tr.* v. *Angus* (1901) 39 S.L.R. 119).

[13] *Nova Debita.*—(1) If security completed at date of transaction it cannot be reduced whether granted before, at, or after date of notour bankruptcy; see notes on *MacArthur & Ors.* v. *Campbell's Tr.* 2nd Div., Nov. 6, 1953, in 1953, S.L.T. p. 81. (2) If security not then delivered or completed (*a*) it is void if its completion within the six months does not depend upon some voluntary act of the debtor, but upon some further action of the creditor (*Lindsay* v. *Adamson* (1880) 7 R. 1036, *per* L.-P. Inglis; *Caledonian Insurance Co.* v. *Beattie* (1898) 5 S.L.T. 349); (*b*) the implement by an insolvent of an obligation to grant a specified security, instantly and unconditionally enforceable at date of making the loan, is likewise valid (*Stiven* v. *Scott* (1871) 9 M. 923, *per* L.-P. Inglis at p. 933; also *Taylor* v. *Farie* (1855) 17 D. 639); (*c*) but an obligation to grant a specified security at some indeterminate time or on certain conditions cannot be implemented (*Id.*; *Moncrieff* v. *Hay* (1851) 14 D. 200; *Gourlay* v. *Mackie* (1887) 14 R. 463); *Clydesdale & North of Scotland Bank* v. *Crosbie's Trustee*, 1953 S.L.T. (S.C.R.) 62. (*d*) nor an obligation to grant an unspecified security (*void*: *Paterson's Tr.* v. *Paterson's Trs.* (1891) 19 R. 91). The general principle governing these transactions is that the transfer of the security must be part of the same transaction as that creating the debt (*Clydesdale & North of Scotland Bank* v. *Crosbie supra*).

[14] The date of a deed, under the Act, 1696, or the B.A., 1913, is the date of registration or of delivery or of intimation, or of such proceeding as is requisite rendering same effectual (B.A., s. 4).

[15] See Companies Act, 1947, section 115 (3) extending period.