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INSOLVENCY LAW REVIEW COMMITTEE

TWENTYNINTH MEETING

Meeting to be held in the Conference Room, 2-14 Bunhill Row on Tuesday, 24 April 1979, at 10.00 am.

A G E N D A

1 Minutes of the meeting on 12 March. 28

2 Matters arising.

3 Secretary's report.

4 Bankruptcy (ILRC 94 and 95).

5 * Receiverships (see brief for last meeting and ILRC 73).

6 Any other business.

7 Agenda for next meeting (16 May).

* Time permitting.

T H TRAYLOR
Secretary.

94

INSOLVENCY LAW REVIEW COMMITTEE

BANKRUPTCY (by the Secretary)

LIST OF CONTENTS

	Paras
Introduction	1 - 4
The Petition	5 - 7
Bankruptcy deposits	8 - 9
The Receiving Order	10 - 15
First Meeting of Creditors	16 - 17
The Trustee	18 - 19
Committee of Inspection	20 - 21
Public Examination	22 - 23
Adjudication of bankruptcy	24 - 25
Property which does not pass to trustee	26 - 39
Wife's property	40 - 42
Housing and bankruptcy	43 - 45
After-acquired property	46 - 49
Disabilities of bankrupt	50 - 51
Discharge of the bankrupt	52 - 60
Bankruptcy offences	61 - 63
Consultees views on disabilities and bankruptcy offences	Annex

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INSOLVENCY LAW REVIEW COMMITTEE

BANKRUPTCY (by the Secretary)

Introduction

1 The "Commencement of Bankruptcy" was covered by Muir Hunter in ILRC 33, to which ILRC 49 on "Acts of Bankruptcy" was complementary. Previously, Muir had prepared a paper on the "Assimilation of Bankruptcy and Company Winding Up Initiatory Procedures" (ILRC 20), in which he drew attention to anomalies between the two systems and their inadequacies as regards rehabilitation. When this paper was discussed (6th Mtg, 28/7/77) the difficulties of assimilation were highlighted and doubtless we shall give further consideration to this after the Penny and Weiss sub-committees have reported.

2 ILRC's 33 and 49 were taken at the 10th Mtg on 17/11/77 and a sub-committee was set up to consider how best to harmonise events leading up to bankruptcy and winding up petitions. Reports from the sub-committee (ILRC's 54 and 57) and counter proposals by Peter Millett (ILRC 71) were subsequently considered and it was left that the sub-committee and Peter should try to reach agreement (20th Mtg, 11/7/78).

3 In this paper it is intended to leave the foregoing matters to one side and deal in a general way with the subsequent parts of existing bankruptcy procedure. When considering these matters, members should bear in mind that we propose to reserve 'bankruptcy' for criminal bankruptcy and other cases where a detailed investigation is called for, such as where there are reasonable grounds for believing that assets have been concealed or that some fraud or serious misconduct has been committed.

4 Members will recognise that the subject is too broad to be dealt with entirely in one paper - or at one meeting of the Committee. I have, therefore, left out a number of matters such as partnerships and summary bankruptcy procedure for discussion later.

The Petition

5 All bankruptcy proceedings start with a petition to the Court which may be presented by a creditor or creditors jointly or by the debtor himself. If a creditor's petition, the Court will require proof that the debt or debts are not less than £200, that the debtor has committed an "act of bankruptcy" and that he is a person who is subject to the jurisdiction. At this stage the Court may make a receiving order against the debtor, but not adjudicate him bankrupt unless he consents.

6 A debtor presenting his own petition must state that he is unable to pay his debts. The Court may make a receiving order against the debtor and at the same time an order of adjudication declaring him bankrupt.

7 The Institute of Chartered Secretaries and Administrators (C83) say that the right of a debtor to file his own petition should apply only where there is no possibility of clearing debts out of future income because, for most creditors bankruptcy of the debtor is defeat in that they will get only partial repayment.

Bankruptcy deposits

8 Upon the presentation of the petition the petitioner must make a deposit to cover the fees and expenses to be incurred by the Official Receiver. The deposit is subsequently repaid to a petitioning creditor out of the proceeds of the estate in the order of priority laid down in the Rules, provided money is available in the estate.

9 Following the implementation of the Insolvency Act, 1976, deposits were increased for creditors' and debtors' petitions from £7.50 and £5 respectively to £90 and £50. This matter has been dealt with in greater detail in ILRC 95 to which is attached a paper by Alfred Goldman.

The Receiving Order

10 The principal object of the receiving order is the protection of the estate; under it, the Official Receiver becomes the receiver of the debtor's property, ie. the property is put in safe keeping pending the outcome of proceedings. However, the debtor is not divested of his property at this stage; he remains the occupier of his business and private premises and personally liable to pay rates and other bills for the supply of services to those premises. But the Official Receiver has complete control of the debtor's property and where practicable, he is required to obtain and keep possession of it.

11 An important consequence of the receiving order is that, generally speaking, it operates to stay proceedings by any creditor whose debt is provable in bankruptcy. However, this does not affect the power of any secured creditor to realise or otherwise deal with his security, or the ability of a landlord to levy distress for rent due.

12 The debtor is required to submit a statement of affairs to the Official Receiver and attend upon the OR to assist him in his enquiries into the debtor's financial affairs. During this period the debtor is in danger of incurring criminal liability if he infringes any one of various provisions which are designed to safeguard creditors' interests and to facilitate administration of the proceedings. These matters are dealt with later in this paper.

13 The Institute of Professional Civil Servants (C57) suggest that the hiatus between the making of a receiving order and adjudication is not in the best interests either of the debtor or creditors. There is some feeling that a bankruptcy petition ought to result in an order of adjudication unless the debtor attends the hearing and opposes, in which case a receiving order would enable the OR to establish the debtor's financial position.

14 The Weiss Sub-Committee are looking at the possibility of using the period following the hearing of a petition to enable the OR to advise the Court on whether the debtor's affairs should be administered in bankruptcy or whether there should simply be a liquidation of his assets for the benefit of his creditors. The necessary breathing space to carry out a preliminary examination and call a meeting of creditors would seemingly require some form of Protection Order.

15 The Committee may feel that consideration of the Receiving Order should be deferred until the Weiss Sub-Committee has reported.

First Meeting of Creditors

16 A general meeting of creditors, which the debtor must attend, should be held not later than 14 days from the receiving order, on 6 clear days' notice sent by post to all creditors and advertised in the Gazette and a local paper.

17 The creditors' meeting considers any proposal by the debtor for settling his debts either in full or by way of composition or scheme of arrangement. Acceptance of any such proposal is subject to approval by the Court. At present, in the absence of acceptable proposals the creditors may decide to ask the Court to adjudge the debtor bankrupt and to appoint a person of their choice as trustee of the estate. They may also agree a committee of creditors and they may leave nomination of the trustee to the committee. If the creditors fail to appoint a trustee within a specific period of time, one is appointed by the Department. In practice, I believe the OR usually becomes the trustee.

The Trustee

18 The trustee appointed by the creditors may or may not be a creditor. The Blagden Committee were of the opinion that a creditor ought not to be capable of being appointed the trustee and that s.19, BA 1914 should be amended so as to include the words "not being a creditor".

19 A trustee appointed by the Department should be "some fit person". Blagden supported the views of a number of their witnesses that all appointed trustees should possess such professional qualifications as may be prescribed.

Committee of Inspection

20 The CCAB (C117) recommend that postal votes should be permitted in the dealings of the committee of inspection with the estate. This, it is hoped, would enable creditors to remain more interested in acting on such a committee, ie. that they need not spend time attending meetings, unless the matter before them is important and a majority of them wish the matter to be discussed in committee.

21 The Accountants' Panel are considering committees of creditors/committees of inspection generally and intend to submit a paper to the Committee with their proposals. The Committee may feel, therefore, that this matter should be left until the Panel has reported.

Public Examination

22 This is a public hearing in the Bankruptcy Court at which the bankrupt, under oath, answers questions put to him by the OR on behalf of the Court. Its purpose is to satisfy the Court that the bankrupt's affairs have been fully investigated, and to provide evidence as to his conduct, which may be taken into consideration in deciding upon his discharge from bankruptcy. Any creditor who has submitted a claim, or his authorised representative, may ask such questions as the Court may allow. The trustee, if appointed, may take part or be represented. When the Court is satisfied that the bankrupt's affairs have been fully investigated, the public examination may be concluded, but the Court has power to adjourn it from time to time, or to adjourn it sine die if it is not satisfied. Adjourning a public examination sine die is of a penal nature, because until it has been concluded a bankrupt cannot apply for a discharge.

23 Under the Insolvency Act 1976 the Court may, upon application by the OR, make an order dispensing with the public examination.

Adjudication of bankruptcy

24 The ultimate fate for the debtor is for him or her to be adjudicated bankrupt. This may take place, by order of the Court, after a receiving order upon any of the following circumstances:-

(a) if the creditors so resolve; or

(b) if no resolution is passed at all by the creditors; or

(c) if no meeting is held by the creditors; or

(d) if a composition or scheme is not approved within 14 days of the examination of the debtor; or

(e) if the debtor fails to submit a statement of affairs; or

(f) if a composition or scheme is not properly fulfilled, or becomes impossible to operate, or was approved by the Court as a result of fraud; or

(g) on the application of the debtor; or

(h) if a quorum of creditors has not attended the first meeting of creditors, or the Court is satisfied that the debtor has absconded; or

(i) where a composition or scheme is not accepted by the creditors; or

(j) where the public examination of the debtor is adjourned sine die.

25 The order of adjudication operates to divest the debtor of his property and to vest it in the trustee. The trustee is then in a position to realise the assets and to distribute the proceeds among the creditors in accordance with the priorities laid down in the Bankruptcy Act. The remedies of creditors having provable claims against the debtor are extinguished, and their remaining right is to prove in the bankruptcy proceedings.

Property which does not pass to the trustee

26 A number of classes of property do not vest in the trustee, such as trust property and property obtained by mistake or fraud. Only those classes which have been the subject of criticism will be referred to in the following paragraphs and perhaps members will draw attention to any other protected property which requires amendment.

Tools of trade, etc

27 The bankrupt is permitted to keep the tools of his trade (if any), and the necessary wearing apparel and bedding of himself, his wife and children to a value not exceeding £250 in the whole. The word "tools" has apparently been interpreted as indicating that the concession is for the benefit of workmen rather than professional men. It has been suggested that the concession in relation to tools should be extended so as to render it applicable to the income-earning apparatus of professional and businessmen as well as those engaged in a trade.

28 The monetary limit was increased from £20 in 1976 and Ian Fletcher suggests that it may still require to be handled somewhat flexibly if unduly harsh results are to be avoided. Equally, however, there is a need to impose some limit in view of its potential use as a loophole for evasion of the full consequences of bankruptcy.

29 Blagden recommended that, while there should be a monetary limit in respect of the tools of the bankrupt's trade, business or profession, wearing apparel, bedding and furniture should have no monetary limit but be covered by the word "necessary".

30 In 1975 the "Justice" Committee on Bankruptcy proposed:-

(a) there should be a limit of £500 in relation to the necessary wearing apparel and bedding of the bankrupt, his wife (to include his de facto wife) and his children, and his furniture;

(b) a limit of £200 for tools of trade; and

(c) the bankruptcy court to have discretion to increase either of these limits in special circumstances.

31 The Institution of Professional Civil Servants (C57) feel that a greater range of basic household furniture and essential living items, eg, cookers, refrigerators, washing machines, etc, should not be part of the bankrupt's estate divisible amongst his creditors. A similar plea is made by M E Stedman, an undischarged bankrupt, who in C123 cites his personal experiences.

32 The Institute of Chartered Secretaries and Administrators (C83) makes similar proposals, saying that it is in the interests of the whole community that citizens should have all the necessary tools of trade (which may include a motor vehicle) and adequate furnishings. They think the value of such necessities may well exceed £250 and that more generous exclusions are required, the exclusions being made known to all credit giving agencies so that they can reassess their policies.

Trust property

33 Blagden received evidence that, where a solicitor becomes bankrupt, there has been doubt whether moneys in his clients' account were held in trust, in view of the fact that the account may often be made up of money difficult to identify and subject to a charge in favour of the solicitor for his costs incurred in its recovery. Blagden recommended that the Act should be amended so as to specifically exclude money standing to the credit of the clients' account of a bankrupt solicitor. They added that his right to costs would vest in the trustee as a debt due to the estate.

34 In written evidence to us, the CCAB (C117) say that it does not appear that any difficulty now exists, but if there is any doubt then the situation should be covered by amending legislation.

Personal earnings

35 A bankrupt's salary or income are not available to the trustee without a special Court order. Upon application by the trustee the Court may order the whole or part thereof to be paid to the trustee, but before making the order the Court will have regard to the needs of the bankrupt and his family.

36 Where the bankrupt is an officer in the Armed Forces or the Civil Service, no such order can be made unless the chief officer of the bankrupt's department consents in writing. Blagden suggested that this had been to ensure that the officer's efficiency would not be diminished by reason of the pressure of the order. That Committee saw no reason to perpetuate the requirement as a condition precedent to an order, though thought it right that the Court should consider the views of the bankrupt's superior officer. Blagden felt that all bankrupts should be put upon the same footing, it being left entirely in the discretion of the Court on the facts presented to it to decide whether or not the effect of any order to appropriate any of the bankrupt's income would be against the public interest.

37 Evidence submitted to the Blagden Committee indicated that the provisions in the Act were not sufficiently wide to cover all forms of income and that where an order was made it was easily evaded (eg. by the bankrupt changing his job). A further defect was that the provision did not cover the self-employed. Blagden put forward a draft provision to cover these points.

38 The IPCS (C57) recommended that the Court should be given greater power to attach the post bankruptcy earnings of bankrupts and they call for the repeal or substantial amendment of s.51.

Refunds of Tax

39 Blagden drew attention to one further item which they considered should be excluded from forming part of the bankrupt's estate: this was where, owing to the law relating to income tax, any refund of tax attributable to the income of the bankrupt's wife, is legally the property of the husband. This recommendation is supported in evidence to us by the CCAB (C117). We agree

Wife's property

Bogus allocation of incomes

40 We have received numerous complaints about property in the name of the bankrupt's wife, trading in her name, etc. There has been a suggestion, also, that the family unit should be the bankruptcy unit.

41 The Rating and Valuation Association (C99) submit that having regard to the present day enhanced financial and legal position of the wife she might reasonably be expected to share to some extent the financial responsibility of her debtor husband. They think that a trustee should have the power to recover assets transferred to her within 2 years of the petition.

42 Mr Felber (C135) (ex-bankrupt) feels that the criterion should be whether the bankrupt has enjoyed the benefits of assets belonging to his wife (such as a house) as if it were his own. If so, half the value of the asset should be for the benefit of his creditors. The wife's personal jewellery, however, unless otherwise attackable, should escape as it now does. He points out, also, that it is reasonable for a wife to wish to be financially protected for her own sake, and possibly that of her children, against the business failure or other actions of her husband which could leave her penniless and helpless.

Housing and bankruptcy

43 This seems an appropriate place to refer to the submission by C J Blamire of the Birmingham Settlement Money Advice Centre (C82). He says that the trustee's duty to realise on the property (including the house) of the bankrupt creates considerable social problems especially in small bankruptcies. Often there is either:-

(a) little or no equity - hence the sale makes little impact on the debt; or

(b) there is a balance after meeting the creditors' claims, but such balance is insufficient to use as a deposit on another house.

44 Mr Blamire suggests that in small bankruptcies the family dwelling should not be considered a realisable asset, but that the trustee should have the right to apply to the Court for a charging order on the property - such order to remain unenforceable except on death of the bankrupt.

45 Mr Farrar (C15) draws our attention to the "more humane" provisions of New Zealand law which makes the family home immune, not only from the attacks of most classes of creditors, but also from the demands of the Inland Revenue.

After-acquired property

46 Apart from personal earnings, referred to in paras 35-38 above, the general rule is that after-acquired property coming to the bankrupt subsequent upon his adjudication vests in his trustee. However, s.47 provides a qualification which enables the bankrupt under certain specified conditions to defeat the trustee's title. That section provides that transactions by the bankrupt with any person, in respect of property acquired after adjudication, are valid as against the trustee if:-

(a) completed before any intervention by the trustee, and

(b) made by the other party bona fide and for value.

47 This led to the view that after-acquired property did not vest in the trustee absolutely until he intervened and claimed the property. Therefore, it was not considered necessary

for the trustee to disclaim any such after-acquired property which might be onerous (eg. an unprofitable lease, or shares subject to a call). However, the decision of the Court of Appeal in Re Pascoe (1944) was that after-acquired property vested in the trustee immediately upon its acquisition by the bankrupt. The result of this decision seems to be that the trustee no longer has an option to take or leave after-acquired property, and that onerous property would vest in him without any intervention on his part and even against his wish.

48 Blagden felt that it was desirable to restore the position to what it was thought to be before the Pascoe decision and they submitted appropriate amendments to s.38.

49 I cannot recall any submissions having been made to us about after-acquired property but I understand some of our members may be in favour of amending the existing provisions.

Disabilities of bankrupt

50 The disabilities of the bankrupt consequent upon adjudication are as follows:-

(1) All property belonging to him, including property acquired by him prior to his discharge (ie. "after-acquired property") vests in his trustee for distribution among his creditors.

(2) He must not, either alone or jointly with any other person obtain credit of £50 or upwards from any person without informing that person that he is an undischarged bankrupt.

(3) He must not engage in any trade or business under a name other than that under which he was adjudicated bankrupt without disclosing to all persons with whom he enters into any business transaction the name under which he was adjudicated.

(4) He cannot act as a director of a company or directly or indirectly take part in the management of a company, except by leave of the Court by which he was adjudged bankrupt.

(5) He cannot act as a receiver or manager of the property of a company on behalf of debenture holders, except under an appointment made by order of the Court.
[NB. We have already decided that the exception to this rule should be deleted

(6) He cannot sit or vote in the House of Lords, or be elected to, sit or vote in the House of Commons, or be elected to or act as a JP, unless the bankruptcy is annulled or he obtains a

certificate of misfortune. These disqualifications are extended, subject to the same conditions, by other statutes to his election to or being a member of a local authority and to the holding of other public offices. In all these cases the disqualification continues until five years have elapsed from the date of his discharge.

51 Several of our consultees, in their written evidence, have dealt with the disabilities of a bankrupt and bankruptcy offences together. This evidence is summarised in an Annex to this paper.

Discharge of the bankrupt

52 At any time after he has been adjudicated bankrupt and provided his public examination has been concluded if not dispensed with, the bankrupt may apply for his discharge from bankruptcy. The effect of a discharge order is to release the bankrupt from all debts which were provable in the bankruptcy save for a limited number of exceptions and to free him from virtually all of the restrictions and disqualifications of a bankrupt. The discharge must be sought by the bankrupt himself. However, if the Court is so minded, it may make an order which will give the bankrupt an automatic discharge upon the fifth anniversary of his adjudication. If no such order has been made, the Court is required to review the position after five years have elapsed since adjudication.

53 At the hearing the Court may:-

(a) grant an absolute and immediate discharge; or

(b) refuse the discharge; or

(c) suspend the discharge for a specified time; or

(d) suspend the discharge until a dividend of 50p in the £ has been paid; or

(e) grant a discharge conditional upon the bankrupt's consenting to judgment being entered against him by the OR or trustee for any balance of the debts provable in the bankruptcy which have not been satisfied. The judgment will be satisfied out of the future earnings or after-acquired property of the bankrupt in accordance with the Court's directions; or

(f) combine a suspended discharge with the attaching of conditions.

leave to act as director

no preparation thereof

54 The Court will normally only grant an unconditional, absolute discharge where the bankrupt is entitled to a "Certificate of misfortune", ie. certifying that the causes of the bankruptcy were beyond the debtor's control, without any misconduct on his part.

55 Mr Farrar (C15) suggests that the result of s.26 BA 1914 and ss.7 and 8 of the Insolvency Act, 1976 is that the bankrupt who wishes to obtain an early release is faced with a dilemma. He can now lose out by an application under s.26 and this is not altogether satisfactory. Mr Farrar feels that the bankrupt's right to appear in proceedings under s.8 of the 1976 Act should be expressly dealt with.

56 The Finance Houses Association (C41) think that automatic discharge under s.7, 1976 Act would appear to put an end to an order under s.51 BA 1914 for appropriation of earnings and they ask if this is desirable.

57 The East Sussex Trade Protection Society (C42) feel that automatic discharge is completely wrong and that each case should be carefully studied as to the events leading up to the bankruptcy. They think that in many cases offences prior to bankruptcy are quite fraudulent and such people should not be granted a discharge until at least 80% of the liabilities have been repaid with interest.

58 The Rating and Valuation Association (C99) find it difficult to accept that discharge is not now dependent upon the debtor making periodic payments equivalent to a proportion of the indebtedness, during his period of bankruptcy.

59 The CCAB (C115) believe the automatic discharge provisions are an improvement in the law and should enable the OR to supervise the post-bankruptcy activities of debtors more closely.

60 Mr Felber (C115) does not think that an application for discharge should be made without the bankrupt's consent and he cites his own case:-

" I have a comment to make in connection with the new 5-year rule (Section 8, chapter 60 Insolvency Act 1976). Under this section within twelve months after the fifth anniversary of adjudication the official receiver shall make an application to the court for a date for a hearing for discharge of the bankrupt if he has not already applied. This application is to be made without reference to the bankrupt and I consider this to be wrong.

Bankruptcy has a great effect on the life not only of the bankrupt but of his family; particularly his wife and children. It is the latter who often have to suffer more from the opprobrium of neighbours, acquaintances, schoofellows and local tradesmen than the bankrupt himself. If the bankruptcy, because of its size, or for other reasons, has attracted the attention of the press the situation is aggravated, and the suffering of those who are closely connected by family ties with a bankrupt can be truly devastating. However, time is a great healer, but when a bankrupt whose affairs have attracted publicity applies for discharge the wound is often re-opened. I must here refer to my own case. I was adjudicated bankrupt in June 1971 and because of the size of my debts (which apart from current outstanding surtax and capital gains tax, were all related to personal guarantees) there was a lot of publicity in the press which had a great effect on members of my family. When in 1973 and again in 1975 I made applications for discharge the official receiver's reports made reference to the possibility of proceedings

being taken against me because of investigations which were being made as to my conduct as a director of companies with which I was connected before my bankruptcy. Under these circumstances I postponed my applications because the reading of the official receiver's reports in open court would almost certainly have caused the more newsworthy portions to have been reported in the press, with, no doubt, traumatic effect on members of my family. In February 1978 I made a further application having been bankrupt for almost seven years and the official receiver, after quoting from the two previous reports of 1973 and 1975, reported that as there was insufficient evidence to support proceedings he (the official receiver) "should now finally report that the conduct of the bankrupt is satisfactory". I was therefore granted my discharge on three months suspension and in his summing-up the registrar stated that although I had faced the possibility of prosecution at one stage I had not been guilty of any offence which could lead to prosecution.

Short reports appeared in several newspapers, mainly laying stress on the size of the bankruptcy and the relatively small amount I had repaid to my creditors but one local newspaper made the following damaging remark at the end of its report:-

> "Mr. Felber had faced the possibility of prosecution at one stage, Mr. Hunt said".

This report was taken right out of context because to be fair it should have gone on to say that it had been found that I had not been guilty of any offence which could lead to prosecution.

There may be other reasons why a bankrupt would not wish an application for discharge to be made without his consent. For example the Act says that the bankrupt does not have to be present. However, he may wish to be present and be prevented by absence abroad or illness or some other factor and under present legislation he is only entitled to fourteen days notice of the hearing.

I suggest that the bankrupt's wishes should be taken into account before the application of the five-year rule which I imagine has been very properly introduced to assist bankrupts who do not know how to apply for discharge or may not even realise they have a legal right to do so."

need to consider retroactive period

Bankruptcy offences

61 The Court cannot grant an unconditional discharge where the bankrupt has been convicted of any offence connected with his bankruptcy, or where any of the following "facts" have been proved against him:-

(a) that his assets will not produce a dividend of 50p in the £ unless this is due to circumstances for which he cannot justly be held responsible;

(b) failure to keep proper books of account within the 3 years prior to the bankruptcy;

(c) trading with knowledge of insolvency;

(d) contracting a provable debt without having at that time and reasonable expectation of being able to pay it;

(e) Failure to account satisfactorily for any loss of assets;

(f) rash and hazardous speculations, unjustifiable extravagance in living, gambling, or by culpable neglect of his business affairs;

(g) putting any creditor to unnecessary expense by a frivolous or vexatious defence to any action properly brought against him;

(h) contributing to his bankruptcy by incurring unjustifiable expense in bringing a frivolous or vexatious action;

(i) giving a fraudulent preference within 3 months of the bankruptcy;

(j) incurring liabilities within 3 months of the bankruptcy with a view to making his assets equal to 50p in the £ of his unsecured liabilities;

(k) having previously been made bankrupt or made a composition or arrangement with his creditors;

(l) guilty of any fraud or fraudulent breach of trust.

62 With regard to criminal offences, there are a number which arise from the debtor's conduct prior to the presentation of the petition (eg. concealment or removal of property, books offences, disposal of property obtained on credit, etc), a number arising from conduct subsequent to the presentation of the petition, some which may be committed either before or after the petition, and a number arising from conduct subsequent to adjudication.

63 As was mentioned in para 51 above written evidence about a bankrupt's disabilities and offences is summarised in the Annex to this paper.

61 is misconduct, not offences (ss 154-159)

23.3.79

WRITTEN EVIDENCE ON BANKRUPTCY DISABILITIES AND OFFENCES

1 The Midland Bank (C25) believe that many bankrupts fail to understand fully the disabilities which apply to them and the offences which they may commit. Ignorance must inevitably lead to breaches. Even where fairly blatant breaches appear to occur, it seems that rarely is action taken under the statutory provisions, though this may be due to difficulty of proof. Nonetheless, there is risk that the law may be brought into contempt if not enforced. The Bank suggests that the present lists of disabilities and offences should be simplified, ensuring that they are readily understood by bankrupts and that sanctions follow any breach.

2 J H Farrar (C15) supports the recommendation of the "Justice" Committee that the provision whereby the bankrupt commits a criminal offence if he obtains credit to the extent of £50 upwards without disclosure, should be amended so that the monetary limit is repealed and the offence becomes one of failure to pay the debt within a specified time of incurring it, the bankrupt having a defence if he can establish that he had reasonable prospects of paying the debt at the time he obtained the credit.

para 98

3 The Exeter Chamber of Commerce (C39) comments that the penalties imposed for bankruptcy offences are often derisory and the East Sussex Trade Protection Society (C42) suggests that the penalties should be stricter with a penal clause available for major offences.

4 The Post Office (C51) welcomes the new provisions in the Insolvency Act, 1976, but says that there will still be the difficulty of identity and tracing the individual; it is still too easy for a person to change his name.

5 The Post Office continues:

"There are many miscellaneous and highly technical offences under the Bankruptcy Acts. In practice bankrupts are seldom, if ever, prosecuted for those offences, and these seem to be mentioned only by the Official Receiver when bankrupts are applying for a discharge. It could be that there are good reasons for not bringing prosecutions in respect of those offences, but it would seem that if infringements are provable then either the persons concerned should be prosecuted or alternatively the appropriate provisions of the Bankruptcy Acts should be repealed. This, it is suggested, is a sphere which requires serious consideration, since the offences are highly technical and it is doubtful in many cases whether bankrupts are aware that they are committing them."

6 The IPCS (C57) say:

"At present, due to the high level of work and the low staffing levels, the disabilities of an undischarged bankrupt have become somewhat of a cypher. Breaches of the law in this respect are prosecuted only exceptionally and usually where they have come to light in a second bankruptcy. If the deterrent affect of a bankruptcy is to be maintained, it would appear obvious to us that such disabilities must be properly policed, but this of course, will need a properly staffed Official Receiver's Service. If proper staffing is not maintained and given the future high incidence of automatic discharges, it appears likely to us that the disabilities of an undischarged bankrupt will become devoid of any meaning.

The bankruptcy offences in the Act remain as relevant as ever but prosecution is not encouraged by the inadequacy of the sentences passed. Perhaps some consideration could be given to the matter of the offence of failing to keep proper books of account. This is a retrospective offence and some concern has been expressed as to its propriety."

7 The HP Trade Association (C70) refer to the offence of obtaining credit whilst an undischarged bankrupt and point to an anomaly between HP and credit sales. They recommend changes in the law:-

"There is one matter within the present law which is a minor irritant to the hire purchase industry and which we believe requires amendment. As members of the Committee will no doubt recall, in the case of R. v Garlick (1958 42 Cr.App.Rep.141) the Appeal Court held that the obtaining on hire purchase terms of goods worth more than £10 (at that time the minimum limit) by an undischarged bankrupt did not constitute the obtaining of credit, so that no offence was committed. The court recognised that the position would have been different, of course, if the contract has been one of credit sale.

While we would not disagree with the view expressed by the Courts in the state of the law as it now stands, it seems to us ridiculous that this sort of difference between credit sale and hire purchase should continue to exist. This view has, of course, been accepted by the legislature in the Consumer Credit Act 1974, where Section 9 (3) of that Act now specifies that a hire purchase agreement should be taken to constitute a supply of fixed term credit equal to the total price less the deposit and total credit charge, thus effectively equating the two types of credit

Yes

for the purpose of the Act. We urge that similar steps be taken in any new insolvency legislation to cover not only hire purchase agreements "within the Consumer Credit Act", but those outside its scope (i.e. where more than £5,000 credit is advanced) which might be entered into by an individual who is subsequently shown to be an undischarged bankrupt, and who had not disclosed the fact to the creditor. We hope that the Committee would think it right to recommend that the law be amended in the manner we suggest."

8 Mr Blamire of the Birmingham Settlement Money Advice Centre (C82) refers to the disabilities relating to the office of MP and JP. He suggests that there should not be an automatic bar following bankruptcy; the bankrupt should be required to inform the appropriate appointing authority and let the decision as to dismissal from, or acceptance for, office be in the hands of that authority.

9 Mr Blamire further recommends that the credit limit (para 43(2) above) should be increased to £200, but failure to notify the new creditor of the position should be a criminal offence.

10 Ian Fletcher (C93) says it is essential that a thorough revision is made of the legal provisions bearing upon the debtor's duties to make a full and frank disclosure of his affairs and to assist in the insolvency administration. The penalties for non-fulfilment of any of these duties should be made far more severe, as a deterrent against possible attempts by "undeserving" debtors to pose as the converse. Criminal penalties should be greatly increased, and the "civil and administrative" consequences of such "insolvency offences" should likewise be made more vigorous, especially in relation to ultimate discharge. Likewise, there should be a raising of the penalties (including the criminal penalties) applicable to the various species of conduct anterior to insolvency, whereby the debtor has both rendered the consequences of his failure more serious for his creditors, and/or conducted himself in such a way as to perpetuate fraud upon his creditors.

11 The National Association of Trade Protection Societies (C114) say that there is a strongly held view that existing bankruptcy law can be too easily exploited by the unscrupulous. It is felt that the disabilities of a bankrupt are not severe enough, particularly where misdemeanours can be proven as set out in s.29(3), BA 1914. Careless or irresponsible business practice which results in heavy losses to creditors needs to be dealt with firmly by the OR, and to do so, OR's must be allocated the resources necessary to enable them to probe deeply into the bankrupt's affairs.

12 The CCAB (C117) believe that bankrupts often act indirectly in the management of limited companies, hiding behind other persons. They suggest that should any person be convicted of such an offence, not only should he suffer the appropriate penalty, but he should be barred from being a director or concerned in the management of a limited company for a further period of up to 10 years.

13 The CCAB point out also that Blagden called for simplification and consolidation of the very many offences which may arise as a result of bankruptcy proceedings (ie. ss.154-160, BA 1914) and had commented also that they could not see why an order of the Bankruptcy Court should be needed for the institution of criminal proceedings. The accountancy bodies agree with these recommendations.

14 The CCAB add that bankruptcy offences appear to be generally dealt with leniently by the Courts, very often by fines. Such punishments are inappropriate, because any after-acquired property surplus to the bankrupt's living requirements vests in the trustee. It must be remembered that bankrupts have received relief from their debts by virtue of the bankruptcy proceedings, and that it may be appropriate in a criminal prosecution on indictment for offences in the Bankruptcy Acts, for the Court to recommend to the Bankruptcy Court that the debtor's discharge be suspended for an appropriate period.

15 Mr Felber (C115) makes the following comments and proposals:-

i) " First of all I would like to comment on a bankrupt's disability for obtaining credit of £50 or more. The Act states "It is declared to be an offence for an undischarged bankrupt, either alone or jointly with any other person to obtain credit to the extent of £50 or upward from any person without informing that person that he is an undischarged bankrupt". Surely it should be clearly pointed out to every bankrupt that an offence is committed when the bankrupt has obtained credit to an aggregate of £50 or more (R. v Hartley 1972). This decision in fact contradicts the precise wording of the Act and either the Act should be reworded to read "....... to obtain credit of £50 or upward from any person or persons without informing such person or persons that he is an undischarged bankrupt", or if that was not the intention of the Act then the decision referred to above should be overturned by new legislation.

ii) There was a programme on radio 4 on 3.5.1978 in which a number of people recently made bankrupt were interviewed. It was very revealing to hear how ignorant these people were regarding what they were able and what they were not able to do. Two particular points were made by each one.

Firstly, they were under the impression that they could not engage in any trade or business without disclosing the fact that they were bankrupt. The Act does not say this. It says that an undischarged bankrupt may not engage in any trade or business under a name other than that under which he was adjudicated, without disclosing the name under which he was adjudicated.

Secondly, they thought that a bankrupt could not have a bank account. This is not so. There is even a place on the official form to be completed by a bankrupt when applying for his discharge which asks for details of any banking account. It is of course wise for a bankrupt to obtain the consent of his trustee before opening a bank account and also to advise the bank of his position although I have not found any statutory obligation to do either.

iii) I think that a booklet should be given to every bankrupt setting out clearly his liabilities and also setting out the things he may do in grey areas such as I have illustrated above. This would be supplementary to any forms or copies of statutes which are handed to the bankrupt officially. The booklet should be written in clear, workmanlike layman's language because most bankrupts are small businessmen who often find it difficult to interpret legal language."

INSOLVENCY LAW REVIEW COMMITTEE

BANKRUPTCY DEPOSITS

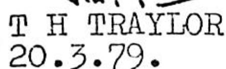
1 Attached is a paper which was prepared by Alfred Goldman for consideration by the Insolvency Rules Advisory Committee. The Rules Committee are unanimously of the opinion that bankruptcy deposits are too high and in November 1977 they made a formal recommendation to the Secretary of State for Trade that deposits should be reduced to £20 for a debtor's petition and £50 for a creditor's petition.

2 The Rules Committee said that in arriving at this decision they were very conscious of the reasons for the increases: the Insolvency Service was under pressure as a result of the heavy work-load imposed upon it, and many of the cases that were dealt with in bankruptcy in recent years might well have been more suitably administered under some more streamlined procedure. Nevertheless the Committee did not think that either of these considerations justified fixing the amounts of the deposits at such a level as would make it difficult for debtors to seek the protection offered by the Bankruptcy Acts and discourage creditors from using bankruptcy as a means of debt collection.

3 The Rules Committee said that the number of petitions presented during the first seven months of 1977 compared with the same period in 1976 revealed that there had been substantial reductions in the County Courts, where the majority of debtor's petitions are presented, but not apparently in the High Court, where any reduction in the number of petitions presented by ordinary creditors had been compensated for by an increase in the number of petitions presented by Government Departments who (for obvious reasons) are undeterred by the size of the deposit.

4 It seemed, therefore, that increasing the deposits had probably not fully achieved the object of the reducing the work-load of the Insolvency Service; but whether it had or not it had had the undesirable and, in the Committee's view, unwarranted effect of preventing debtors and creditors from exercising crucial rights given to them under the Bankruptcy Acts.

5 The recommendations of the Rules Committee were finally rejected by the Secretary of State in July 1978. He said that the object of the increases was to relieve the Insolvency Service from the need to deal with insolvencies which did not warrant detailed investigation; that such immediate measures were required to contain the problem until the Cork Committee would have time to report; and that until he had the benefit of the Cork recommendations and could solve the problem in some other way, he must balance the need to keep the Insolvency Service efficient against the needs of certain classes of debtor and creditor who wished to avail themselves of bankruptcy proceedings.



T H TRAYLOR
20.3.79.

BRITISH JEWELLERY AND GIFTWARE FEDERATION LIMITED

Director General: M. B. ALTON F.C.I.S., A.T.I.I. Deputy Director General: P. BURNS FARQUHAR F.C.I.S., F.S.C.

Registered Office: *Registered No. 69391 England*
Saint Dunstan's House, Carey Lane, London EC2V 8AA 01-606 0871

13th December, 1976

Alfred Goldman Esq.,
Isadore Goldman & Son,
Solicitors.
11/13 Southampton Row,
London W.C.1.

Dear Sir,

I am writing to you as a member of the Joint Bar and Law Society Committee and following publication of an article by the Legal Correspondent of the Daily Telegraph on Saturday 4th December, 1976.

As you will see from our name, we are the Trade Association for the jewellery and giftware industries; as part of our services to these industries we provide a trade protection service.

The proposal due to come into force on the 17th December, are causing us very deep concern, and, on behalf of our members, we would wish our name to be joined with those who are opposing the increased costs.

Much of our industry is made up of small firms trading on a very personal basis and the additional financial burden which it is proposed to impose will most certainly act as a very substantial deterrant to the proper pursuit of justice because a further barrier is being created in favour of the debtor in the normal process of recovering monies due.

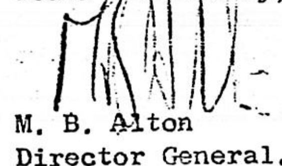
The deposits which have to be paid into court are only part of the total costs of a recovery action and in many many cases, even with the present amounts of deposit the creditor is almost certain to incur legal costs whether or not he recovers all or part of the debt.

It is regretted that the bankruptcy procedure has to be used as a means of recovering funds but, regrettably, there seems to be a little alternative in those cases where the debtor consistantly refuses to meet his obligations.

Unless manufacturers and other traders dealing on a basis which is not "strictly cash" have some confidence that, in the event of default, they have adequate safeguards and remedies, if necessary to pursue the matters through the courts, at reasonable costs there is every likelihood that further deterioration in the country's economic performance will take place and that costs will rise to take a greater account of the increased prospect of unrecoverable debts.

It is these circumstances that have prompted me to write to you, in the expectation that you will have had many similar letters supporting action which is now being taken by the Joint Law Reform Committee of the Bar and the Law Society.

Yours faithfully,



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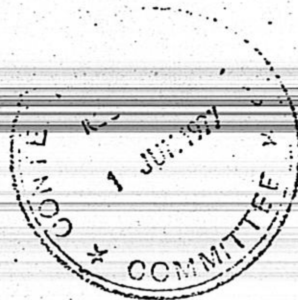

C J O Maggs Esq
The Law Society
The Law Society's Hall
113 Chancery Lane
London EC3

KB/PJC

Solicitors

31 May 1977

Dear Mr Maggs

Bankruptcy Deposits

I have refrained from writing to you until now concerning Bankruptcy deposits until we have been able to obtain considered reaction from our various corporate and private clients to the increased deposits.

I think it fair to say that our corporate clients are detracted from taking bankruptcy proceedings where the debt is much below £750.00, and sometimes below £1,000.. Once upon a time they would only have been detracted at the £300.00 mark. Therefore, to that extent, I suppose, ultimately there will be more written off debts of higher sums thus increasing the eventual cost of credit.

In respect of the larger debts, corporate clients are, where they feel the situation demands the issue of a Bankruptcy Petition, still inclined to take that course.

There can be little question, however, that bankruptcy is not the same forceful weapon as it was. Whatever may have been the intention of the Government to reduce the cost of the Bankruptcy services, they have, whether they like it or not, reduced the overall effectiveness of this process. They are causing some debts to be marked as irrecoverable, and certainly it is becoming apparent that individuals against whom Judgments have been obtained for sums below £1,000. are begging the question as to whether or not the Judgment Creditor will incur the expense of bankruptcy proceedings. It is this last feature which is of the greatest concern to us. The average individual, carrying on a business, is nowadays far more aware of the process of Court. They have become so as a matter of necessity, and also, because some of them are issuing their own County Court Summonses to recover their own debts. Therefore, when they are challenged by their own suppliers for

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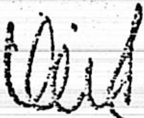
payment, they are more likely, if no goodwill is to be retained, to take the chance for waiting bankruptcy proceedings, especially if they know (often from experience) that a levy by the County Court Bailiff or the Sheriff's Officers will result in a return of no goods.

In respect of Petitions by individual Clients to enforce Judgments obtained, no clear picture emerges. Certainly it is a matter of extreme difficulty to us to explain to those Clients why they should be involved in disbursements often in excess of £160.00, never mind our own charges, to obtain and enforce a default Judgment to the point of a Receiving Order. The relationship between disbursement and our genuine net profit in matters of this nature no longer bears any relation to reality. To run a litigation practice specialising in debt enforcement, and maintain goodwill, has now become a matter of increasing difficulty. There is still a reluctance on the part of individual Clients to pay costs on account. To ask them for substantial disbursements as well, to enforce what they consider to be their just rights, is adding salt to an already open wound.

I know that the Society always like to have some actual statistics. It is difficult to give any statistics as to how many Petitions would have been presented had there been no change, and how many have been presented. The best estimate that we feel we can give is that there has been a reduction of about 50%.

We shall be pleased to provide any further information or assistance.

Yours sincerely



Keith Berman

BANKRUPTCY WORKLOAD FOR JANUARY TO JUNE 1977

COMPARED WITH CORRESPONDING PERIOD 1976

	LAND REGISTRY FIGURES					
	BANKRUPTCY PETITIONS			BANKRUPTCY RECEIVING ORDERS		
	1976	1977	% REDUCTION	1976	1977	% REDUCTION
JANUARY	967	417	59.6	591	474	19.8
FEBRUARY	970	513	47.1	604	455	24.7
MARCH	1074	583	46.0	705	458	35.0
APRIL	875	492	48.8	577	337	41.6
MAY	886	606	31.6	633	417	34.1
JUNE	898	484	46.0	634	384	39.4
TOTAL FOR SIX MONTHS	5670	3095	45.4	3744	2525	32.5

	1976		1977	
	1st qtr	2nd qtr	1st qtr	2nd qtr
Receiving and Administration Orders				
High Court	379	467	493	487
County Courts	1,512	1,318	857	574
Total	1,891	1,785	1,350	1,061