1(5.2)

ILRC 45TH MEETING

Brief for Item 6

Petitions to wind-up brought by the Department ILRC 130)

1 In ILRC 130, Chris refers to the Department's powers under s.210 (see para 26). Clause 70 of the lost 1973 Companies Bill was intended to replace s.210 and thus implement the proposals which were made by the Jenkins Committee.

2 Copies of Clause 70 and the amplifying notes are attached. Sub-section 2 of the clause relates to petitions brought by the Secretary of State.

3 We have received submissions in written evidence suggesting that Clause 70 should be enacted.

now s. 75 of 1980

Extracts From Companies Bill

PART V

MANAGEMENT AND ADMINISTRATION OF COMPANIES

Protection against mismanagement

Power of court to grant relief against company where members unfairly prejudiced.

70.—(1) Any member of a company may apply to the court by petition for an order under this section on the ground that the affairs of the company are being conducted in a manner which is unfairly prejudicial to the interests of some part of the members (including himself) or that anything has been or is proposed to be done by or on behalf of the company which is or would be so prejudicial.

(2) If in the case of any company—

(*a*) the Secretary of State has received a report under section 168 of the Act of 1948 (inspectors' reports) or exercised his powers under Part III of the Act of 1967 or section 20(2) to (4) of the Insurance Companies Amendment Act 1973 (inspection of company's books and papers); and

1973 c. 58.

(*b*) it appears to him that any ground exists by virtue of which a member could apply to the court under subsection (1) above,

he may himself (in addition to or instead of presenting a petition for the winding-up of the company under section 35(1) of the Act of 1967) apply to the court by petition for an order under this section.

PART V

(3) If the court is satisfied that a petition under this section is well founded it may make such order as it thinks fit for giving relief in respect of the matters complained of.

(4) Without prejudice to the generality of subsection (3) above, an order under this section may provide for—

(*a*) regulating the conduct of the company's affairs in the future;

(*b*) restraining the doing or continuing of any act complained of by the petitioner;

(*c*) authorising civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct;

(*d*) the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly.

(5) Where an order under this section makes any alteration in or addition to any company's memorandum or articles, then, notwithstanding anything in any provision of the Act of 1948 but subject to the provisions of the order, the company concerned shall not have power without the leave of the court to make any further alteration in or addition to the memorandum or articles inconsistent with the provisions of the order; but, subject to the foregoing provisions of this subsection, the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company and the provisions of that Act shall apply to the memorandum or articles as so altered or added to accordingly.

(6) An office copy of any order under this section altering or adding to, or giving leave to alter or add to, a company's memorandum or articles shall, within fourteen days after the making of the order, be delivered by the company to the registrar of companies for registration; and if a company makes default in complying with this subsection, the company and every officer of the company who is in default shall be guilty of an offence and liable on summary conviction to a default fine.

(7) In relation to a petition under this section, section 365 of the Act of 1948 (general rules for winding up) shall apply as it applies in relation to a winding-up petition.

(8) This section shall apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by act of parties or operation of law

as it applies to a member of the company, and references to a member or members shall be construed accordingly.

(9) In subsection (2) above and the other provisions of this section in their application to proceedings on a petition under that subsection "company" means any body corporate which is liable to be wound up under the Act of 1948.

(10) Section 210 of the Act of 1948 and section 35(2) of the Act of 1967 (which are superseded by this section) shall cease to have effect except in relation to proceedings on a petition presented before this section comes into operation.

HOUSE OF COMMONS

COMPANIES BILL

DEPARTMENT OF TRADE AND INDUSTRY

NOTES ON CLAUSES

PART IV - ACCOUNTS, REPORTS AND ANNUAL RETURNS

CLAUSE 70 - POWER OF COURT TO GRANT RELIEF AGAINST COMPANY WHOSE MEMBERS ARE UNFAIRLY PREJUDICED

This Clause, which replaces section 210 of the 1948 Act, increases the protection given to the interests of minority shareholders by extending the grounds on which they may apply to the court and by widening the court's powers to grant relief.

2. Section 210 of the 1948 Act provides that a member of a company who complains that its affairs are being conducted in a manner oppressive of some of the members may petition the court for an order. If the court is satisfied that the complaint is justified and that the facts would justify winding up the company but that this would be unfairly prejudicial to the oppressed members, it may make any order it thinks fit to deal with the matters which led to the complaint. This section, which was based on a recommendation by the Cohen Committee, has never produced the results expected of it. The courts have interpreted the phrase "in a manner oppresive of" very restrictively. It is also very difficult for a complainant to demonstrate that the facts would justify the making of a winding up order on the ground that it is just and equitable that the company should be wound up.

In practice, therefore, minority shareholders have been able to obtain a remedy under section 210 only in the most severe cases.

3. The Jenkins Committee considered this question in considerable detail (paras 199-212). They concluded that the section as at present drafted did not afford adequate protection to the interests of minorities. They made the following recommendations for strengthening it:

(i) The need to demonstrate that the facts would justify the winding up of the company should no longer be a condition of intervention by the court (para 212(a)).

(ii) The section should be amended so as to extend it to cover cases where the affairs of the company are being conducted in a manner unfairly prejudicial to the interests of some part of the members and not merely in an "oppressive" manner (para 212(c)).

(iii) The section should be amended to make it clear that it covers isolated acts as well as a course of conduct (para 212(B)).

(iv) Provision should be made to enable the court to restrain the commission or continuance of any act which would suffice to support a petition under the section (para 212(d)).

(v) The court should have an express power, where it thinks fit, to authorise the bringing of proceedings in the name of the company against a third party on such terms as the court directs (para 212(e)). This would enable the court to deal with cases in which the company itself has been wronged and the action which damages the interests of the minority shareholders is the company's failure to take action against the wrongdoer (eg if a director has misappropriated the company's funds and the other directors, who are also the majority shareholders, fail to take action to recover the money).

(vi) Legal personal representatives and others (eg trustees in bankruptcy) to whom shares are transmitted by process of law should be entitled to present a petition under section (para 212(f)).

The clause implements all these recommendations but extends (vi) to cover persons to whom shares are transferred for example, on a sale of the shares as well as those to whom they are transmitted by process of law. For convenience and ease of comprehension, the amendments are incorporated in a new provision which replaces Section 210.

4. The changes introduced by this clause should go a very long way to strengthen the position of a minority shareholder who

has a genuine complaint. It may be argued that this strengthening is meaningless as far as the small shareholder is concerned as in practice he is not willing, and does not have the financial resources, to appeal to the court. But if a shareholder is not prepared to take advantage of the remedies available to him in order to protect his own financial interests, it is not for the Government to use the taxpayer's money to do so on his behalf, unless following the appointment of inspectors (see note on clause 71 and brief IV) or an investigation of the company's books and papers it appears that a petition should be made to the court.

5. Subsection 1 provides that any member of a company may petition the court for an order if the company's affairs are being conducted in a way that is unfairly prejudicial to the interests of any part of the members (including himself) or if any act or proposed act of the company would be so prejudicial. This implements the Jenkins recommendations discussed in para 3(ii) and (iii) above.

6. Subsection 2 enables the Secretary of State to bring a petition under this section if, having received an inspector's report or having used his powers to inspect a company's books and papers, it appears to him that there are grounds on which a member could apply to the court. This subsection clarifies the Secretary of State's existing powers under Section 35 of the 1967 Act. The wording of that section has been construed as meaning that the Secretary of State can act only

if the information on which his decision is based is contained in the report or in the documents inspected but not if already he had the relevant information and the report or document merely confirmed it. This subsection removes this unintended limitation on the Secretary of State's powers.

7. Subsection 3 provides that, if the court is satisfied that a petition is well founded, it may make any order it thinks fit for dealing with the subject of the complaint.

8. Subsection 4 lists examples of the type of provision which may be made in a court order under the previous subsection, but without restricting the court to the provisions mentioned. (a) and (d) reflect section 210(2) of the 1948 Act; (b) and (c) are additions which implement the Jenkins recommendations discussed in para 3(iv) and (v) above.

9. Subsection 5 provides that if the court orders an alteration in a company's memorandum or articles, the company cannot alter those documents in a way inconsistent with the order, except with the leave of the court. It also provides that any amendments to the memorandum or articles ordered by the court shall have effect as if they had been made by resolution of the company in the usual way. This subsection re-enacts subsection 3 of section 210.

10. Subsection 6 provides that the company must send a copy of any order amending its memorandum or articles to the Registrar for filing and specifies the penalties for failure to do so. This

subsection re-enacts subsection 4 of section 210.

11. Subsection 7 provides that the Lord Chancellor may, with the consent of the DTI, make rules relating to petitions under this clause in the same way as he makes rules relating to petitions for the winding up of a company. These rules cover such matters as giving notice, who may give evidence, etc. The subsection re-enacts subsection 5 of section 210.

12. Subsection 8 enables a person to whom shares have been transferred voluntarily or transmitted by process of law to petition the court for an order under this clause. This implements the Jenkins recommendation discussed in para 3(vi) above and extends it to cover also persons to whom shares have been transferred voluntarily, even though that transfer has not been registered and they are not therefore members of the company.

13. Subsection 9 defines the type of company in relation to which subsection 2 is to apply. Bodies corporate liable to be wound up under the 1948 Act are companies registered under that Act or earlier Companies Acts and unregistered companies (primarily companies incorporated under special Acts of Parliament or by Royal Charter). The subsection re-enacts part of Section 35 of the 1967 Act.

14. Subsection 10 provides that section 210 of the 1948 Act an section 35 of the 1967 Act shall cease to have effect except as regards petitions presented before the clause comes into effect.

January, 1974

INSOLVENCY LAW REVIEW COMMITTEE

PETITIONS TO WIND UP COMPANIES BROUGHT BY THE DEPARTMENT OF TRADE

(by Mr C A Taylor)

1 I was invited to prepare a paper as to the circumstances in which the Secretary of State for the Department of Trade can petition to wind up a company (ILRC 30, para 10, and the 10th Mtg minutes, para 21, refer).

2 Members will understand that I cannot now speak for the Department and indeed I do not know to what extent its policies may have been modified or changed in the light of more recent experience or, perhaps, needs which did not previously exist. However, I will try to outline the ground rules covering this matter which I think would concern any government in its oversight of the corporate sector, and the relevant regulating statutes. Some references are made to the Board of Trade as the precursor of the Department of Trade.

3 The majority of instances of DOT petitions result from inspections under ss.164, 165 and 172, CA 1948, from examinations and enquiries under s.109, CA 1967, or from enquiries into Insurance Companies by the Department under s.15 of the Insurance Companies Act 1958 and s.79 CA 1967, or from ss.18 and 19 of the Protection of Depositors Act 1963, where it appears to the BOT that it is expedient to petition to wind up.

4 In general one can say the Department will petition if such a course is in the "public interest", but that is a very broad statement, and the only satisfactory way I can delimit the generality is by looking at the various cases where, over the years, the Dept is advised that such a course does lie.

5 Indeed the "Public Interest" concept is in my experience somewhat misleading as the Dept sometimes pursues - in the general good - that which may be considered a purely private interest: eg. where minority shareholders are being defrauded, or perhaps being cheated short of criminal fraud, or perhaps being oppressed. Or for instance where shareholders or creditors are so diverse that individual action or class action is completely impracticable and yet the urgency and necessity for bringing the company's business to an end requires the Dept to incur public expense in petitioning.

6 Having thus rather extended "Public Interest", I will now illustrate the pursuit of that elusive concept by mentioning some of the cases where I had some personal knowledge, but in case members may feel that the record of some of the companies named does not seem to tie up with the facts, I should add that if the DOT is also a creditor - or another Govt Dept is - then that allegation will be included in the petition, although the indebtedness is only part of the grounds for seeking the winding up.

7 So far as insurance companies are concerned members will appreciate that in looking after policy holders' interests, the Dept checks how far the net assets match up to the statutory margin of solvency, even though there be no insolvency in the commercial sense of s.222(e), CA 1948, ie. being unable to pay its debts as they become due. I now give some examples.

(am. DS.35) initiation of proceedings by petition.

Insurance Companies

8 The London General Insurance Company Ltd (00248/35). The Dept appointed inspectors and the company was persuaded to file its own petition.

9 Craven Insurance Company Ltd. The BOT petitioned on grounds of lack of statutory margin of solvency.

10 Vehicle & General Insurance Co Ltd. BOT appointed inspectors, the petition by the company followed the report.

11 Fire Auto & Marine Insurance Co Ltd (Savundra). BOT appointed inspectors.

Non-insurance companies

12 Koscot Ltd, where I instructed Peter Millett to petition. The fraud was of the pyramid selling type and those in control were attempting to send the assets out of the jurisdiction.

13 Pinnock Finance Company (Great Britain) Ltd (00662/68). Here the Dept appointed inspectors following complaints from creditors - it was a deposit taking company and the winding up ensued - again the company was prevailed upon to file its own petition, following convictions under the Exchange Control Act.

14 Commodity Speculations Ltd - a fraud on shareholders.

15 South Western Deposit & Loan Society and Mutual Benefit Society were both deposit-taking companies.

16 Carlton Greig & Company Ltd - merchant bankers - wound up by the Official Receiver as liquidator creditor of other companies in the group.

17 H S Whiteside Ltd (001733/67) - Pan Yam Pickles, Etc. The Dept petitioned following the inspectors' report. The OR sued the auditors successfully.

18 I ought also to mention the "Craddock" and "Burden" groups of companies where the Dept appointed inspectors, in most cases its own officers, and wound up some 20 companies, mostly public and former rubber company shells. The OR recovered nearly £1M for defrauded minority shareholders, largely from banks and issuing houses party to the passing of company funds to persons in control to buy shares in the companies, thus acquiring control and defrauding yet a further group of minority holders.

19 The OR is enabled to petition to wind up under s.224(2), CA 1948 where a company is being wound up voluntarily but the liquidatio is not proceeding satisfactorily.

20 I have also petitioned - first for restoration and then for winding up in the case of a company which had been dissolved - Edward Blockoe & Sons Ltd - again, it was a case where the voluntary liquidator had not completed the liquidation. I am informed that it is no longer necessary first to restore.

21 I think these cases will indicate instances where the Dept or BOT or OR have petitioned, but to understand the full impact of the Dept's winding up proceedings one should refer to the relevant inspectors' reports where there has been an inspection, and appreciate the changes brought about by the 1967 Companies Act, in particular, s.35(1) empowering the BOT to petition on the ground that "it is expedient in the public interest" if the Court deems such a course to be "just and equitable". It must appear to the BOT to be expedient from the inspectors' report, or information from s.168, CA 1948, or ss.109 to 118, CA 1967, or ss.18 or 19 of the Protection of Depositors Act 1963. There has over the years been built up a body of case law about the term "just and equitable" so far as it relates to a ground for a winding-up petition, and in course of time "Public interest" will become similarly defined.

22 Under s.224(1), CA 1948, the BOT could present a petition to wind up a company which fell within s.169(3) of the Act. S.169(3) in turn applied where it appeared to the BOT from a report of its inspectors that it was expedient, unless the company was already being wound up by the Court, to present a petition for it to be wound up by reason of the circumstances set out in s.165(b)(i or ii). (S.169 is now substituted by s.35(1) of the Ca 1967).

23 These circumstances were (i) that the business of the company was being conducted with intent to defraud its creditors - or the creditors of any other person, or otherwise for a fraudulent or unlawful purpose or in a manner oppressive of any part of its members or that it was formed for any fraudulent or unlawful purpose; or (ii), that the person concerned with the formation of the company or the management of its affairs had been guilty of fraud, misfeasance or other misconduct towards it or its members, but as I indicated above, s.35 CA 1967 now includes "Public interest".

24 S.169 CA 1948 was substituted by s.35, CA 1967 because the BOT found, inter alia, s.169 to be defective, as under that section the BOT could set up an inquiry if the company was currently being conducted with intent to defraud and the BOT had no power if the activity had ceased.

25 "Public interest" also covers instances where it appears to the BOT that proceedings ought to be brought by a company for the recovery of damages in respect of fraud, misfeasance or other misconduct in connection with the promotion, formation of a company, or the management of its affairs or for the recovery of any property of the company which had been misapplied or wrongfully retained. In such a case the BOT itself can bring the proceedings in the name of the company (see Selangor United Rubber Plantations Ltd, 2AER 1255(1967)).

26 S.210, CA 1948, enables the BOT to petition if it appears from shareholders' complaints or from an inspection that the affairs of a company are being conducted in a manner oppressive to some part of the members. If the Court is satisfied it can wind up on the "just and equitable" ground or make such other order as it thinks fit.

27 In conclusion it will be observed that the power to petition to wind up is one only of the measures which can be taken by the BOT to seek relief from the Court in circumstances ranging from outright fraud through misfeasance, protection of policy holders, investors,

depositors et al, oppression and finally tidying up where perhaps a liquidator has left things undone even though the company may have been dissolved, and no longer exists. It is in this context that the Department of Trade's petitions should be considered.

16 July 1980

3(3 4)

INSOLVENCY LAW REVIEW COMMITTEE

FORTYFIFTH MEETING

Meeting will be held on the 3rd Floor of Midland Bank Head Office, Poultry Building, on Wednesday 20 August 1980 at 10.00 am.

A G E N D A

1 Minutes of the meeting on 16 July.

2 Matters arising.

3 Secretary's report.

4 Group Trading (ILRC's 119,128,131 and brief) ✓

5 The Family Dwelling (ILRC 129). ✓

6 Department's power to institute winding up proceedings (ILRC 130). ✓

7 Receiverships (ILRC 73 paras 94-108).

8 Insolvency Courts (ILRC 132).

9 Any other business.

10 Agenda for the next meeting (25 September).

T H TRAYLOR
Secretary
4.8.80

7(12)

INSOLVENCY LAW REVIEW COMMITTEE

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T H TRAYLOR
Secretary
4.8.80

ILRC 45TH MEETING

Brief for Item 2

Matters arising from 44th Meeting

With reference to para 32 of the minutes. John Hunter wishes to question the view that the problem about fines raised in C37 (Justices' Clerks' Society) and C48 (Clerk to the Justices, Portsmouth) is not one with which we should concern ourselves. These are well argued submissions which appear to throw up an area of confusion about the present law and a possible conflict between the Bankruptcy Act and s.27 of the Justices of the Peace Act 1949. John adds:

> "What the law should be appears to me to involve a question of insolvency policy which is, I would submit with respect, very much our concern. I have neither experience nor expertise in this field. As David has kindly offered to look into it, might I suggest a reference to WG1".

2 With reference to para 11. A letter was subsequently received from the Department. Copies of Mr PAR Brown's letter dated 21 July and of the Chairman's provisional reply dated 23 July are attached. Members will note that there are two additional proposals - both relating to disqualification from acting as a director - for inclusion in the new Companies Bill.

Matters arising from 43rd Meeting

3 With reference to para 7 of the minutes, copies of the Secretary of State's reply to the Committee's letter of 13 June were circulated on 5 August. In his letter the Secretary of State said he would shortly be asking officials to write seeking the Committee's early views on some of the more pressing aspects of law reform needing to be resolved.

4 Attached is a minute dated 7 August which has been received from the Department together with a copy of my reply.

ILRC - 45TH MEETING

Brief for Item 5 - The Family Dwelling

1 Comments on ILRC 129 have been received from Duncan and Peter Avis, and are attached. (P. Avis' letter attached to brief for Item 4).

2 Members may recall that preliminary discussions of this subject took place at the 30th meeting (see paras 23-25 of the minutes) and the 31st meeting (paras 10 to 27).

3 During the ensuing twelve months a number of papers have been considered by the Working Group, some of which were prepared by members who were not in the Group. A number of these are attached and having read them, members may feel that the WG has reached a fairly reasonable compromise.

The Family Dwelling

Notes by G.A.W.

To the practitioner the temptation to accept proposals which relieve him of a large part of the odium of throwing the Debtor's family out of their home is obviously attractive. However, I fear that agreement to the proposals now made has very little to do with the social justice on which they claim to be based.

Without repeating or even totally adopting the points already put forward by Duncan McNab, I think that we can start from the premise put forward early on by Chris Taylor that in the majority of cases the matrimonial home does not create much of a problem because somehow the debtor finds a relative or friend to take over his interest and then somehow or other makes his peace with the Building Society or Bank Mortgagee for the service of the secured debt.

We are frequently reminded that the equity in the matrimonial home forms the greatest single asset of the average Bankrupt and therefore we must look not only at the social justice of protecting the matrimonial home but also as to whether it is socially just that the Creditors who have relied on this asset should be deprived of its benefit for an appreciable time.

The debtor who has at one time in his life had reasonable resources at his disposal will at that time have had the choice of spending them either on a better house and thus engaging in what is these days called conspicuous consumption, or else in building up savings in one form or another. Is it really just that if his life style has been more frugal he is deprived of those savings but if his family has already in the past participated in what with hindsight could be regarded as a life style which he could not afford, they shall then for that very reason be permitted to continue it.

contd...

Meanwhile, the Creditors are deprived of the main asset to which they could have looked except, of course, where one of them has taken the precaution of getting a Charge in which case none of our recommendations would apply anyhow. The incentive to do just this would therefore also become greater.

I am not averse to a reasonable breathing space being allowed for negotiations but I would not put this at more than six months and I am already quoted in WG2/3 at Paragraph 17 as pointing out that the Trustee should be entitled to some evidence that serious efforts were being made. If the debtor has not succeeded in finding a solution at the end of the six months proceedings will then in any case have to be taken by the Trustee who would obviously not be allowed simply to throw the debtor and his family out physically. This in itself will in practice give some more time but I can really see no justification for accepting a proposal that would take the whole procedure much over a year because in my opinion that would throw the balance of social justice too far in the wrong direction. If the largest single asset is protected to what I would regard as an excessive extent the incentive to meet one's financial obligations would be that much reduced.

18.8.80.

ILRC - 45TH MEETING

Brief for Item 7 - Receiverships

The 'brief' which was prepared for item 10 of the last meeting is re-issued herewith. Also attached is page 1 of a letter dated 6 August from Peter Avis commenting on paras 2, 6, 9 and 14.

INSOLVENCY LAW REVIEW COMMITTEE

45th.

FORTYFOURTH MEETING - BRIEF FOR ITEM 7

RECEIVERSHIPS (ILRC 73)

1 During the latter part of 1978 the Committee considered most of the proposals which had been put forward by the Accountants' Panel. It was decided to defer consideration of the final paragraphs (94-108) to a later date (see minutes of 29 Mtg, para 43). This brief deals with the proposals put forward in the remaining paragraphs.

Disposal of interest in property (paras 94,95)

2 The Panel point to the useful provisions in s.21 of the Scots Act, which enable a receiver to dispose of property in circumstances where he is unable to obtain the co-operation of a creditor having a security interest in that property. In such circumstances, the receiver is empowered to apply to the Court for authority to sell or dispose of the property free of encumbrance.

Audit of receiver's accounts (paras 96,97)

3 The Committee's provisional view was that the Department should have discretionary power to audit a receiver's accounts. Secondly, that such accounts should be deemed to satisfy the liability of a company to file accounts (4th Mtg, para 36).

4 The Panel see no practical difficulties but in view of the cost involved and the stricter rules governing who may be a receiver, they suggest that the Department's discretion be limited to cases where the receivership is not followed by liquidation nor survival of the company.

5 NOTE At the 43rd Meeting when dealing with "Committees of Creditors" it was decided that a committee should have power to require the Department to audit accounts.

6. The Panel also suggest that the Committee should consider who should bear the cost of a receivership audit.

Remuneration of receivers (paras 98-101)

7 The Panel indicate doubts as to which provisions apply to a receiver appointed under a floating charge. They recommend adoption of s.18 of the Scots Act with the addition of some clauses based on the Solicitors' Remuneration Order.

Cessation of Receivership (paras 102, 103)

8 The Panel approve the Committee's provisional view that prior to ceasing to act, a receiver should send to all creditors a summary of his receipts and payments for the whole period of his administration, together with his comments. However, they feel that there should be provision for him to apply to the Court for leave to dispense with this duty in whole or in part.

9 The Panel draw attention to s.22 of the Scots Act under which a receiver may be removed only by the Court. They think this is a sensible provision.

10 The Panel also draw attention to an anomaly between England and Scotland regarding the re-floating of a floating charge. They prefer the Scottish system under which, if the receiver is removed or ceases to act and no other receiver is appointed within one month, the floating charge ceases to attach to the property and re-floats.

Liquidation (paras 104,105)

11 The Panel agree with the Committee that a receiver should be required to satisfy a liquidator regarding his dealing with the company's assets. They suggest this be done by re-introducing Clause 96 of the 1973 Companies Bill amended so as to enable either the OR or the liquidator to require any person to provide information or to produce books and papers concerning the company's affairs.

12 The Committee were provisionally of the view that although a receiver's experience would be of benefit in an ensuing liquidation he should rarely be other than a joint liquidator. He should not be sole liquidator in a voluntary liquidation without the sanction of the Court. (4th Mtg, para 39). The Panel agree and think that these provisions should apply to all types of liquidations.

Miscellaneous

13 The Panel say that if receivership law is to be codified in a manner similar to the Scots Act it will be necessary to include clauses dealing with:

(a) an express power to appoint,

(b) the circumstances justifying appointment, and

(c) the right to appoint within a certain period after a demand for payment, without payment having been made.

14 The Panel feel that the period in para 13(c) above should be limited to 24 hours rather than 21 days as provided by s.12(1)(a) of the Scots Act in order to prevent any serious dissipation or deterioration of the assets.

Trevor Traylor

T H TRAYLOR
Secretary
1 July 1980

Midland Bank Limited

Poultry London EC2P 2BX

P G H Avis
Assistant General Manager

Private and Confidential

Cmdr. T.H. Traylor, M.B.E., C.de G.RN,
Department of Trade,
Insolvency Service,
2-14 Bunhill Row,
London EC1Y 8LL.

6th August 1980

Dear Tim,

I have a couple of thoughts on Item No. 7 of the Agenda for the 45th Meeting as follows:-

Receiverships (ILRC 73) Brief for Item 10 (of 46th Meeting).

Para: 2. I have no objections to the suggestion of the adaptation of the provisions in Section 21 of the Scots Act, but I feel it might be necessary to write in certain precautions to protect the rights of a mortgagee. Furthermore, if in the event of a receiver obtaining permission of the Court to a sale he, the receiver, must account to the mortgagee in the proper order of priority to the extent of the mortgagee's interest in the property.

Para: 6. In a majority of cases I consider that the Department should pay for the cost of a receivership audit, but if in the event the accounts so audited were found wanting in any degree then the Department ought to be able to recover the whole or part of the cost from the receiver, depending upon the outcome.

Para: 9. I agree that Section 22 of the Scots Act would be a sensible provision providing the debenture holder retains the right to remove the receiver should this action become necessary.

Para: 14. I am inclined to the view that it would not always be practicable to limit the period under 13(c) to 24 hours. There could be problems, particularly with the communication system as it is at the moment, and I would prefer to see the limit extended to 7 days, on the understanding, of course, that the debenture holder can appoint his receiver after demand for payment, and without payment having been made, within a matter of hours if he so wishes.

[redacted]

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Registered in England (No. 14259)
Registered Office Poultry London EC2P 2BX

ILRC - 45TH MEETING

Brief for Item 7 - Receiverships

The 'brief' which was prepared for item 10 of the last meeting is re-issued herewith. Also attached is page 1 of a letter dated 6 August from Peter Avis commenting on paras 2, 6, 9 and 14.

ILRC - 45TH MEETING

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INSOLVENCY LAW REVIEW COMMITTEE

45th.

FORTYFOURTH MEETING - BRIEF FOR ITEM 7

RECEIVERSHIPS (ILRC 73)

1 During the latter part of 1978 the Committee considered most of the proposals which had been put forward by the Accountants' Panel. It was decided to defer consideration of the final paragraphs (94-108) to a later date (see minutes of 29 Mtg, para 43). This brief deals with the proposals put forward in the remaining paragraphs.

Disposal of interest in property (paras 94,95)

2 The Panel point to the useful provisions in s.21 of the Scots Act, which enable a receiver to dispose of property in circumstances where he is unable to obtain the co-operation of a creditor having a security interest in that property. In such circumstances, the receiver is empowered to apply to the Court for authority to sell or dispose of the property free of encumbrance.

Audit of receiver's accounts (paras 96,97)

3 The Committee's provisional view was that the Department should have discretionary power to audit a receiver's accounts. Secondly, that such accounts should be deemed to satisfy the liability of a company to file accounts (4th Mtg, para 36).

4 The Panel see no practical difficulties but in view of the cost involved and the stricter rules governing who may be a receiver, they suggest that the Department's discretion be limited to cases where the receivership is not followed by liquidation nor survival of the company.

5 NOTE At the 43rd Meeting when dealing with "Committees of Creditors" it was decided that a committee should have power to require the Department to audit accounts.

6. The Panel also suggest that the Committee should consider who should bear the cost of a receivership audit.

Remuneration of receivers (paras 98-101)

7 The Panel indicate doubts as to which provisions apply to a receiver appointed under a floating charge. They recommend adoption of s.18 of the Scots Act with the addition of some clauses based on the Solicitors' Remuneration Order.

Cessation of Receivership (paras 102, 103)

8 The Panel approve the Committee's provisional view that prior to ceasing to act, a receiver should send to all creditors a summary of his receipts and payments for the whole period of his administration, together with his comments. However, they feel that there should be provision for him to apply to the Court for leave to dispense with this duty in whole or in part.

9 The Panel draw attention to s.22 of the Scots Act under which a receiver may be removed only by the Court. They think this is a sensible provision.

10 The Panel also draw attention to an anomaly between England and Scotland regarding the re-floating of a floating charge. They prefer the Scottish system under which, if the receiver is removed or ceases to act and no other receiver is appointed within one month, the floating charge ceases to attach to the property and re-floats.

Liquidation (paras 104,105)

11 The Panel agree with the Committee that a receiver should be required to satisfy a liquidator regarding his dealing with the company's assets. They suggest this be done by re-introducing Clause 96 of the 1973 Companies Bill amended so as to enable either the OR or the liquidator to require any person to provide information or to produce books and papers concerning the company's affairs.

12 The Committee were provisionally of the view that although a receiver's experience would be of benefit in an ensuing liquidation he should rarely be other than a joint liquidator. He should not be sole liquidator in a voluntary liquidation without the sanction of the Court. (4th Mtg, para 39). The Panel agree and think that these provisions should apply to all types of liquidations.

Miscellaneous

13 The Panel say that if receivership law is to be codified in a manner similar to the Scots Act it will be necessary to include clauses dealing with:

(a) an express power to appoint,

(b) the circumstances justifying appointment, and

(c) the right to appoint within a certain period after a demand for payment, without payment having been made.

14 The Panel feel that the period in para 13(c) above should be limited to 24 hours rather than 21 days as provided by s.12(1)(a) of the Scots Act in order to prevent any serious dissipation or deterioration of the assets.

Trevor Traylor

T H TRAYLOR
Secretary
1 July 1980

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6th August 1980

Dear Trevor,

I have a couple of thoughts on Item No. 7 of the Agenda for the 45th Meeting as follows:-

Receiverships (ILRC 73) Brief for Item 10 (of 46th Meeting).

Para: 2. I have no objections to the suggestion of the adaptation of the provisions in Section 21 of the Scots Act, but I feel it might be necessary to write in certain precautions to protect the rights of a mortgagee. Furthermore, if in the event of a receiver obtaining permission of the Court to a sale he, the receiver, must account to the mortgagee in the proper order of priority to the extent of the mortgagee's interest in the property.

Para: 6. In a majority of cases I consider that the Department should pay for the cost of a receivership audit, but if in the event the accounts so audited were found wanting in any degree then the Department ought to be able to recover the whole or part of the cost from the receiver, depending upon the outcome.

Para: 9. I agree that Section 22 of the Scots Act would be a sensible provision providing the debenture holder retains the right to remove the receiver should this action become necessary.

Para: 14. I am inclined to the view that it would not always be practicable to limit the period under 13(c) to 24 hours. There could be problems, particularly with the communication system as it is at the moment, and I would prefer to see the limit extended to 7 days, on the understanding, of course, that the debenture holder can appoint his receiver after demand for payment, and without payment having been made, within a matter of hours if he so wishes.

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INSOLVENCY LAW REVIEW

Minutes of the Fortyfifth Meeting of the Review Committee on 20 August 1980

Present:	M V S	Hunter	(in the Chair)
	P G H	Avis	
	J S	Copp	
	J M	Hunter	
	D	McNab	
	P J	Millett	
	T R	Penny	
	C A	Taylor	
	E I	Walker-Arnott	
	T H	Traylor	(Secretary)
	E L	Reeves	(Assistant Secretary)
In attendance:	J R	Endersby	
	D	Graham	
	R B	Jack	
	G A	Weiss	

1 The Committee met at 10.00 am. The minutes of the fortyfourth meeting held on 16 July were agreed and signed.

MATTERS ARISING

2 With regard to para 32 of the minutes of the fortyfourth meeting, the Secretary said that Mr John Hunter's views had been circulated. He had pointed to the evidence from the Justices' Clerks' Society (C37) and the Clerk to the Justices, Portsmouth (C48). It was agreed that something needed to be said about fines and Mr Graham undertook to produce a note.

3 The Secretary, referring to para 11 of the minutes, said that he had now circulated a letter from Mr P A R Brown (dated 21 July 1980) and the Chairman's interim reply. In addition to the s.332(3) point already considered, two further points had been put relating to s.188 for possible inclusion in the next Companies Bill. Mr Muir Hunter said that the two additional points appeared to be uncontroversial; it was agreed that they were acceptable although it was thought that they only marginally related to insolvency and therefore, were not strictly a matter for the committee. The committee did not feel able to propose any additional points for inclusion in the Bill.

4 It was noted that the Chairman had suggested a further matter; the point was that the Department did not act quickly enough and what was proposed was that disqualification should be automatic with the onus shifted onto the director to persuade the Court to lift it - if it was to be automatic it should be after three insolvencies instead of two. The Committee however saw problems, particularly with multiple insolvencies, and it was suggested that this needed further thought and was a matter for the final report.

5 The Secretary was asked to pass the Committee's views to the Chairman so that they might be communicated to Mr Brown.

6 Attention was directed to the request from the Department on 7 August, which apparently followed from the Committee's letter to the Secretary of State on 13 June and his reply of 23 July; copies of the correspondence had been circulated. It was suggested that on Acts of Bankruptcy, the Committee should say that they would be recommending the substitution of an entirely new initiation procedure coupled with proposals on a number of other matters which could not be dealt with in isolation. Similar remarks applied to the other points raised by the Department. A number of members voiced deep concern at the time and additional work which would be involved in dealing with such requests. Members felt that it could seriously delay the preparation of the Final Report and that it was imperative that this should be completed as soon as possible; therefore no additional work should be taken on which might impede its preparation.

7 It was agreed that subject to the Chairman's view, the Committee should reply that their views on Acts of Bankruptcy had already been indicated and that all other matters were being subjected to detailed examination and it was not possible at this stage to communicate any firm conclusions.

SECRETARY'S REPORT

8 The Secretary said that apologies for absence had been received from Sir Kenneth Cork, Mr Drain and Mr Goldman.

9 Oral evidence hearings had been fixed for the mornings of 8 September (CLCB) and 15 September (CCAB); these would be at Guildhall and more detailed information would be circulated as soon as possible. The Secretary suggested that members might assemble at 10.00 am for a preliminary meeting (as before) that oral evidence should start at 10.30 and be completed by 12.45. No arrangements would be made for lunch.

10 The CLCB had indicated that they had nothing to add to their written evidence. The Committee thought they might be questioned on the Committee's views on the floating charge and the "Goldman" levy, the widening of the responsibilities of the receiver, the proposal for a receiver's committee, the Administrator, preference for wages account, the position of banks under s.227 (Grays Inn Building Co.), the "washing" of overdrafts, group trading, cross guarantees, the family dwelling, and moneys in transit when a bank collapsed. The CCAB could be asked much the same, together with the question of the lien taken on a company's records, the reaction of the average practitioner to the Department's proposals in the Green Paper, the likely fee that a trustee would require under those proposals, and the handling and investment of funds.

11 The Secretary said that the Law Society and the Senate of the Inns of Court and the Bar could see the Committee in October. He reminded the Committee that they had also expressed the wish to see the revenue departments and Department of Employment (separately) and the Department of Trade. It was thought that the lawyers and the Department of Trade would each require a half day and the other departments could be seen on one day. The Chairman had indicated that he had 21 and 22 October and 10 and 12 November available. The Secretary was instructed to make the necessary arrangements.

12 Other meetings fixed for September were: Working Group 2 on 4 September, the main Committee on 25 September (this would be at Guildhall House) and Working Group 1 on 29 September.

13 Papers circulated since the last meeting had been ILRC 129-132, further written submissions (C203-216), the letter from the Secretary of State and the Chairman's reply and briefs and comments from members on items on the agenda. Placed before the Committee were a letter from Mr Goldman, a note by Mr Weiss on the Family Dwelling and extracts from "British Business" on the Green Paper and Insolvencies in England and Wales: Second quarter.

14 The Secretary circulated a draft letter (agreed with the Chairman which it was proposed to send to consultees who had submitted evidence on bankruptcy. This was agreed with the addition to the final paragraph

15 It was agreed that discussion of the OR's Service should be deferred until the Working Groups had reported. Mr Penny said that representations had been made to him from time to time that there were many tasks which were wasteful of the OR's time and he thought the IPCS might have referred to this also, either in their written or in their oral evidence. It was agreed that they should be invited to give an amplification of this matter.

GROUP TRADING

16 The Committee had before it ILRC 119, 128, 131, a brief from the Secretary on the Accountants' Panel and Legal Panel views and on the New Zealand proposals, comments from Mr Avis, Mr Copp, Mr McNab and Mr Walker-Arnott, comments from various members of the One Hundred Group of Chartered Accountants (C202, C204-214) and the views of the CBI (C216)

17 The Secretary suggested that the government would clearly do something about group trading and were expecting the Committee to put forward some proposals. The New Zealand proposals relied upon a definition of "related company" which was already in their main Companies Act; it was based on similar definitions in our own Taxes Management Act 1970.

18 Mr Copp suggested that the NZ proposals, where the Court was given discretion, dealt satisfactorily with all different possible circumstances without altering the limited liability concept. Mr Millett said that if something had to be done it could be either making the holding company liable for a subsidiary's debts or subordinating inter-company indebtedness to the claims of external creditors; the NZ clause makes the holding company liable.

19 Mr Muir Hunter pointed out that the majority of the consultees were for making the holding company liable. Limited liability itself had been encroached upon in relation to holding companies by consolidated accounts, and by fraudulent trading. To make a holding company liable for a wholly-owned subsidiary is an alteration in limited liability law and that would be a consequence of the power to control. Consultees refer to group representation. Even in the most respectable groups there were various group activities such as transfer pricing which could be criticised.

20 Mr Millett said that the reasons usually put forward against change were that if the individual is able to limit his liability a corporate body should also be able to do so; that ordinary people do normally understand that a holding company is not liable; and that the raising of risk capital would be jeopardised.

21 Mr Copp pointed out that there are many other sorts of debts than trading debts. He was against a blanket direction because of the difficulties which could not be foreseen. He favoured something on the lines of New Zealand, with the ability to apply to the Court for a declaration that a creditor has been misled into relying on a holding company. The Court would have discretion to make the parent pay but would need guidelines. This approach would enable subsidiaries which were not wholly-owned to be dealt with.

22 It was recognised that overseas companies were a special case.

23 Mr Avis preferred the Legal Panel approach but thought that there were a lot of useful things in the final paras of Accountants' Panel paper which could be used for writing in the detail.

24 Mr Taylor was for either the New Zealand solution or the Accountants' Panel solution.

25 Mr Weiss said that he stood by what the Accountants' Panel had proposed.

26 Mr Walker-Arnott accepted that the matter could not be dropped, but pointed out that the Committee were not reforming company law. The attraction about the NZ approach was that it started when a company was being wound-up. The evidence was that people are aggrieved if they had relied on a group and had been misled or had had misrepresentations made to them. Disclosure could be made clearer (about guarantees and subordination); if the company says that it is part of a group it could be required to state that there is no legal support arrangement. Combining what you could or should say on letterheads, accounts, etc, with the just and equitable remedy would be sensible. Part of the just and equitable remedy would be what representations had been made and what disclosure there had been. He was bothered however about vagueness in the NZ clause.

27 Mr Penny said that there was such a wide range on companies that the just and equitable remedy was the only way - the Court should be given discretion.

28 Mr McNab thought that this would add to the work of the Courts. He agreed with the Legal Panel. Mr Graham took the same view.

29 Mr Jack said he supported Mr Walker-Arnott. There was undesirable uncertainty in leaving things to the Court. Companies have a duty to so organise their affairs that they minimise their liability.

30 Mr Millett ran through the possibilities accepting that something had to be done. The law could be left as it is, but the major companies pressing for this insisted that they supported their own subsidiaries, so they should not complain if it was made the law. He was not persuaded of any difference between the individual and the corporate shareholder on that the creditor ought to know with whom he is dealing - even if he is not misled, the ordinary man expects the holding company to support its subsidiary. He saw no real danger of risk capital not being available. He totally disapproved of leaving matters to the discretion of the Court - the judges would be as divided as were the Committee. This left two choices - either making it universal as the Legal Panel suggested, or confining it to the case where the creditor has been misled.

31 Mr Muir Hunter summed up by saying that three bodies of opinion appeared to have emerged - those in favour of the Legal Panel, those wishing the Court to have discretion and those against anything except where there had been express misrepresentation.

32 Mr Walker-Arnott pointed out that the Court had discretion in the case of s.332 to say liabilities should be visited on any person party to fraudulent trading in such amounts as it may decide; that was a lifting of liability in certain circumstances. An additional area where liability could be lifted could be demarked clearly in respect of misrepresentation.

33 It was thought that the paper now promised by the CBI (in C216) might be helpful.

34 It was agreed that something should be done and what was finally put forward must reflect the insolvency situation. The Committee were split almost equally for and against the Legal Panel proposal and it was agreed that the chapter should set out the grievances and the opposing views. Mr Walker-Arnott undertook to produce the section against a major change but in favour of a small change, and Mr Millett promised to produce one setting out the opposite view.

35 On the question of deferring inter-company indebtedness, it was noted that this could be regarded either as complementary or an alternative. Mr Millett pointed out that in the USA if such indebtedness is in the nature of longterm capital it is deferred, but something had to be said in the fraudulent preference chapter. If the parent company is to be liable, fraudulent preference provisions were not needed for the group - it all depended on what decisions were made. Mr Walker-Arnott pointed out that the Legal Panel were against deferment. The Committee were asked for their views - including those who wished to see the universal Legal Panel idea imposed, - the majority were against deferment.

THE FAMILY DWELLING

36 The Committee had before it ILRC 129 and comments by Mr Avis, Mr Goldman, Mr McNab, Mr Penny and Mr Weiss.

37 Mr Copp said that the paper was an accepted compromise by members of the Working Group. He added that para 18 was not exhaustive but merely covered things which might be overlooked.

38 Mr Taylor said that all members of the Group had agreed that property of a bankrupt should vest but they realised also that there was a social duty towards the family.

39 Mr McNab accepted that some help might have to be given to the family of a bankrupt but this should not be at the expense of the creditors. It should apply only for a very limited period. He was against a debtor's children being allowed to go to private schools unless it could be proved that someone else was paying.

40 Mr Weiss agreed that there should be a fairly short overriding time limit, and while accepting that the interests of the family must be taken into account Mr Penny could not go beyond that. The present law was fair and there should be a time limit.

41 Mr Copp pointed out that para 6 said that it would be wrong to allow the debtor and his family to live for an extended period in a house which provided an over-lavish standard of life. It also envisaged a delay and not a cancellation of creditors' rights. He also drew attention to paragraph 9.

42 Mr Millett accepted that the paper proposed a substantial shift against creditors. It was however sufficiently mild for him to accept it. He had a reservation that it might encourage a debtor to go bankrupt to avail himself of the protection.

43 There was discussion about the use of the word "paramount" in para 9. Mr Copp pointed out that the Court was merely being given the greatest possible discretion to take all the circumstances into consideration. Emphasis should be placed on the earning capacity of the debtor and he felt sure that in many cases money was being lost to the creditors by requiring the debtor to switch houses. He stressed that additional points could be added to para 18. By saying "paramount" it was meant that the Court should consider the children in the short term; in the long term it would be the creditors. It was then agreed that the word "paramount" should be amended to "immediate".

44 Mr Muir Hunter said that the idea of the paper was not revolutionary in the light of the recent House of Lords decision. He would like to see the law made clearer and more predictable.

45 Mr Taylor thought something should be said about the creditors' interests and the Secretary said that this had been taken for granted in the final paragraphs and would be spelt out in the chapter of the report.

46 Mr Muir Hunter suggested that para 18 might begin "One would expect that a properly instructed Court would take into consideration some such matters as the following".

47 Mr Penny expanded his views. It had to be made clear that a wealthy man could not be allowed to continue indefinitely when all he needs is enough to earn his living and maintain his family in a limited state. If it was made too easy, all debtors would produce sick wives. The family home was often the only worthwhile realisable asset and if this was delayed too long there would be nothing for the creditors; in his view the Holliday decision was wrong. If a possession order is made, a council house becomes available; this happens all the time with husbands who do not pay the rent. There must be a time limit and the limited discretion should be for no more than 12 months. He was against including dependant parents.

48 Mr Muir Hunter accepted that different social considerations applied in respect of dependant parents. Mr Millett pointed out that if because dependant parents were involved, the family was not evicted, the position would only get worse in time. Mr Copp said that it had only been intended to give a breathing space. Put to the Committee, the majority were for leaving dependant parents in, with the proviso by Mr Avis that they should have been in occupation for a minimum time - say one year.

49 Mr John Hunter was not keen on an absolute time limit. The trust for sale cannot have a time limit.

50 Mr Avis thought that the judge's discretion would be to give a time limit. There might be a creditor who was suffering more than the debtor and this would be taken into account.

51 Mr McNab preferred a definite time limit with the Court having power to extend it.

52 It was agreed that common law marriages and stable unions would have to be included.

53 It was also agreed that debtors should not be encouraged to go bankrupt to preserve their position and the provisions would need to be extended outside bankruptcy into enforcement (ie where there was only one creditor).

54 The matter was referred to the Drafting Sub-committee to prepare a draft chapter for the Final Report.

PETITIONS TO WIND UP COMPANIES BROUGHT BY THE DEPARTMENT OF TRADE

55 The Committee had before it ILRC 130 and a note by the Secretary.

56 It was noted that Clause 70 of the 1973 Bill had now been enacted as s.75 (CA 1980), replacing s.210 (CA 1948).

57 The Secretary pointed out that another clause in the 1973 Bill had not been enacted (Clause 85). This had been put forward by the Department to extend the grounds under which the Secretary of State could petition, in view of difficulties which had been met. An explanation of this clause, which would also amend s.35 (CA 1967), was as follows:-

> "This Section gives the Secretary of State power to petition the Court for a company to be wound up, if it appears to him that it is expedient in the public interest for that company to be wound up. In deciding whether or not to present a petition, the Secretary of State is limited to considering inspectors' reports or information obtained under s.109 of the 1967 Act or s.18 or 19 of the Protection of Depositors Act 1963. This limitation has sometimes proved embarassing in cases where the information which has led the Department to the view that a company should be wound up has come from other sources. It is, therefore, proposed to remove this limitation and thus to enable the Secretary of State to present a petition in all circumstances in which it appears to him expedient in the public interest for a company to be wound up".

58 Mr Millett doubted whether this came within the Committee's remit but it would have to be pointed out that if the Secretary of State's petition succeeds a full winding-up order would follow and the procedures would have to go on as now.

59 It was agreed that reference should be made to the clause and that it had the Committee's support. A para would be included in the initiation section saying that the Secretary of State also has power in the public interest to apply for winding-up, one of the possible grounds being insolvency. The matter was referred to the Drafting Sub-committee.

ANY OTHER BUSINESS

60 Mr Penny referred to his paper on Insolvency Courts (ILRC 132) and asked for members' comments, to be sent in before the next meeting.

NEXT MEETING

61 It was agreed that the Committee would meet next at 10.00 am on Thursday, 25 September.