165-5

ILRC - 48TH MEETING

Additional Brief for Item 6 (Administrator)

I enclose a further note from Edward Walker-Arnott.

E L Reeves
E. L. REEVES
17.11.80

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14th November, 1980.

E. Reeve, Esq.,
The Insolvency Law Review Committee,
Room 406A,
Department of Trade,
Gavrelle House,
2/14 Bunhill Row,
London, EC1Y 8LL.

Dear Eric,

A further point has occurred to me on the draft chapter dealing with the Administrator and as I will otherwise be debarred from raising it at next Thursday's meeting, I hasten to put it in writing.

It could substantially defeat the aims and objects we cherish for the Administrator if, after he becomes, under any new law, a familiar animal, the practice develops of parties writing into contracts with companies a penalty, forfeiture or determination clause, triggered by an appointment of an Administrator, provisional or otherwise.

Certainly many contracts nowadays attempt to give the party contracting with a company special rights in the event of there being a Receiver appointed. Of course, a Receiver has his origin in private contracts and there is no reason why statute should interfere to limit other persons taking special rights or special precautions in the event of an appointment of a Receiver. But should not the new law state that any provision in a contract triggering rights of forfeiture, determination or penalty by reason of the appointment of an Administrator be void and unenforceable? We do not want the appointment of the Administrator to trigger the very disappearance of, or disruption to, the business which it is intended to prevent.

Yours sincerely,

Edward

EDWARD WALKER-ARNOTT

ILRC - 48th Mtg

Brief for Item 7 (Property of an Insolvent Debtor Divisible among his Creditors)

1 Chris, referring to para 34 of ILRC 146 which supports Blagden para 108, feels that "incurred" would be better expressed as "outstanding at the date of intervention". He also suggests a drafting change in the last line of para 48 where reference is to the spouse, and not solely to the wife.

2 Duncan says that he will be questioning and opposing certain recommendations in ILRC 146. He has not detailed these as the Chairman stated that members without secretarial assistance could intimate that points would be raised without detailing them.

3 Edward agrees with ILRC 146.

4 John Hunter thinks that para 50 should also have referred to ILRC 87. He has asked that extracts from ILRC 87, 90 and the minutes of the 35th meeting should be circulated for ease of reference - these are attached.

5. Comments by Ritchie are also attached

L Reeves

17 November 1980

EXTRACT FROM ILRC 87

Proposed Canadian Law

13 The Bankruptcy Bill (S-11) uses the term "gift" as opposed to "voluntary settlement". The Bill includes an interpretation section in which a gift is broadly defined to include all transfers made gratuitously or for a nominal consideration.

14 Such transfers may be set aside upon application by the trustee to the court if any of the following conditions apply:

(i) The transaction was at arm's length and the bankruptcy of the donor occurs within 6 months of the date of the transaction.

(ii) The transaction was not at arm's length and the bankruptcy of the donor occurs within 12 months.

(iii) At the time the gift was made the donor was insolvent or unable to pay his debts without recourse to the property regardless of when the gift was made.

15 According to the background papers to the Bill "not at arm's length" implies related persons. This seems to be a narrow definition, certainly not as wide as the Scottish "conjunct or confidant person".

16 It should be noted that (like the EEC draft Bankruptcy Convention - see below) the Canadian Bankruptcy Acts apply both to individuals and to bodies corporate.

17 With regard to a "transfer for a nominal consideration", it has been suggested that such a transfer would be caught by our s.42. However, the Committee may feel that this should be made clear.

EXTRACT FROM ILRC 90

Canada - Bankruptcy Bill, 1978

6 The draft Bill includes provisions on what are termed "reviewable transfers" and the explanatory notes indicate that these provisions will supercede the provincial laws on "fraudulent conveyances".

7 By definition "transfer" includes:

(a) a payment or a set-off;

(b) the incurring of an obligation;

(c) any mode, direct or indirect, of rendering services, and

(d) any mode, direct or indirect, of disposing of existing or future property, voluntarily or under pressure.

8 A transfer which was entered into between persons dealing at arm's length may be set aside either:-

(a) if it was entered into within 3 months of the bankruptcy petition and otherwise than in the normal course of affairs; or

(b) if it was entered into within 6 years of the petition with the intention of both parties to impede or defraud creditors.

9 Where persons are not dealing at arm's length there is no time limit.

10 If the Court finds that a transfer was made for conspicuously less than fair value and to the detriment of the bankrupt, it may give judgment to the trustee for the difference in value, reduce any claim the transferee may have by such amount, or declare the transfer void and restore the parties as far as possible, to their original position.

11 Proceedings to review transfers must be instituted within 3 years of the date of the bankruptcy.

EXTRACT FROM MINUTES OF 35th MEETING (21/11/79)

VOLUNTARY SETTLEMENTS

52 The Committee had before it ILRC 87 and considered the questions set out in para 28.

53 Para 28(a). There was some discussion as to whether there should be void and avoidable periods. Mr Copp was concerned about the family gift of money made when the donor was solvent and the relative had felt that he was entitled to spend and had in fact spent the money. He did not want a void period. Mr Muir Hunter felt that it was wrong for a gift to be taken away in circumstances which the donee could not have envisaged. There was an old provision which said that the gift should be voidable if the donee had reasonable grounds to think that the donor was insolvent. Perhaps the onus of proof of solvency should be extended to all dispositions and the absolute period removed. Other members felt that the two periods should be retained. It was finally agreed that there should be a 12 months void period and a 5 years avoidable period. Mr Muir Hunter suggested that the 12 months should be the last 12 months of the insolvent life. It was also agreed that this would be without prejudice to the law on fraudulent conveyances.

54 Para 28(b). The Committee decided that it could not get involved in the question of "arm's length transactions".

55 Para 28(c). It was agreed that para 28(a) should apply also to companies. The questions of charities and companies making gifts which were not for the furtherance of the companies' interests were discussed, but it was agreed that the provision should apply to everybody.

56 Para 28(d). The question of an offence would be dealt with along with other offences (see para 46 above).

57 Para 28(e). Mr Muir Hunter pointed out that dispositions for an undervalue were referred to in criminal bankruptcy. It was agreed that gifts should include things sold for a substantial undervalue and it should be left for the court to decide in specific cases.

58 Para 28(f). It was agreed that "wife" should be changed to "spouse"

59 Para 28(g). It was agreed that "gift" should be used in place of "voluntary settlement", but Mr Muir Hunter said that a problem might arise in connection with gifts of money.

60 Para 28(h). The problem of the matrimonial home was being dealt with by a working group.

61 Para 28(i). The Committee considered the exclusion of "customary gifts". It was agreed that the provisions should exclude gifts which were not abnormal in the circumstances (leaving it for the court to decide) and these should not exceed a sum to be specified.

Insolvency Law Review Committee.

Property of an insolvent debtor - 1 LRC 146.

Tools of trade, household goods etc:

The decision on exempt assets in insolvency impinges on exempt goods in execution by the Court. The limits in execution are £100 for wearing apparel and bedding and £150 for tools of trade. In bankruptcy these items are lumped together to give an overall exemption up to £250 in value. The values in all cases are the realisable values on a forced sale by auction. If the exemptions are to be more generous in insolvency for debtors there will be a tendency to choose insolvency rather than in lieu procedure with execution. I suggest that the exemptions remain the same.

The bailiffs and sheriffs officers responsible for executions are less sophisticated than trustees

his insolvency and it would not be practicable to require him to make decisions on welfare grounds and the earning capacity of the debtor is most relevant in ~~[illegible]~~ execution proceedings. Stated cash limits are therefore necessary, and have worked well in the past. Any granting of discretion would lead to endless applications to the Registrar.

The evidence of the Times of Court and Laws Society on 12th Nov. was firmly in favour of cash limits for exempt property and a discretion for the Trustee to allow the debtor to retain additional assets on welfare grounds or his order to maximise income. The Trustee's decisions are under the indirect control of the creditors and the Report's recommendation in paras 15 and 25 for the debtor to have the right to appeal to the Court would lead to endless litigation.

I support the recommendations of the Inns of Court and Law Society and suggest that the exemption limits in insolvency should be the same as in execution. I suggest there be an overall figure for tools of trade and household goods, as widely defined in the report, of £300, bearing in mind the method of valuation.

The Inns of Court and Law Society opposed any exemption at all for motor cars ~~but~~ and sought reluctantly to include them even when required for the debtors trade business or profession. I suggest that cars be not exempt at all but that the court have a discretion to allow retention where the vehicle is essential to maximise income.

I endorse the Report's suggestion that essential goods of unnecessarily high value should be sold and an

allowance made to the debtor out of the proceeds of sale for the purpose of purchasing substitutes.

The proposals ~~appear~~ generally are too generous to the debtor and if accepted will lead to a curtailment of consumer credit and a further deterioration in the effectiveness of enforcement procedures. The average judgment debtor is not a "hard-done-by" innocent but is ~~rather~~ on the contrary a selfish cheat who is determined to defeat his creditors if he can. The interests are always well protected by the Court by means of suspended committal orders.

T. A. Lewis

13th Nov '80.

ILRC - 48th Mtg

Brief for Item 8 (Administration of Estate of Person Dying Insolvent)

Comments by John Hunter, Ritchie and Edward are attached.

17 November 1980

ILRC's 148 and 149 - ADMINISTRATION IN BANKRUPTCY OF ESTATE OF DECEASED INSOLVENT

Comments by John M. Hunter

ILRC 148

Paragraph 1.

It should be understood that -

(a) Section 34 of the 1925 Act applies to the administration of an insolvent estate out of court as well as under a Chancery order of administration,

(b) under rules set out in Part 1 of the First Schedule of the 1925 Act the administration of an insolvent estate, whether in court or out of court, is in accordance with the bankruptcy rules. In AG v. Jackson 1932 AC 365 at 384 Lord Tomlin said (referring to the 1925 Act) "As the new Act applies the bankruptcy rules to the whole area of administration, i.e. both in court and out of court, there cannot be any case of an insolvent estate where the administration will be governed by any other rules."

Section 34(2) of the 1925 Act was repealed by the Administration of Estates Act 1971. The law regarding the right of a personal representative to retain or prefer is now contained in section 10 of that Act, a copy of which is attached.

Paragraph 4.

Priority is given to funeral and testamentary expenses under the rules in Part 1 of the First Schedule to the 1925 Act. Section 130(6) of the Bankruptcy Act 1914 is now superfluous and in fact the corresponding provision of the Bankruptcy Amendment Act (Northern Ireland) 1929 was repealed by the Administration of Estates Act (Northern Ireland) 1955 which introduced into Northern Ireland provisions identical to those of the 1925 Act in relation to insolvent estates.

/If

If the second sentence implies that the bankruptcy rules are exclusive to an administration under section 130 of the BA 1914 it is, with respect, inaccurate. See comment on paragraph 1.

I presume that the reference to the Bankruptcy Court's powers of investigation of the affairs of the deceased is to the power under section 25 of the BA1914 (applied by section 130) to summon persons for private examination. This is indeed a useful power and the corresponding Northern Ireland provision has recently been invoked in a controversial insolvent estate administration in bankruptcy in Northern Ireland. Unfortunately, the person the trustee most wants to examine is only amenable to the jurisdiction of a court in Heaven or Hades!

Paragraph 6.

The reference is to section 130 and not 13. I do not understand the comment of the IPA which suggests that an administrator of an insolvent estate is at liberty not to use the provisions of section 34 of the 1925 Act if so inclined. If they just mean that estates are being brought into the Bankruptcy Court which should be administered out of court, the statistics do not suggest that this is so to any material extent.

Paragraph 7.

It would appear from the memo. attached that the difficulty regarding fees may not in fact apply to the Public Trustee, but this would have to be checked. As regards Trust Corporations, I think whatever is necessary to enable proper fees to be charged should be done.

Re memo., at para.(b) - payment of debts in full before insolvency is ascertained - I find it difficult to see what further is required than already contained in section 10(2) of the 1971 Act referred to above.

/Paragraph 8.

Paragraph 8.

I think it is essential that the option of an insolvency administration under the Bankruptcy Court should remain available for cases where the assistance of the Court is required in investigation of the deceased's affairs and particularly where the trustee under a court administration might be able to recover property under our proposals relating to antecedent transactions.

Paragraphs 11 and 12.

I consider that such administration should be under a Liquidation of Assets Order. With no live debtor on whom to visit any disabilities of bankruptcy I see no advantage in a bankruptcy order. Presumably the personal representative would be discharged from the debts in the same way as we envisage for discharge of a debtor subject to a Liquidation of Assets Order.

I see no reason to make any special provision for after-acquired property as I do not think this can arise in the case of administration of a deceased's estate. We may, however, have to consider what is to be done with a reversionary interest existing at the date of death which falls in after the trustee has been discharged. This could arise also with a living debtor subject to a Liquidation of Assets Order and I do not think we have averted to it. With no "long-stop" of the O.R. as trustee after release of the trustee appointed, perhaps the Chancery Court could appoint a new trustee under section 41 of the Trustee Act, 1925, but I am not sure whether this would be regarded as a case where there is a subsisting trust. In any case it would be better for the Insolvency Act to make express provision for appointing a replacement trustee (who might of course be the previously released trustee if willing to be re-appointed) if required.

/Paragraphs 15 - 18

Paragraphs 15 - 18.

I agree with Blagden. We will of course want to relate these to our new proposals relating to antecedent transactions, all of which should be made applicable to an administration by the Court of the estate of a deceased insolvent.

Paragraphs 18 and 19.

I agree with Blagden. As our general proposals on insolvency, if accepted, will involve considerable changes in what is now Part II of the BA 1914, I doubt if we can usefully spell out the provisions which, from their nature, are not capable of being applied to the administration of a deceased debtor's estate. This can be left to the Department when giving instructions to the draftsman.

Paragraphs 20 and 21.

See note to paragraph 1 above. Section 10 of the 1971 Act appears to me to be adequate.

Paragraph 22.

The decision in Re Kitson must be correct. I would not be in favour of enabling a creditor whose debt is incurred, not by the deceased debtor but by his personal representative after his death, to be proved in the administration. A personal representative who carries on a business of the deceased is personally liable for any debts or liabilities incurred in the course of the business, whether or not the business is carried on under a power in the deceased's will. In the latter case, he has, however, a right of indemnity out of the assets which he is authorised to employ in the business.

/ILRC 149

The important suggestion that the trustee of the deceased debtor should have rights against property which passes by survivorship on the death of the debtor, limited to the deceased's beneficial interest, whilst superficially attractive, appears to me to present formidable problems in implementation. I will be interested to learn whether Peter Millett, in particular, shares this view.

When a debtor who holds property as a joint tenant is adjudicated bankrupt the vesting of his beneficial interest in the property in the trustee effects a severance of the joint tenancy and the trustee becomes entitled to his interest as an appropriate share of the whole, as a tenant in common with the other co-owners. In the case of a deceased insolvent, his estate passes to his personal representative on death and is only vested in the O.R. as trustee if and when an order is made under section 130 of the BA 1914. The interest under a joint tenancy ceases at the moment of the debtor's death, so there is nothing to pass to his p.r. or the O.R. One could not retrospectively sever the joint tenancy from the date of death without removing the essential feature of a joint tenancy - the right of the co-tenants to succeed to the deceased's interest automatically by survivorship. Perhaps one day the law will cease to allow such a right and that the only concurrent interest which will be permitted will be a tenancy in common. Such a proposal is clearly not for us.

If our new proposals relating to gifts are applied to an administration of a deceased insolvent's estate in bankruptcy, creditors will no longer be deprived of property passing by survivorship on the death of the debtor under a joint tenancy voluntarily created by the debtor within the vulnerable period.

7 November 1980.

(*b*) when required to do so by the court, exhibit on oath in the court a full inventory of the estate and when so required render an account of the administration of the estate to the court;

(*c*) when required to do so by the High Court, deliver up the grant of probate or administration to that court."

Retainer, preference and the payment of debts by personal representatives.

10.—(1) The right of retainer of a personal representative and his right to prefer creditors are hereby abolished.

(2) Nevertheless a personal representative—

(*a*) other than one mentioned in paragraph (*b*) below, who, in good faith and at a time when he has no reason to believe that the deceased's estate is insolvent, pays the debt of any person (including himself) who is a creditor of the estate; or

(*b*) to whom letters of administration had been granted solely by reason of his being a creditor and who, in good faith and at such a time pays the debt of another person who is a creditor of the estate;

shall not, if it subsequently appears that the estate is insolvent, be liable to account to a creditor of the same degree as the paid creditor for the sum so paid.

Miscellaneous and supplemental

Sealing of Commonwealth and Colonial grants.

1892 c. 6.

11.—(1) The following provisions of section 2 of the Colonial Probates Act 1892, that is to say—

(*a*) subsection (2)(*b*) (which makes it a condition precedent to sealing in the United Kingdom letters of administration granted in certain overseas countries and territories that a sufficient security has been given to cover property in the United Kingdom); and

(*b*) subsection (3) (power of the court in the United Kingdom to require that adequate security is given for the payment of debts due to creditors residing in the United Kingdom);

shall not apply to the sealing of letters of administration by the High Court in England and Wales under that section, and the following provisions of this section shall apply instead.

(2) A person to whom letters of administration have been granted in a country or territory to which the said Act of 1892 applies shall on their being sealed by the High Court in England and Wales under the said section 2 have the like duties with respect to the estate of the deceased which is situated in England and Wales and the debts of the deceased which fall to be paid there as are imposed by section 25(*a*) and (*b*) of the Administration of Estates Act 1925 on a person to whom a grant of administration has been made by that court.

1925 c. 23.

ILRC 148 - ADMINISTRATION ON BANKRUPTCY OF ESTATE OF PERSON DYING INSOLVENT

Further comments by John M. Hunter:

Paragraphs 18 & 19

1. Under section 9(i) BA 1914 the court has power to stay proceedings against the property or person of the debtor after presentation of a petition, and under section 7(i) no creditor may proceed against the property or person of the debtor in respect of a provable debt after the making of a receiving order.

2. There are no corresponding provisions in section 130 in relation to proceedings against a deceased debtor's estate. If a creditor commences or continues an action against the personal representative for recovery of a provable debt (not an administration action, which is provided for in section 130(3)) after the making of an order under section 130 there seems to be no procedure for having it stayed.

3. If an order for administration of an estate is made in the Chancery Division, Order 4, rule 5, of the Rules of the Supreme Court 1965 provides for the transfer to the group of Chancery judges in which the administration order was made of an action by or against the executors or administrators assigned to another Division or another group of Chancery judges. On the application for transfer the action may be stayed (Daniell's Chancery Practice, 8th edn. 1643/4). A corresponding procedure following the making of a receiving order is provided for in section 105(4) of BA 1914, but there is no such provision in section 130.

4. I hesitate to make any proposals in relation to English court practice, but perhaps Muir and Peter Millett, in particular, would say whether they think that provisions corresponding to sections 7(1), 9(1) and 104(4), substituting administration order for receiving order where appropriate, should be incorporated in section 130.

13 November 1980.

Administration of deceased insolvents' estates (ILRC's 148, 149)

(Comments by Ritchie Penny)

1 The changes we propose in relation to winding-up and bankruptcy must inevitably lead to correlated changes in the administration of deceased insolvents' estates. We have to consider first the harmonisation of such administrations with our new procedures so far as practical and secondly, the elimination of defects in the existing procedure to make administrations more effective and more just.

2 There are four major problems in relation to current procedures to which our attention has been drawn namely:-

(a) Administration under s.130 BA necessitates service of the petition on the personal representatives of the the deceased and if there are none the petition cannot proceed.

(b) The bankruptcy provisions for recovery of assets not in the name of the deceased at the date of death are not applicable and ss. 40,41 and 42 of the Bankruptcy Act are not available to a trustee. This means, inter alia, that challenging doubtful transactions and recovery of property held jointly is not possible.

(c) If personal representatives intermeddle in the estate whether appointed by a will or under a Court Grant, and find that the estate is insolvent, they have no way of recovering their expenses unless the creditors agree.

(d) A personal representative who pays money to a creditor to preserve the assets may find himself liable personally to pay all the creditors in full on the strength of a legal fiction known as "the Sufficiency of Assets Rule".

3 In relation to harmonisation, ILRC 148 raises a number of points and I suggest the following answers to them and to the above points (a) to (d) :-

(1) The proceedings under s.130 must be retained and improved by strengthening the powers of the trustee to include all the powers of the trustee in insolvency save insofar as they are inappropriate to a deceased's estate.

(2) A simplified procedure in insolvency should be developed so that proceedings under s.34, Administration of Estates Act, 1925 becomes unnecessary.

(3) Whoever is appointed trustee should be entitled to charge fees for work done.

(4) Although the original order would be made by the Court, a procedure equivalent to the Liquidation of Assets would enable the trustee to proceed unsupervised.

(5) Even if it may prove to be a very rare occurrence it should be possible for the Court to make an order equivalent to full bankruptcy so that the OR can be brought in to investigate if fraud is suspected.

(6) If (5) is accepted should there be a Protection Order to invoke the assistance of the OR in a preliminary investigation and report to the court? As the debtor is deceased I suggest that if the trustee is a "Specially Qualified Person" or a Trust Corporation there is no need for a PO. It can be left to the trustee, on whom the special duties to report to the court would be imposed as with trustees in other forms of personal insolvency, or the creditors to apply to the court for a full bankruptcy order.

(7) I cannot see the relevance of "after-acquired" assets when the debtor is deceased. Even an interest "in futuro" is nonetheless an interest and would vest in the trustee. If the trustee carried on the business, any profits earned would accrue to the estate. If profits or losses arose between the date of death and the making of the order they would be credited or debited to the estate. If there were profits or other income accruing during the period between death and the insolvency order they would be part of the estate, but if a capital asset which was not vested at the date of death accrued then it would seem it should not form part of the assets vested in the trustee. This is however open to discussion. What, for instance, would happen to a football pool win arising during this period?

(8) The peculiar and unjust right of a personal representative to retain funds to meet debts due to him personally should be withdrawn.

(9) Any bona fide acts done in the administration by any of the persons named in (11) below should be binding on the trustee, and any expenses incurred shall be a prior claim against the estate ranking ahead of all the other claims except the funeral expenses and the fees and expenses of the trustee.

(10) The debt supporting the petition should be any debt including a contingent or future debt which could have been proved in the deceased's insolvency had he survived and become insolvent on the date of his death.

(11) The court should have power to dispense with service, or order substituted service on the personal representative if the court is satisfied there is no such representative or he cannot otherwise be served. In this connection "personal representative" would include any of the following:-

(i) An executor named in the deceased's will but who has not proved.

(ii) An executor who has proved.

(iii) An administrator who has taken out Letters of Administration.

(iv) An executor "de son tort". This refers to anyone who intermeddles in an estate without the authority to do so. It includes a person who intends to seek Letters of Administration but has not yet done so, a person who incorrectly believes himself to be an executor under a will (eg. the will proved to have been revoked or was invalid ab initio) or a person who either out of self-interest or a desire to be helpful deals with any part of the estate because no-one else is doing so. Such a person becomes personally liable for the consequence of his actions and, as indicated above, can fall within the rule "Sufficiency of Assets".

(12) Any surplus in the estate after payment of creditors in full, including any interest we agree in the other procedures, can be dealt with by application to the court for directions. There is already a general power to do this under the Trustee Act 1925.

(13) Property held by the deceased at the date of death as a joint tenant (ie. survivor takes all) with another person is subject to a special form of contract. In bankruptcy the debtor's share can be claimed by the trustee severing the joint tenancy. But on death, it ceases to exist and the whole ownership of the parties in the property vests in the survivor. It would be wrong to change the contract just because one of the parties to it has died insolvent. If the other party had died first the whole interest would have vested in the estate. The legal position should therefore stand as it is unless the trustee can set aside the transaction creating it.

4 The procedure would be as set out in the following paragraphs:-

Application by a creditor

5 The application would be filed giving details of the debt of the deceased (so far as known), the grant of any probate or Letters of Administration, the name and address of any personal representative (as defined in (11)) and any enquiries made to trace a representative if an application for substituted service or dispensing with service is included. The application would be supported by affidavit if there were a request for dispensing with service or substituted service.

Application by a personal representative

6 There is no reason why the existing right of a personal representative to apply need be curtailed. His application should give details of the administration to date and a Summary Statement of Affairs showing why the estate appeared insolvent.

Service

7 The application would be served on any personal representative known to the court.

The Hearing

8 The hearing would be in Chambers and attended by the applicant and any personal representative or their legal representatives.

9 At the hearing, the court could make any of the following orders:-

(a) Liquidation of Assets providing that the applicant had nominated a suitable trustee and filed the trustee's consent to act.

(b) Full bankruptcy with or without a trustee.

(c) Dismiss the application.

10 If the original applicant did not proceed and another applicant had given notice that he wished to be substituted the court could make an order on the second applicant's request.

11 Grounds for dismissal would include:-

(a) A defect in procedure which would prejudice any party concerned and such prejudice could not be rectified by the grant of time or other concession.

(b) The estate was not insolvent.

(c) The application was premature and the estate was being completely administered by a personal representative.

(d) The debt was not proved.

12 The only ground for making a full bankruptcy order would be that a full investigation of the deceased's affairs was necessary in the public interest.

13 The trustee could include the Public Trustee or a Trust Corporation currently engaged in the administration of trusts and winding-up estates.

Effect of an Order

14 The order should vest the assets in the trustee and he should advertise for creditors and call a meeting. The creditors should be entitled to form a committee which would have the same powers and duties as a Creditors' Committee in Liquidation of Assets for an insolvent individual.

Priorities

15 The usual priorities should apply save that there should be three types of pre-preference in the following order. First, the fees and disbursements of the trustee; second, funeral expenses and third, the net bona fide disbursements of any personal representatives.

Discharge

16 I can see no reason for special provisions in insolvent administrations unless there is a surplus which is provided for in (12).

COMMENTS BY EDWARD WALKER-ARNOTT

ILRC 148

I agree that we should adopt the various Blagden proposals.

I agree that the alternative procedure to administration of an insolvent's estate under the Administration of Estates Act should be a Liquidation of Assets Order rather than bankruptcy - the absence of the debtor making it unlikely that enquiries will get at the full truth of the insolvency, and impossible to visit personal sanctions.

I am concerned about the two points made in the Midland Bank internal note appended to ILRC 148. Should the law not provide that an executor can charge a fee, notwithstanding that the estate proves to be insolvent after he has assumed office? And should not the law also provide that an executor who pays a debt in full at a time when he may reasonably conclude that the estate is solvent, is in no jeopardy should the estate prove subsequently to be insolvent?

INSOLVENCY LAW REVIEW COMMITTEE

FORTYEIGHTH MEETING

Meeting to be held in the Conference Room, 2-14 Bunhill Row, on Thursday, 20 November at 10.00 am.

A G E N D A

1 Minutes of the meeting held on 15 October.

2 Matters arising.

3 Secretary's report.

4 Powers and Duties of Liquidators (ILRC 140 and 145; report by Accountants' Panel and Written Evidence) *

5 Accountability of Receivers (ILRC 141-144; note by Secretary, reports by Legal Panel and Accountants' Panel and Written Evidence)*

6 Draft Chapter on The Administrator - to consider points raised by members which have not yet been resolved. *

7 Property of an Insolvent Debtor Divisible amongst his Creditors (ILRC 146-147; report by WG2 and Written Evidence)**

8 Administration of Estate of Person Dying Insolvent (ILRC 148-149; note by Secretary and Written Evidence). **

9 Compulsory Insolvency Procedures for Corporate Debtors - Harmonisation with ILRC 133.***

10 Any other business

11 Agenda for next meetings (17 December and 18 December).

* Circulated on 24 October.
** Circulated on 4 November.
*** Circulated on 11 November.

E L REEVES
Assistant Secretary
12 November 1980

ILRC 48TH MEETING

Brief for Item 2 - Matters Arising

Disqualification of Directors - Comments by Ritchie Penny

1 I think a number of matters must be resolved before a chapter on this subject can be prepared.

2 In the course of our discussions I for one was unconscious of the very relevant provisions of section 188 Companies Act. In para 10 (ii) of the minutes we have these in mind but I think we need to spell out carefully the amendments needed to the section and the reasons therefor. I especially draw attention to s.188(1)(b)(ii) which includes "any breach of his duty to the company". This is pretty wide but presumably needs to be extended to "duty to third parties".

3 In para 10 (iii) we mention "serious insolvency". Do we mean "Compulsory Winding-up" as now defined by us?

4 In para 10 (v) we say it shall be "unlawful". I presume we mean it shall be an offence. Section 188(6) could be used for this purpose, duly adapted to cover automatic disqualification. Alternatively, do we mean that a director so acting is not a director at all and anything he does is not the act of the company and cannot be the subject of a claim against the company? I accept he should have personal liability but this may not be worth much and third parties dealing innocently with him as a director might lose their claim against the company.

5 I believe there is already a register of disqualified directors and this may affect our views under para 9 of the minutes. If there is such a register we must decide whether to continue it, as section 188 will otherwise be at variance with our new law.

6 In para 10 (iv) we mention "act as a director". Section 188 is much wider and includes "management". Do we intend to adopt the wider provisions of this section? The same wording is used in section 9 of the Insolvency Act 1976.

7 Some definition has to be provided in para 10(iii) to guide the Court in the exercise of its discretion. The Court has to be satisfied that the man should be prevented from being involved in the management of a company because? his conduct as director of a company makes him unfit to be concerned in the management of a company (s.9(1)(6) Ins. Act 1976). Or are we to deal with it as in s.188 and simply provide that a director of a company in Compulsory Winding-up shall be liable to an order of disqualification if the Court sees fit? The expression used is simply "the Court may make an order".

ILRC - 48TH MEETING

Additional Brief for Item 2 - Matters Arising

Paragraph 21 - Remuneration - Comments by Mr John Hunter

The question of remuneration of trustees in bankruptcy and under a Liquidation of Assets Order came before WG2 at their meeting on 30 October. It was agreed that there should be uniformity of procedures between personal insolvency and company winding-up. Accordingly, we discussed the decisions of the Committee on paragraph 15 of ILRC 137. I said that I thought the Committee had not made any precise proposals to deal with the situation where there was no creditors' committee, although I had invited them to do so in my note ILRC 137. I said that I had gathered that in such a case the remuneration was to be fixed by the Court, as at present in a compulsory winding-up, and I expressed misgivings about this which were shared by other members of WG2.

I accept that I was wrong in proposing, as I had done in my note on ILRC 137, that section 296 of the Companies Act 1948, under which the remuneration of a liquidator in a voluntary winding-up is fixed by the creditors where there is no committee of inspection, should be applied to all liquidations. I still question, however, whether the Court is the appropriate forum. I think the Department of Trade would be more acceptable. Certainly in Northern Ireland where committees of inspection are rarely appointed in compulsory winding-up and where, under our Rules, the remuneration is fixed by the Taxing Master, the system is almost universally condemned by liquidators.

I submit that I am entitled to ask for further consideration of this matter without infringing the ruling against re-opening decisions, on the ground that the position where there is no creditors' committee has not been adequately dealt with.

Hopefully in order to save time I have made a second attempt at formulating what I now suggest should be the rules governing the fixing of remuneration of liquidators in both forms of winding-up and of trustees in personal insolvency, thus:-

1. Where there is a committee of creditors -

   (a) subject to (b), the committee should fix the remuneration, by percentage or otherwise, and having regard to guidelines which would be set out in rules and would be by analogy with the Solicitors Remuneration Order,

   (b) where the liquidator or trustee is not satisfied with the remuneration proposed by the committee he should have a right to require it to be fixed by the Department of Trade.

/ The above is my understanding of what was agreed at the 47th meeting with the substitution of the Department for the Court. /

/Cont'd

2. Where there is no committee of creditors -

/ See C65 Raymond Wright - ILRC 138 Appendix N /

(a) if the charges are based on the OR's scale they should be notified to the creditors and if objection is received from, say one tenth, in value of the creditors they should be determined by the Department of Trade, otherwise they should be payable without authorisation,

(b) if the charges are not based on the OR's scale, they should be determined by the Department of Trade.