

Brief for Item 10 - After-acquired Property

1 Attached is a supplementary note by the draftsman dealing with the definition of "after-acquired property".

2 Peter Millett considers it an excellent paper in every respect and has only two comments, viz:

✓ (i) I think we must consider carefully the suggestion that earnings of any kind should constitute after-acquired property. This will surely give rise to great difficulties. I am wholeheartedly in support of debtors paying their debts out of their earnings - but to use Income Payments Orders for this purpose, not the after-acquired property rules.

(ii) I am not happy with the suggestion that no penalty should be incurred by the debtor for failing to disclose after-acquired property. Surely the right approach is to require him to complete a 'Nil' return - and make it an offence knowingly to sign a false return, ie. equate it with Income Tax Returns, Passport Applications, Car Licence Forms, etc."

3 Alfred and Duncan both found parts of the draft difficult to follow, particularly para 3, which John Copp also felt as being in need of further explanation. Muir has made some detailed amendments which may help.

4 Regarding our proposals relating to s.51 of the Act of 1914, Alfred says:

" I think it is important that perhaps greater emphasis should be given to the increased power which we recommend that a trustee should have to obtain an Income Payments Order, and that a bankrupt should, in our new procedures, only retain for himself and his family the minimum necessary for their support.

The situation hithertofore is that it has been very difficult for a trustee to obtain an order of this nature, and I feel almost ashamed at the ease, when I have been acting for a bankrupt, with which I have been able to defeat such applications."

5 Para 1 Additional sentence proposed by John Hunter in supplementary note (attached).

6 Para 2 Duncan had difficulty with this para, and may be helped by Muir's suggested amplification, viz:

✓ Line 2 after 'discharge', read "of the liabilities of a person adjudicated bankrupt under the present law. We propose, however, that in the case of a debtor who is not adjudicated bankrupt but only made subject to...".

7 Para 3 Muir suggests we add:

"There are, however, quite separate provisions in section 47 relating to the position of a banker who ascertains that his customer is an undischarged bankrupt, with which we deal below."

8 New paras 3A and 3B by Muir under a sub-heading "Bankers". Muir adds, "I do not think that this has been covered yet. Has Peter Avis any views? It needs a recommendation in para 29, and an addition to para 21."

✓ 3A. As stated above, the protection afforded by section 47(1) to transactions by the bankrupt with third parties is expressed to be dependent upon their being transactions "for value". This requirement naturally calls into question the status of transactions by a bankrupt with his bankers, some categories of which would plainly not be for value in the ordinary sense. ^{The position of bankers is therefore} ~~in that subsection~~ specially provided for/by enacting that "the receipt of any money, security or negotiable instrument from, or by the order or direction of, a bankrupt by his banker, and any payment and any delivery of any security or negotiable instrument made to, or by the order or direction of a bankrupt by his banker, shall be deemed to be a transaction by the bankrupt with such banker dealing with him for value". The corollary of this protective "deeming" is that the banker shall not knowingly deal with a bankrupt by allowing him to operate an account (without the trustee's approval), and upon ascertaining that his customer is an undischarged bankrupt, he is under an obligation to stop ~~the~~ account and to notify the trustee or the Department and ^{to} await their instructions.

✓ 3B. We regard these provisions as constituting a reasonable bargain so far as bankers are concerned, although bankers have ~~be~~ been known to have suffered thereby by the bankrupt's deceit. We do not recommend any ~~change~~ in this part of the after-acquired property provisions under the present law." (See also Para 29 (2) A)
 and para. 21, just)

9 Para 6, last word. Duncan prefers: "We recommend that the necessary amendments to section 38 should be made."

10 Para 7

✓ (a) Muir asks: "Should 'adjudication' be read throughout as including 'Liquidation of Assets', where appropriate? See, for example, para 29(2)."

(b) John Copp comments "But the bankrupt may by then have disposed of it (see s.47). Would the trustee's title then be to any proceeds of sale? Do we need to suggest any amendment to s.47?"

- (c) Duncan suggests that the final phrase be amended to read "but until he did there would be no liability in relation to any such burdens."

11 Para 8 Duncan suggests that the first 5½ lines be deleted, and the para start, "We are of opinion that property acquired between the commencement of bankruptcy and the adjudication order should be limited to property acquired after adjudication and should not include....".

12 Para 9 Duncan suggests:-

- (a) Deleting line 1 and replacing it with "We recommend that";
(b) Line 3 - deleting the word 'reasonable';
(c) Deleting lines 5 to 10.

13 Para 10 Duncan suggests deleting the para and adding to para 9, "We also recommend that funeral expenses where a bankrupt has died should be treated as a pre-preferential debt."

14 Muir proposes a new para 10A:-
"A question may arise, after the discovery of after-acquired funds, or property acquired therewith, where the funds have accrued from taxable income, on which the insolvent (or the deceased) has not paid tax, whether such tax should also be included in the above category of "necessaries". Muir asks, "What do the Committee think?"

15 Para 11 line 5 Duncan suggests that this sentence be deleted.

16 Paras 12 and 13. Muir suggests a rider to be added to the end of para 12, and a redraft of para 13.

RIDER TO Page 5, para 12.

After "concerned", add:

"In practice, however, we understand that direct orders for payment are rare, and instead the court orders the bankrupt, or accepts his undertaking, to make regular payments to the trustee out of his net surplus earnings."

Delete Para. 13, and substitute:

"13. The section has been restrictively construed, and certain forms of income have been held to be excluded from its ambit. For example, life income from a family settlement has been held not to be "income" vesting in the trustee only pursuant to an order under the section, but to vest absolutely, ^{as do} ~~while~~ the earnings of a professional man who is not "employed", but exercises his professional skill and knowledge: the position

at the present day of an employee whose remuneration is of a fluctuating amount, or is employed on piecework, would seem to fall within the latter category. But whether or not the bankrupt's ^{means of} livelihood, as represented by his financial receipts, falls within the section or not, it is plain, it seems, that the court will always ensure that he retains enough to live on."

17 Para 13 On the original draft, John Copp commented, "It has not been much used - probably because of the narrow construction."

18 Para 17, line 12 Duncan queries the word 'savings'.

19 Para 19 Duncan suggests:-

- (a) line 2 - amend 'completely' to read 'equitable and';
- (b) line 6 - delete 'in the manner proposed by the Blagden Committee';
- (c) line 8 - delete 'and we therefore support it'.

20 Para 20 See addition to first sentence in John Hunter's supplementary note - and an addition to end of para.

21 Para 20, lines 5-7 Muir asks "Does this mean that his estate has been adjudged bankrupt or L of A (as under s.130) or him? In answer to John's note at the end of the para, Muir says "I agree, subject to the clarification of my (above) sidenote."

22 Para 21, line 18. Muir suggests a new para should start at "However". [I agree].

23 Para 21 John Copp comments:-

- (a) line 20 - 'unexpectedly' - "Even more resentment if the assets were expected!"; and
- (b) line 25 - 'Windfalls' - 'Is this not in essence, a distinction between after acquired capital and after acquired income?'

24 Para 21 Muir suggests adding: "This limited 'vesting' will not however preclude the trustee from intervening to investigate bank accounts stopped under the special banking provisions."

25 Para 22 Muir suggests adding: "under the present law, a bankrupt who has received his discharge conditionally on making payments out of his future earnings or after-acquired property is obliged to make a declaration as to them not less than annually until the condition is satisfied."

26 Para 23 Muir suggests adding: "after-acquired income and property, and Bankruptcy Rule 236 requires him to supply information regarding the latter, if required to do so, on cases covered by the preceding paragraph."

27 Para 26, lines 4 and 5 Peter Avis suggests this should read, "particulars of all property acquired by him after adjudication which would be....".

28 Para 27, line 3 Duncan queries whether the Committee agreed that non-compliance should not be a criminal offence.

29 Para 28 Muir suggests:-

(a) line 2 - inserting "windfall" before 'acquisitions' and

(b) adding at the end of para, "pending investigation of the assets so acquired and the initiation of steps to recover them."

(c) Muir has put a side note to the para "Discharge of bank accounts?" *Disqualify.*

30 Para 29(1) line 1 The word 'absolutely' - should it be 'automatically'?

31 Para 29(2) line 6 Should the word 'automatically' be inserted after 'trustee'?

32 Muir suggests sub-para (2A):-

"The protection of bankers and their corresponding obligations, as existing under the present law should continue; these obligations should apply not only to bankruptcy but to liquidation of assets."

33 Para 3(3) Muir would add:-

"and for the payment of any income tax accrued or accruing due and payable on such after-acquired property as comprises taxable income."

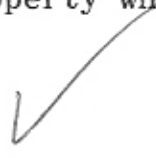
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T H TRAYLOR
Secretary
3 July 1981

AFTER-ACQUIRED PROPERTY

Supplementary note by draftsman

1. The point made in Eric's note of 11 June about the problem of definition is a valid one and I suggest the addition of a new sentence at the end of para. 1 as follows:-

"In accordance with the generally accepted terminology we use the term "after acquired-property" in this report to refer to such property although we are aware that in section 26(2) of the Act of 1914, in the context of conditions which may be included in an order of discharge, it has the different meaning of property which a bankrupt acquires after his conditional discharge."



2. I have not dealt directly with the application of after-acquired property provisions to a voluntary arrangement or a D.A.O. To remedy this, I suggest that the first sentence of para. 20 should be amended to read -

"The new provisions should extend to cover successive insolvency administrations in a bankruptcy or, subject to paragraph [21], under a Liquidation of Assets Order, including an order for the liquidation of assets of a deceased insolvent," and a new sentence added at the end of this para. to read -



"Whether or not after-acquired property will be available to creditors in a voluntary arrangement will depend upon the terms of the

/arrangement.

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arrangement. It will not be available in a D.A.O. as this procedure will not involve the vesting of assets in a trustee."

16 June 1981

JOHN M HUNTER