7)

ILRC 61ST MTG

Brief for Item 7

Chapter 16 - Insolvency Practitioners - Powers and Duties

1 Peter Millett makes the following general comments:-

(i) "We do not grapple with the real problem at all. In many situations, the creditors and the debtor's interest are in conflict (eg. if the assets are sold now, the creditors will get 90p, the debtor nothing: if the trustee delays sale for a couple of years, the creditors will be paid in full, and the debtor will receive a substantial sum. The creditors would rather have 90p now(reasonably); the debtor would rather wait (obviously)). Who is to decide? How can the trustee if he owes duties to both? Must the Court decide in every case? And how?"

(ii) "Where are we going to deal with the Centrebind problem? (Shareholders put company into voluntary liquidation - liquidator sells the main asset to the shareholders before the creditors' meeting). We have made the problem worse. I thought that we were going to provide that no liquidator could sell the company's main asset or take any major step pending the creditors' meeting. I don't think we can shrug this one off by saying - we've cured it by insisting on professional qualifications. There are plenty of bad but qualified hats around. Also, Clinton-Davis has proposed an amendment to the Companies Bill to deal with the problem - so we must refer to it and propose our own solution."

(iii) "Borrowing powers - surely, only with the sanction of the committee?"

NOTES. On Peter's first point: it may be more in perspective if one refers to "the debtor" as "the insolvent"; moreover, in Peter's example, he is an insolvent who is unable to either agree a voluntary arrangement with his creditors or obtain a DAO. I would think that most professional trustees would know where their duty lay and that the Courts would soon put an end to any vexatious complaints. In any case, I don't think we are proposing to change the present law on this subject and I don't think we have received any representations of difficulty about it from practitioners, or complaints from others.

On Peter's second point - we have referred to "Centrebind" in para 668, but not to the problem of assets being sold before the creditors' meeting. However, we have recommended that the directors must appoint a provisional liquidator (see para 670). Does not that solve the problem? Can a provisional liquidator dispose of the main assets? OR's are instructed to seek the sanction of the Court if there are good reasons for the disposal of substantial

Ch. 13

assets when acting as provisional liquidator following a w.u.o. OR's certainly have no power to sell or dispose of any assets (without Court sanction) when appointed provisional liquidator before a w.u.o. Perhaps we should recommend that, to make the position clear, no provisional liquidator should be able to dispose of assets (other than perishables) without the sanction of the Court.

Peter's third point refers to para 32 which Muir has dealt with extensively (see below)]

2 Para 2 - Redraft by Muir:

["In a number of matters, the powers of a liquidator or trustee are subject to the prior sanction of his committee of creditors (at present called "the Committee of Inspection") or, where there is no committee, the Department of Trade or of the Court. We deal with such "Committees of Creditors" (as we propose to rename the Committee of Inspection) in the next chapter; suffice it to say at this stage that, in relation to the general exercise of their powers, we consider that the requirements for such sanctions can be dispensed with. In reaching this decision, with its necessary diminution in the element of "creditor control", we have borne in mind our proposals for comprehensive qualifying requirements for all insolvency practitioners, and our proposals for imposing upon them the statutory duties of care which are discussed below."

[I am not sure that all of Muir's proposed additions are correct. I believe that our decision was to call them liquidator's/trustee's/receiver's/administrator's committees as the case might be (thus overcoming the problem of the committee which includes contributories) and I intend to cover this in the next Chapter.]

3 Para 5 Peter Millett suggests this para be deleted.
[I agree.]

4 Para 9 Redrafts by (a) Peter Millett and (b) Muir:-

(a) PM

9. "We support the general approach of Justice, but we would not go so far as to propose that the duty of care of a trustee - or of any other insolvency practitioner - should be one of the utmost good faith. This goes beyond the ordinary fiduciary duties of a trustee to his beneficiaries, and is in our view inappropriate. The insolvency practitioner will be a professional man charged with the responsibility of managing and realising property belonging to others. He must act honestly, reasonably and prudently, and display proper professional skill and competence. We consider that he should owe to the debtor, the creditors and other interested parties a duty of care appropriate to his professional standing, and the ordinary fiduciary duties appropriate to a professional trustee."

see PM's opening notes on f.l. Conflict

varying according to person to whom owed

[NOTE. This is also in line with a note by John Lopp]

(b) ~~9.~~ "While we support, generally, the proposals put forward by "Justice", we would not go so far as to suggest that the duty of a trustee - or of any other insolvency practitioner - should be one of the utmost good faith. In our view, such an obligation would go beyond ordinary fiduciary duties, and would imply in particular a duty to report and disclose akin to that owed by one partner to another, or by an assured to an insurer. We do, however, consider that the liquidator or trustee should owe a certain fiduciary duty to the debtor, to the creditors and to other interested parties; the extent and characteristics of that duty will, we think, vary according to the person to whom it is owed."

5 Paras 10 and 11. Redrafts by Muir (paras 10,11,11A & 11B):-

10 It ~~could~~ may be argued that if legislation imposed a duty of care upon the liquidator or trustee, equivalent to that of any professional man towards a client, there might be a danger of numerous actions being brought against trustees or liquidators, particularly by individual debtors. It is a well-known fact of life in the insolvency world that not only individual debtors, but also the directors of insolvent companies, are very prone to take an ~~very~~ extravagantly optimistic view of the value of the available assets, and ~~tend~~ to take a critical view of their trustees or of the liquidators. If the trustees or liquidators do not realise the assets at the estimated values put on them in the statement of affairs, the insolvent or the director (or the shareholders) ~~might~~ may well feel that this provides them with a prima facie case for complaint. One may even encounter a certain tendency to believe in a conspiracy against the debtor, in which he is the innocent victim.

11. We do not regard these risks in themselves as sufficient reason for precluding the introduction of any such legislation; but it must contain elements of control and provide a sifting process, so as to prevent the trustee or liquidator from being constantly open to attack and harassed in his administration, and in particular from being exposed to frivolous litigation whether by insolvents, directors or creditors. This could be achieved by providing that a debtor (or debtor company, or its directors) should not be allowed to bring such an action without the leave of the Court. Precedents for such leave of the Court being required to bring an action can be found in Section 1 of the Limitation Act, 1963, in Section 141 of the Mental Health Act, 1959, and in

Section 224(1), proviso (c), of the Act of 1948 (controlling petitions sought to be presented by contingent or prospective creditors).

11A. So far as concerns the right to sue a trustee or liquidator [or, an even more limited field, a receiver or administrator], we are of opinion that, without desiring to impugn the sanity of disgruntled debtors, or to deny them a just relief for their grievances, the following observations of Lord Simon are in point : [See para 12 below for my note there]

> "Section 141 of the Mental Health Act 1959 places a hindrance on the recourse of a class of citizens to the courts of justice. Although Magna Carta promised that to no man would justice be denied or delayed, it is not unparalleled for the legislature to constitute such lets and conditions. An obvious example is the legislation relating to vexatious litigants. The mischief and the parliamentary objective must be similar. It must have been conceived that, unless such classes of potential litigant enjoy something less than ready and unconditional access to the courts, there is a real risk that their fellow-citizens would be, on substantial balance, unfairly harassed by litigation." (R. v. Bracknell JJ., Ex parte Griffiths (1976) A.C. 314, at p.329).

That Section precludes mentally disordered persons from commencing any proceedings for acts done to them under the Act without the leave of the Court, which must be satisfied that "there is substantial ground for the contention that the person to be proceeded against has acted in bad faith or without reasonable care."

11B. So far as concerns such actions by one creditor, or by a few creditors (as distinct from a majority, or a substantial number of them) we would not envisage any such prior leave to sue being obtained; but the legislation might provide a limited protection by requiring the aggrieved person or persons to prove that he or they had called, or sought to call, a meeting of creditors to ventilate his or their grievances, and might additionally be required by the Court to give security for costs. In the most recent reported case of an action by an aggrieved creditor (Leon v. York-O-Matic Ltd (1966) 1 W.L.R.1450, where the bankruptcy cases were applied), the Court held that an individual creditor had no locus standi to sue the Liquidator as for a breach of trust (a defect which our proposals would remedy); but on the basis that he could claim to be aggrieved by the Liquidator's act or decision, (analogously with Section 80 of the Act of 1914, referred to above), the judge held that on the evidence he was not satisfied that the Liquidator had not acted bona fide or in a way in which no reasonable liquidator could have acted, and had not, in the circumstances, as commercially judged, sold the company's undertaking at an undervalue, gross or otherwise.

6 Re the Note to para 11; Peter Millett says creditors and other interested parties should not have to obtain leave of the Court; John Copp disagrees.

7 Para 12 Muir points out that the paras cited from Ch.8 do not themselves lay down any bases for suing a receiver for misconduct, and this could be the right place for it, or better in his para 11A. The Administrator (Ch.9) does not refer to accountability at all, except quare at para 520.

8 Para 13(b)(c)(d)(e) - Redraft by Muir:-

"

(b) his principal (or primary?) duty should be to act in a fiduciary capacity, and to deal with the property under his control honestly, and in good faith, and in a commercially reasonable manner; his consequential (a secondary?) duties should be to comply promptly and efficiently with all the specific statutory duties and requirements imposed upon him by his office;

(c) default in the performance of his principal (or primary?) duty, and (but only where appropriate) of his consequential (a secondary) duties, should give rise to a cause of action against him at the suit of the debtor (or debtor company) and the creditors and other interested parties for breach of statutory duty, to the extent of any damage sustained by the complainant in consequence thereof, (other than nominal damages);

(d) these provisions should apply to all liquidators, trustees and others administering insolvent estates; and

(e) they should also apply to receivers and administrators, but only to a limited extent, having regard to the differences between their offices, and those of trustees and liquidators. In the case of receivers, we would refer to our recommendations as to the limited extent of their "accountability", set out in Chapter 8, at paras 442 to 454.

9 Paras 13(b)(c)(d)(e) - Redraft by Peter Millett:-

(b) his duty should be to act in a fiduciary capacity and to deal with the property under his control honestly, ~~and~~ in good faith, ~~and~~ with proper skill and competence and in a ~~commercially~~ reasonable manner;

(c) the provision should give rise to a cause of action on the part of ~~the debtor (or debtor company) and~~ the creditors and other interested parties or, with the prior leave of the Court, the debtor or dr. co., for breach of statutory duty, if default has been made and damage sustained in consequence thereof;

(d) the provision should apply to all liquidators and trustees administering insolvent estates; and

(e) the provision should also apply to receivers and administrators.

10 Para 15 Muir suggests deleting the last phrase (top of page 6).

11 Para 16 "We recommend" has it.

12 Para 17 John Copp suggests adding:-
"This should be co-existent with the right to apply to the Court for permission to bring a civil action (see para 11)."

13 Para 18 'Note' Of those who have responded to date, two say "Yes" and one says "Probably not".

14 Para 22 Muir suggests the second sentence be deleted.

15 Para 23

(a) Peter would add "We consider that this is the appropriate measure of his liability."

(b) Muir would add "However, we have proposed in Chapter 15 at paragraph 762, the introduction of compulsory bonding and indemnity insurance for all insolvency practitioners which should go a long way to protect parties injured by their acts."

16 Paras 24/25 Re-arranged and redrafted by Muir:-

This is my rearrangement and redrafting of paras 24/25

Registered land: Inspection of the Land Registry

24/25 The position in England, as we understand it, is that a folio in the Land Registry cannot be inspected without the written consent of the registered owner. In Ireland, by contrast, the Land Register has always been open to general public inspection. We have received submissions from insolvency practitioners that a trustee in bankruptcy or a liquidator should have power to require the Land Registry to disclose the names of the registered owners of land and property, in respect of which he can, by a statutory declaration, depose to his belief that the estate which he is administering may have an interest therein, or may have a cause of action against the registered owners related to the land.

[Does this mean only Northern Ireland or all Ireland? Muir]

Should be a "we recommend" here.

/ NOTE: The submission which came from Mr.R.B.Knight (C17) was changed by the Accountants' Panel to giving the liquidator power to search the register (as in Ireland). We rejected this (by a majority), because we were against giving the liquidator any "fishing" powers. John Hunter, in support of the proposal, pointed out that there would be no breach of confidentiality of the register involved as the liquidator or trustee stands in place of the registered owner. In the Report should we support the original proposal?/

See my para 24 above. MM

/ Peter Millett supports the original Note (c) and John Copp agrees with John Hunter's original remarks (in the Note). /

17 Para 28 Muir suggests a sub-heading - "Committee of creditors". / Unfortunately that is not what we have decided to call it! /

18 Para 28 Redraft by Muir:-
"In the next chapter we put forward proposals whereby in place of the existing Committee of Inspection, a committee of creditors (and of shareholders, where applicable) should be appointed and should be kept informed of the progress of the administration and should be empowered to apply to the Court if they are not satisfied with its progress or any other relevant matter. In view of this proposal, and of the tighter control over who may act as liquidator or trustee, we consider that sanction to employ a solicitor is no longer necessary. The trustee or liquidator should however be required to inform the committee of his intentions to commence or to defend legal proceedings, and thereby to incur costs to be defrayed out of the assets, and if the majority are opposed to the action he proposes, he should only be entitled to proceed with it at the expense of the estate after obtaining the leave of the Court."

/ NOTES (1) Propose to accept.

(2) Since preparing the original draft, I've re-read the TUC evidence and am inclined to think that the workforce (whether they are creditors or not) have as much right as contributories both to a "first meeting" and to representation on the committee. /

19 Para 31 Muir queries the phrase in brackets at the end of the para. It was added by the Committee when someone suggested that one member of the committee ought to be able to apply to the Court if he had the support of the other committee members. On reflection, isn't this the same thing as "the committee"?

20 Para 32 and its 'Note' - Redraft by Muir:-

Borrowing Powers

32. For the purposes of ensuring the efficient administration of the ~~esta~~ estate, trustees and liquidators may need to raise funds by borrowing upon the security of the assets of the estate. Under the present law, a trustee may only borrow, and then only with the permission of the committee of inspection, and only for the purpose of paying the bankrupt's debts; (section 56(5) of the Act of 1914) he cannot carry on the bankrupt's business without a similar permission, and then only for the purpose of its beneficial winding up, /and it is not expressly stated that he may so borrow for that purpose also (section 56(1)). In the case of compulsory winding up, the liquidator may, without any leave from the committee of inspection, borrow on the security of the assets any money required, but he may not carry on the business of the company without permission, and then only for its beneficial winding up (section 245(1)(b)). A liquidator in a voluntary winding up, whether members' or creditors', may both borrow money on the security of the assets, and carry on the business for the purpose of its beneficial winding up, without any permission (section 303 of the Act of 1948).

32A. It seems to us that in this field also there should be a harmonisation of the respective powers of the persons administering insolvent estates. We therefore recommend that the powers of the trustee or liquidators be assimilated to that of the voluntary liquidator referred to above (as prescribed in section 303 of the Act of 1948) applying the same formula as suggested in paragraph(28) above, that it to say that the borrowing should be reported to the committee of creditors, as should also be the carrying on of the business for the purpose of its beneficial winding up, with liberty to the committee to object in themanner there indicated. This formula would apply to all the procedures which we are proposing in this Report, and would include the Official Receiver when acting in any capacity in an insolvency matter, and the administrator under Chapter 9

(Note I hope that the above text sufficiently accepts T.T.'s invitation in his note. MH)

[John Copp favours a power to borrow to enable a call on shares to be met, to avoid forfeiture, and perhaps for other short-term emergencies, but thinks the loan should be limited in time.]

21 Para 35 Peter Millett suggests adding:-
"In such circumstances, a representative action may be brought by a single shareholder or creditor on behalf of the others. It would not, in our view, be appropriate for such proceedings to be brought by the liquidator or trustee."

22 Para 42 Muir suggests:

(a) amending line 3 to read 'destroy general categories of books and papers'; and

(b) adding to para: "but he should retain, or cause to be stored, important documents of record, such as minute books and share registers, for a substantially longer period."

[NOTE: I have sounded out the Department on this one and they see no requirement to distinguish between the various books and documents. In fact, in a compulsory liquidation, the OR normally applies to destroy all books, etc, six months after the liquidator's release (ie. about 18 months before the company is dissolved). Exceptions are made for records which may be required by a receiver, or for prosecutions or civil proceedings, or in respect of records of historical importance. Regarding the latter, the OR contacts interested people (museums) and gets an undertaking that the records will be kept by them to his order.

However there is an anomaly in respect of voluntary liquidations in that under s.341 (to which John Hunter referred us at the 48 Mtg) the liquidator may be ordered to produce books up to 5 years after dissolution, on the footing that they are under his absolute control, seemingly, no matter what instruction he may have received from his committee.]

23 Para 49, last sentence

(a) Peter Millett suggests it be amended to read ".....insolvency practitioners make this requirement unnecessary".

(b) Muir suggests: "our proposals regarding the higher qualifications required by insolvency practitioners seem to us to justify a degree of trust to which the oath adds little further substance. Since the duty to make returns is statutory, inaccurate or improper returns will expose their authors to penalties."

24 Para 50 Muir says "No, I do not agree, except in the case of formal or semi-formal applications or applications made ex parte (eg. under s.25 BA 1914). Our judicial system rarely dispenses with sworn evidence, oral or written - see Re Allied Produce Ltd (1967) 3A11 ER 399 a Secretary of State petition."

[NOTE. This para is virtually verbatim from the proposal by J Hunter which was approved at the 48th Mtg.]

T H TRAYLOR
Secretary
3 July 1981

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ILRC 61ST MTG

Addendum to Brief for Item 7

Chapter 16 - Insolvency Practitioners - Powers and Duties

1 Edward makes the following general comment:

"There are a number of references to duties owed to 'the debtor, the creditors and other interested parties'. I think we should be clearer as to what we mean by 'other interested parties'. I am far from clear."

2 Paras 3 and 4. Substantial drafting amendments have been made in order to improve the draft.

3 Para 7 Edward would remove the reference in line 14. Yes

4 Para 9 Edward comments on "fiduciary duty" as follows:

"The reference to "fiduciary duty" is adequate and need not in my view be expanded. It means the duty to act in good faith, not to profit from the position, not to allow a conflict between duty and interest to arise, to account punctiliously and so on. It does not extend to the exercise of care, skill and expedition."

5 Para 10. Suggestion by Edward:

"Would it be worth mentioning the point that a concomitant of restricting the class of persons qualified to act as insolvency practitioners is to impose on the restricted class a clear duty of care. If they are to be qualified and have the benefit of the office, they must shoulder the burden that the qualification suggests and requires."

6 Para 14 Peter Avis suggests that this para should follow para 12, before we go on to "recommendations".

7 Para 16. Peter Avis suggests this should become para 13(f).

8 Para 18 Edward suggests:

"I would have thought it worthwhile observing in passing that all we say about duties must apply with equal force to the conduct of liquidators in non-insolvency winding ups."

9 Para 19 Peter Avis suggests an opening para under this sub-heading, which includes the substance of para 22 and leads in to the present para 19; viz:

> Control of the Court
>
> 19 We have received many representations concerning the lack of clarity and harmonisation in those areas where control by the court is enlisted on the question of grievances arising out of the power and duties of Insolvency Practioners. It would seem that some rationalisation is necessary and that one simple provision covering all classes of insolvency practioner, including receivers and administrators, should be introduced. The following instance highlights the problems:-
>
> (a) Sections 245(3) and 246(5) of the Act etc
>
> (This takes in paragraph 22, page 7)

10 Para 23 Edward asks:

> "Should we not make it plain that a liquidator in breach of his duty of care cannot recover out of the estate: since, by definition, the damage suffered is the reduction in the size of the estate."

11 Para 25 Edward's view is as follows:

> "I would tend to omit this as rather unimportant. However, I still think that the 'fishing' objection is relevant. If the liquidator or trustee is asking questions because he stands in place of the registered owner, he knows who owns what and therefore is unlikely to be asking questions in the first place. As I understand it, the problem to which the suggestion is addressed is this: a liquidator or trustee thinks that Blackacre may be owned by the insolvent debtor, but is not sure and is trying to find out."

12 Para 32 Edward agrees that there should be power to borrow, and adds:-

"For instance, there may be money arising - without doubt (perhaps because of a bank guarantee) - in the future under a past realisation, but money is needed immediately for some critical reason such as preserving assets."

T H TRAYLOR
Secretary
7 July 1981

ILRC 61ST MTG

Second Brief for Item 7

Chapter 16 (Part II) - Powers and Duties (of Receivers and Administrators)

Note this relates to paras 51-67 which were sent out on the 30 June.

1 Ritchie kindly remarked that he had no comments on this draft "which seems to be well founded on common sense".

2 Peter Millett remarks:

> " Ought we not to be more specific, and deal with particular powers? I have in mind Mark Homan's Memorandum for the Accountants' Panel. Not all his complaints are met by adopting s.15 of the Scots Act. "

[Note I'm not sure what Memo Peter is referring to; it may be that all of Homan's complaints were accepted by the other Panel members or by the Committee.]

3 Para 51, last word Muir asks "Adequate for what purpose - the protection of the debenture holder or of others?"

4 Para 56 Muir suggests we add, "The receiver should however be required to maintain a "seal book" ie. a record of the use of the seal by him."

5 Peter Millett remarks:

> " Giving the receiver power to use the Company's seal does not meet the problem referred to in para.56, and we should be careful not to give the impression that it does. I enclose a statement of the current law,* which shows that it is not as unsatisfactory as may be thought: it is from a proposed new text-book now being written by an able colleague of mine. "

[* Annex 'A' attached.]

6 Para 58 Muir suggests we add, "The penalty imposed by section 372(5) for non-compliance with the duty to produce the statement of affairs - a default fine of £10 per day - is quite inadequate. There should be a power analogous to that conferred in a compulsory winding up in respect of a similar default, by section 235 of the Act of 1948 and Winding Up Rule 55, to apply for an Order of the Court enforceable by committal."

[Note the above includes a new recommendation for approval by the Committee.]

7 Para 60 Peter Millett comments:

" Empty property rates. This requires to be re-written to take account of the following:-

(1) Liability to E.P.T. has been suspended - possibly permanently.

(2) Banister's case was dealing with the care of the receiver who takes possession. Neither the debenture-holder nor the receiver can be liable until they take possession: see Westminster City Council v. Haymarket (1981) 1 WLR 677.

(3) In the course of argument in that case, the Court of Appeal doubted the correctness of Banister's case, which appears to have proceeded on a wrong concession of counsel.

(4) If liability to EPT is restored, consideration should be given to the extent of the charge. Is it readily intended to take priority even to the debenture (as was held in the Westminster case)? "

8 Para 62 Peter Millett comments:

> This problem is not unique to gas. It applies to electricity too. I was proposing to deal with this in "Secured Creditors". It is probably better to exclude it here.

[Note I think Peter may have mis-read the para.]

9 Paras 63 and 64, page 20 Muir says "No!. The statement at the top of page 20 (line 3) is incorrect. The receiver appointed by the Court does not himself apply to the court, except in exceptional cases. I enclose an extract from Kerr on Receivers pp.180/1. [Annex B]. The normal applicant is one of the trustees or other parties interested, or in the case of a debenture holdlr's action, the debenture holder. I doubt the wisdom, or the judicial acceptability, of using the informal s.369 type of application as a forum for a 'mini-action' between the debenture-holder and his receiver. It would be preferable to authorise the issue of an originating summons to determine such disputes by the Judge, or a judge."

[Note. Sorry! I was simply quoting from Jenkins (paras 298 and 306(d), Magnus and Lestrin on Companies Law and Practice (p.331), Kilbrandon on the Scots Act of 1961 (para 70), the submissions from some of our consultees and the proposals put forward by our Accountants' Panel. The Jenkins recommendation has been endorsed by the Committee on at least two occasions and of course, has already been enacted in Scotland.]

10 Para 64 Edwards comments:

> "I do not think we need the word "strongly", but we might make the point that as the debenture holder cannot, under our proposals, remove the receiver, it is important that he has access to the Court to ventilate his dissatisfaction with the acts or omissions of the receiver. "

11 Paras 65-67 Peter Millett comments:

> Paras. 65-67. I don't like the proviso. On the whole, I prefer the original Jenkins' proposal. I don't agree with para. 66.

12 Para 67 Edward comments:

> "I think this paragraph should be stating that relief should only be granted where it is coupled with an imposition of liability on the appointor and should be limited in quantum to the extent of the recovery from the appointor. I do not think a company will be able to recover from the debenture holder unless there is a Court order."

13 Para 67 Muir suggests adding to the para:
"However, this aspect of his personal protection, and of the protection of the company and its creditors, may be affected by the extent to which the receiver is insured, or can be insured, against the risk of such liability."

14 Powers of an Administrator Proposals put forward by Muir:-
"The distinction between the powers of a receiver and the powers of an administrator (under Chapter 9) are:

(1) The receiver can (except in the case of a farmer under an agricultural charge) only be appointed under a debenture creating a floating charge granted by the company, whereas an administrator can be appointed in respect of the affairs of a substantial business carried on by a sole trader or a partnership (para 499).

(2) The principle motivating the acts of an administrator will be the interests of creditors generally, as contrasted with the receiver who must to a substantial extent look to the interests of the debenture-holder. This principle will influence both the exercise of any statutory powers, and the grant of any discretionary powers.

(3) The administrator has to prepare and submit the statement of affairs himself (para 512) whereas the receiver causes it to be prepared by the directors. The administrator will need greater powers of compulsion than the receiver for the production of information, so from this aspect, the administrator will very closely resemble the receiver appointed by the Court.

(4) Since the appointment of the administrator procures a stay of all proceedings and executions (para 516) which a receivership under a debenture does not, he will need the power to enforce such a stay.

Pension Schemes

15 (a) Edward says that it might be convenient to make it clear that where the company has a power to appoint new trustees the receiver can exercise the power.

(b) Muir says "Yes" to the question in Note 1, but adds that it requires more detailed drafting,re aspects of pension schemes and trusts.

(c) Duncan feels that the best interests of employees would be served if the Court appointed someone to look after the fund pending a settlement.

16 Para 58. Redraft by Peter Avis.

Para 58 The existing power to call for a statement of affairs under section 372 of the Act of 1948 is in some cases inadequate, both because it is difficult for a receiver to enforce its production if it is not readily forthcoming and also because he has no satisfactory means of compelling the directors to give answers to any supplementary questions which he may wish to ask. Similarly, as a receiver presently has no power to examine the directors or other persons with knowledge of the affairs of the company, we consider such power should be available in receivership in a similar way to that accorded in a liquidation under section 268 of the above Act. This would be particularly helpful in tracing assets of the company.

17 Para 64. Redraft by Peter Avis:

We therefore endorse the recommendation of the Jenkins Committee which has not been enacted, as we can see no good reason for the distinction that is made in this matter between the receiver appointed by the Court and the receiver appointed out of Court. For example, a situation might arise where there is a dispute between the receiver and the debenture holder and we consider it reasonable that it should be open to either party to refer the matter to the Court for instructions.

We note that provision has been made for this section 23(1) of the Scots Act of 1972.

T H Traylor
Secretary
9 July 1981

ANNEX 'A'

The standard form of mortgage debenture provides that a receiver and manager, appointed thereunder shall be the agent of the company.[1] A compulsory winding up order automatically terminates that agency.[2] Likewise the commencement of a voluntary winding up, by the passing of a resolution to wind up, brings to an end the agency of a receiver and manager.[3] So far as the receiver is concerned, although he retains his right to custody and control over the company's assets, the company, whose agent he is, no longer has full and free capacity to continue its business in terms of the objects in its memorandum. The company cannot authorise the receiver to do any act which it is unable to do itself, so that it cannot empower the receiver, after the date of the liquidation, to carry on its business so as to create debts provable against the unmortgaged assets of the company; but the receiver can still continue to exercise his powers in the name of the company although the company is no longer liable for any debts which he may incur in doing so.[4] In other words the termination of the agency does not leave a vacuum. The receiver is still in control. But his position is peculiar and made more difficult. He cannot bind the company with fresh obligations. Acting, as he does, as a principal he will be personally liable in respect of fresh contracts, albeit with a right to indemnity out of the assets of the company. And if despite the termination of his

1.

2. Gosling v. Gaskell [1897] AC 575, HL

3. Thomas v. Todd [1926] 2 KB 511

4. Visbord v. Federal Commissioner of Taxation (1943) 68 CLR 354 at 352 per WILLIAMS J. The company is "incapacitated by the winding up order from carrying on business, and the receiver could not create debts which would be proveable in the liquidation against the unmortgaged assets of the company: see Gosling v. Gaskell [1896] 1 QB 699, CA at 699-700 per Rigby L.J. (dissenting but upheld [1897] AC 575 HL)

agency he purports to act in the name of the company he may be held liable for breach of warranty of authority.

In some cases a receiver and manager may be content to continue trading because he has extracted a comprehensive (and satisfactory) indemnity from the debenture holders before accepting the appointment. Indeed a prudent receiver and manager will always strive to extract such an indemnity. In rare cases the debenture holders may be liable because the receiver and manager was their agent, either under the express terms of the debenture or by subsequent agreement. In the absence of express agreement it will be difficult to show that the debenture holders have given the appointee authority to act on their behalf. Because of the dangers of personal liability many receivers and managers will, on a liquidation, either cease to trade or hive down the trading business to a subsidiary company immediately.

While a compulsory winding up order or the commencement of a voluntary winding up brings about a cesser of the agency of the receiver and manager, some of his powers survive the death of his agency. He may continue to carry on the company's business, though not so as to impose fresh liabilities on the company.[1] He is of course entitled to take possession of the assets comprised in the debenture;[2] and so that power remains. And he may continue to get in and realise all the company's assets both real and personal comprised in the debenture.[3] Again he retains the power to take proceedings in the name of the company to get in assets of the company comprised in the debenture. Thus in Goughs Garages Ltd. v. Pugsley[4] the power to bring proceedings in the name of the company to obtain a new lease of business premises was held to survive a winding up order. It was necessary to bring proceedings in the company's home because the legal title was vested in the company. The termination of the authority of the receiver to act as agent of the company does not affect his power to hold

1. Gosling v. Gaskell [1897] AC 595
2. Re Henry Pound Son & Hutchins (1889) 42 Ch D 402, CA
3. Re Henry Pound Son & Hutchins (1889) 42 Ch D 402 at 418
4. [1930] 1 KB 615, CA; followed, perhaps somewhat hesitantly, in Newman Bros Ltd. v. Allum [1934] NZLR 694

or dispose of property comprised in the debenture.[1]

On the other hand there are some powers such as the power to call uncalled capital,[2] or to create debts which would become provable in the liquidation against the uncharged assets of the company which do not survive the termination of the agency[3].

At one time there was debate as to whether the receiver's conveyancing power survives a termination of the agency. One view, unsupported by any citation of authority, was that the determination of his agency entails that he can no longer convey property in the name of the company, even if the debenture so provides.[4] A typical debenture employed by banks and other institutional lenders provides that any appointed receiver exercising a power of sale shall also have a power of attorney to execute any conveyance or other instrument in the name of the company.[5] When the Chief Land Registrar, on the basis of advice

1. Sowman v. David Samuel Trust Ltd. (in Liq) [1978] 1 WLR 22; Barrows v. Chief Land Registrar (1977) The Times, 20th October. There are Australian cases to the same effect: Re Landmark Corporation Ltd. (in Liq) and the Companies Act [1968] 1 NSWR 705; Re High Crest Motors Pty Ltd. (1978) 3 ACLR 564

2. Re Henry Pound Son & Hutchins (1889) 42 Ch D 402. The proper person to get in uncalled capital in a liquidation is the liquidator: Fowler v. Broads Patent etc Co. [1893] 1 Ch 724. A receiver can apply in the liquidation for an order directing him to get in uncalled capital: Re Westminster Syndicates Ltd. (1908) 99 LT 924

3. Re Henry Pound Son & Hutchins (1889) 42 Ch D 402; Thomas v. Todd [1926] 2 KB 511

4. See Kerr Law and Practice of Receivers (15th ed) 351

5. See 2 Encyclopaedia of Forms and Precendents (4th ed) 853 for an example

received, refused to register conveyances by receivers after the commencement of liquidation unless the liquidator was joined as a party, the grounds for his decision were subjected to considerable criticism. One commentator,[1] stressing the absence of any authority for the proposition that the power of attorney to convey in the company's name determined on a compulsory order or voluntary resolution, pointed to the survival in such circumstances of the power to sue in the company's name.[2] Both powers survived, he suggested, because they were needed to realise assets comprised in the debenture. Two decisions in 1977 resolved the controversy. First in Sowman v. David Samuel Trust Ltd. (in Liq).[3] it was held that a receiver could execute a contract to sell a freehold property comprised in the debenture notwithstanding the making of a winding up order. The winding up order did not affect the power of the receiver to hold and dipose of the company's property including the power to use the company's name for that purpose. Accordingly his execution of the contract of sale was a valid exercise of that power. The conveyance itself in Sowman's case had been executed by the debenture holder under a power of attorney contained in the debenture and it was held that this had not been revoked by the winding up. In Barrows v. Chief Land Registrar [4] the receiver not only executed the contract of sale but also executed the conveyance in the name of the company. It was held that the winding up order terminated his agency but did not terminate his power to execute or sign documents as receiver in the name of the company. No doubt similar

1. PJ Millett QC "The Conveyancing Powers of Receivers after Liquidation" (1977) 41 Conv. NS83

2. Gough's Garages Ltd. v. Pugsley [1930] 1 KB 615 CA

3. [1978] 1 WLR 22

4. (1977) Times, 20th October

principles would apply where the event triggering the termination of the agency was a resolution to wind up. It should be added that a conveyance by the receiver in the name of the company is not a "disposition of the property of the company" within section 227 of the Companies Act 1948 and may validly be made without the leave of the court despite the presentation of a petition for compulsory winding up[1]. Formerly it was thought that after presentation of a petition leave of the court was required to a conveyance by the receiver[2]. But section 227 applies only to dispositions of property which belongs beneficially to the company[3] and after the appointment of a receiver and manager the charged property belongs in equity to the debenture holders.[4]

1. see P.J. Millett Q.C. (1977) 41 Conv. NS 83 at 93-95 anticipating the decision in Sowman v. David Samuel Trust Ltd. (in Lig) [1978] 1 WLR 22

2. see Re Clifton Place Garage Ltd. [1970] Ch 477, CA

3 Sowman v. David Samuel Trust Ltd (in Lig) [1978] 1 WLR 22; and see Re Norman King & Co. [1960] SR (NSW) 98

4 George Barker (Transport) Ltd. v. Eynon [1974] 1 WLR 462 at 467; Biggerstaff v. Rowatt's Wharf Ltd. [1896] 2 Ch. 93 at 106

ANNEX 'B'
Kerr on Receivers 15th edn

the receiver to obtain dividends or money payable on redemption of debentures: for a company does not have regard to equitable interests, and, apart from express order, only recognises the legal title of the trustees.

In the performance of his duties and the management of the estate generally, the receiver must have regard to the terms of his appointment. If he requires powers additional to those specifically given or implied thereby, he must obtain from the court leave to exercise such powers, as, for instance, power to carry on a business. Generally speaking, a receiver should not initiate or defend or compromise any proceedings, or do any other act liable to involve the estate in expense, or liability, without obtaining specific authority,[55] which can be obtained on summons supported by an affidavit of the relevant facts.[56] If an agent for sale is appointed by a receiver without leave of the court, the court in its discretion may make him an allowance, even though he is not entitled to commission.[57]

Applications in respect of the estate. All applications to the court in respect of estates in the hands of a receiver should, as a general rule, be made on behalf of persons beneficially interested in the estate, and not by the receiver. The receiver ought not, generally, to originate any proceedings in the action.[58] The conduct of the action is not nowadays given to a receiver [59] and may be taken from the plaintiff if his interest is adverse to other members of a class, *e.g.* of debenture holders, whom he represents.[60] If, owing to any difficulty, an application to the court becomes necessary, the receiver should apply in the first instance to the party having the carriage of the order,[61] or if necessary, to any other party, to make the necessary application. If, after he has done so, no application

[55] Daniell's *Chancery Practice* (8th ed.), p. 1481. The court will not empower a receiver to sue, unless it appears likely that some fruits may be derived from his doing so: *Dacie* v. *John* (1824) M'Clell. 575.

[56] Forms of summons for powers, Atkin's *Court Forms* (2nd ed.), Vol. 33, pp. 203–208; to bring action, p. 203; defend, 204; to carry on business, 207; to pay debts, 204; borrow, 204; repairs, 208; as to the grant of leases, *post*, p. 186.

[57] *Re National Flying Services* [1936] Ch. 271.

[58] *Miller* v. *Elkins* (1825) 3 L.J.(N.S.)Ch. 128; *Parker* v. *Dunn* (1845) 8 Beav. 498; *Ex p. Cooper* (1887) 6 Ch.D. 255. If the receiver of an estate proves without leave against the estate of a bankrupt legatee, a debtor to the estate, he thereby discharges the debt, and entitles the legatee, on the annulment of his bankruptcy, to his legacy: *Armstrong* v. *Armstrong* (1871) L.R. 12 Eq. 614.

[59] *Re Hopkins* (1881) 19 Ch.D. 621.

[60] *Re Services Club Estate Syndicate* [1903] 1 Ch. 78.

[61] *Windschuegel* v. *Irish Polishes Ltd.* [1914] 1 I.R. 33.

is made, and no proper means are taken to relieve the receiver from his difficulty, or if the matter is so urgent that the purpose of the application would be defeated by delay caused in applying to the parties,[62] he may himself apply and would be entitled to his costs.[63] Where a receiver had incurred costs in the execution of his duties, and the parties to the suit had for a long time neglected to provide for them, he may himself apply by summons for payment.[64]

Supervision by plaintiff's solicitor. The solicitor for the party having the conduct of the action should exercise a general supervision over the receiver and protect the estate against irregularities by him; failure to do so may prevent the plaintiff from applying for recoupment out of the fund of expenditure rendered necessary by the irregularity.[65]

Party receiver. Where a party to an action is appointed receiver he is entitled to apply to the court as freely as if he were not holding that office.[66]

Right to sue. A receiver acquires no right of action by virtue of his appointment: he cannot sue in his own name as receiver, *e.g.* for debts to a company, or to parties over whose assets he has been appointed receiver; nor can the court authorise him to do so.[67] In such cases he must maintain the action in the name of the person or persons who would be entitled to sue [68] apart from his appointment.[69] A receiver may, however, acquire a right of action to sue in his own name: for instance, as the holder of a bill of exchange [70]; or the assignee of a debt which has been actually assigned to him; or by virtue of his possession,[71] as, for instance,

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[62] *Cf. Nangle* v. *Lord Fingal* (1824) 1 Hog. 142.

[63] *Ireland* v. *Eade* (1844) 7 Beav. 55; *Parker* v. *Dunn* (1845) 8 Beav. 498. For a recent example see *Brenner* v. *Rose* [1973] 1 W.L.R. 443, where the receiver applied by summons for directions in relation to an underlease.

[64] *Ireland* v. *Eade* (1844) 7 Beav. 55.

[65] *Craig* v. *Att.-Gen.* [1926] N.I. 218.

[66] *Scott* v. *Plate* (1847) 2 Ph. 229, 230.

[67] *Ex p. Sacker* (1888) 22 Q.B.D. 179; *Rodriguez* v. *Speyer Bros.* [1919] A.C. 59, 75, 112.

[68] It must be remembered in partnership cases that one partner cannot sue or be sued in the name of the firm: *Meyer & Co.* v. *Faber* [1923] 2 Ch. 441.

[69] *Rodriguez* v. *Speyer Bros.* [1919] A.C. 59, where the dicta to the contrary in *Rombach* v. *Gent* (1915) 84 L.J.K.B. 1558, were criticised.

[70] *Ex p. Harris* (1876) 2 Ch.D. 423, explained in *Ex p. Sacker* (1888) 22 Q.B.D. 179.

[71] *Ex p. Sacker* (1888) 22 Q.B.D. 179, 185.

ANNEX 'A'

The standard form of mortgage debenture provides that a receiver and manager, appointed thereunder shall be the agent of the company.[1] A compulsory winding up order automatically terminates that agency.[2] Likewise the commencement of a voluntary winding up, by the passing of a resolution to wind up, brings to an end the agency of a receiver and manager.[3] So far as the receiver is concerned, although he retains his right to custody and control over the company's assets, the company, whose agent he is, no longer has full and free capacity to continue its business in terms of the objects in its memorandum. The company cannot authorise the receiver to do any act which it is unable to do itself, so that it cannot empower the receiver, after the date of the liquidation, to carry on its business so as to create debts provable against the unmortgaged assets of the company; but the receiver can still continue to exercise his powers in the name of the company although the company is no longer liable for any debts which he may incur in doing so.[4] In other words the termination of the agency does not leave a vacuum. The receiver is still in control. But his position is peculiar and made more difficult. He cannot bind the company with fresh obligations. Acting, as he does, as a principal he will be personally liable in respect of fresh contracts, albeit with a right to indemnity out of the assets of the company. And if despite the termination of his

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2. Gosling v. Gaskell [1897] AC 575, HL

3. Thomas v. Todd [1926] 2 KB 511

4. Visbord v. Federal Commissioner of Taxation (1943) 68 CLR 354 at 352 per WILLIAMS J. The company is "incapacitated by the winding up order from carrying on business, and the receiver could not create debts which would be proveable in the liquidation against the unmortgaged assets of the company: see Gosling v. Gaskell [1896] 1 QB 699, CA at 699-700 per Rigby L.J. (dissenting but upheld [1897] AC 575 HL)

agency he purports to act in the name of the company he may be held liable for breach of warranty of authority.

In some cases a receiver and manager may be content to continue trading because he has extracted a comprehensive (and satisfactory) indemnity from the debenture holders before accepting the appointment. Indeed a prudent receiver and manager will always strive to extract such an indemnity. In rare cases the debenture holders may be liable because the receiver and manager was their agent, either under the express terms of the debenture or by subsequent agreement. In the absence of express agreement it will be difficult to show that the debenture holders have given the appointee authority to act on their behalf. Because of the dangers of personal liability many receivers and managers will, on a liquidation, either cease to trade or hive down the trading business to a subsidiary company immediately.

While a compulsory winding up order or the commencement of a voluntary winding up brings about a cesser of the agency of the receiver and manager, some of his powers survive the death of his agency. He may continue to carry on the company's business, though not so as to impose fresh liabilities on the company.[1] He is of course entitled to take possession of the assets comprised in the debenture;[2] and so that power remains. And he may continue to get in and realise all the company's assets both real and personal comprised in the debenture.[3] Again he retains the power to take proceedings in the name of the company to get in assets of the company comprised in the debenture. Thus in Goughs Garages Ltd. v. Pugsley[4] the power to bring proceedings in the name of the company to obtain a new lease of business premises was held to survive a winding up order. It was necessary to bring proceedings in the company's home because the legal title was vested in the company. The termination of the authority of the receiver to act as agent of the company does not affect his power to hold

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or dispose of property comprised in the debenture.[1]

On the other hand there are some powers such as the power to call uncalled capital, [2] or to create debts which would become provable in the liquidation against the uncharged assets of the company which do not survive the termination of the agency [3].

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4. (1977) Times, 20th October

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1. see P.J. Millett Q.C. (1977) 41 Conv. NS 83 at 93-95 anticipating the decision in Sowman v. David Samuel Trust Ltd. (in Lig) [1978] 1 WLR 22

2. see Re Clifton Place Garage Ltd. [1970] Ch 477, CA

3 Sowman v. David Samuel Trust Ltd (in Lig) [1978] 1 WLR 22; and see Re Norman King & Co. [1960] SR (NSW) 98

4 George Barker (Transport) Ltd. v. Eynon [1974] 1 WLR 462 at 467; Biggerstaff v. Rowatt's Wharf Ltd. [1896] 2 Ch. 93 at 106

(Revised brief for
61st Mtg reissued)

ILRC 62ND MTG

Brief for Item 4 (paras 51-67)

Chapter 16 (Part II) - Powers and Duties (of Receivers and Administrators)

1 Ritchie kindly remarked that he had no comments on this draft "which seems to be well founded on common sense".

2 Peter Millett remarks:

> " Ought we not to be more specific, and deal with particular powers? I have in mind Mark Homan's Memorandum for the Accountants' Panel. Not all his complaints are met by adopting s.15 of the Scots Act. " No?

[Note I'm not sure what Memo Peter is referring to; it may be that all of Homan's complaints were accepted by the other Panel members or by the Committee.]

3 Para 51, last word Muir asks "Adequate for what purpose - the protection of the debenture holder or of others?"

4 Para 56 Muir suggests we add, "The receiver should however be required to maintain a "seal book" ie. a record of the use of the seal by him."

Yes

5 Peter Millett remarks:

> " Giving the receiver power to use the Company's seal does not meet the problem referred to in para.56, and we should be careful not to give the impression that it does. I enclose a statement of the current law,* which shows that it is not as unsatisfactory as may be thought: it is from a proposed new text-book now being written by an able colleague of mine. "

[* Annex 'A' attached.] Hubert Picarda.

6 Para 58. Muir suggests we add, "The penalty imposed by section 372(5) for non-compliance with the duty to produce the statement of affairs - a default fine of £10 per day - is quite inadequate. There should be a power analogous to that conferred in a compulsory winding up in respect of a similar default, by section 235 of the Act of 1948 and Winding Up Rule 55, to apply for an Order of the Court enforceable by committal."

Yes.

[Note the above includes a new recommendation for approval by the Committee.]

7 Para 58. Redraft by Peter Avis.

add Approx s/affairs.

Para 58 The existing power to call for a statement of affairs under section 372 of the Act of 1948 is in some cases inadequate, both because it is difficult for a receiver to enforce its production if it is not readily forthcoming and also because he has no satisfactory means of compelling the directors to give answers to any supplementary questions which he may wish to ask. Similarly, as a receiver presently has no power to examine the directors or other persons with knowledge of the affairs of the company, we consider such power should be available in receivership in a similar way to that accorded in a liquidation under section 268 of the above Act. This would be particularly helpful in tracing assets of the company.

Yes

8 Para 60 Peter Millett comments:

Empty property rates. This requires to be re-written to take account of the following:-

(1) Liability to E.P.T. has been suspended - possibly permanently.

(2) Banister's case was dealing with the care of the receiver who takes possession. Neither the debenture-holder nor the receiver can be liable until they take possession: see Westminster City Council v. Haymarket (1981) 1 WLR 677.

(3) In the course of argument in that case, the Court of Appeal doubted the correctness of Banister's case, which appears to have proceeded on a wrong concession of counsel.

(4) If liability to EPT is restored, consideration should be given to the extent of the charge. Is it readily intended to take priority even to the debenture (as was held in the Westminster case)?

9 Para 62 Peter Millett comments:

> This problem is not unique to gas. It applies to electricity too. I was proposing to deal with this in "Secured Creditors". It is probably better to exclude it here.

[Note I think Peter may have mis-read the para.]

10 Paras 63 and 64, page 20 Muir says "No!. The statement at the top of page 20 (line 3) is incorrect. The receiver appointed by the Court does not himself apply to the court, except in exceptional cases. I enclose an extract from Kerr on Receivers pp.180/1. [Annex B]. The normal applicant is one of the trustees or other parties interested, or in the case of a debenture holder's action, the debenture holder. I doubt the wisdom, or the judicial acceptability, of using the informal s.369 type of application as a forum for a 'mini-action' between the debenture-holder and his receiver. It would be preferable to authorise the issue of an originating summons to determine such disputes by the Judge, or a judge."

[Note. Sorry! I was simply quoting from Jenkins (paras 298 and 306(d), Magnus and Lestrin on Companies Law and Practice (p.331), Kilbrandon on the Scots Act of 1961 (para 70), the submissions from some of our consultees and the proposals put forward by our Accountants' Panel. The Jenkins recommendation has been endorsed by the Committee on at least two occasions and of course, has already been enacted in Scotland.]

11 Para 64 Edwards comments:

> "I do not think we need the word "strongly", but we might make the point that as the debenture holder cannot, under our proposals, remove the receiver, it is important that he has access to the Court to ventilate his dissatisfaction with the acts or omissions of the receiver."

12. Para 64. Redraft by Peter Avis:

We therefore endorse the recommendation of the Jenkins Committee which has not been enacted, ~~as we can see no good reason for the distinction that is made in this matter~~ between the receiver appointed by the Court and the ~~receiver appointed out of Court~~. For example, a situation might arise where there is a dispute between the receiver and the debenture holder and we consider it reasonable that it should be open to either party to refer the matter to the Court for instructions.

directions

We note that provision has been made for this section 23(1) of the Scots Act of 1972.

13. Paras 65-67 Peter Millett comments:

Paras. 65-67. I don't like the proviso in 67. On the whole, I prefer the original Jenkins' proposal. I don't agree with para. 66. No

14. Para 67 Edward comments:

"I think this paragraph should be stating that relief should only be granted where it is coupled with an imposition of liability on the appointor and should be limited in quantum to the extent of the recovery from the appointor. I do not think a company will be able to recover from the debenture holder unless there is a Court order."

15 Para 67 Muir suggests adding to the para:
"However, this aspect of his personal protection, and of the protection of the company and its creditors, may be affected by the extent to which the receiver is insured, or can be insured, against the risk of such liability."

16 Powers of an Administrator Proposals put forward by Muir:-
"The distinction between the powers of a receiver and the powers of an administrator (under Chapter 9) are:

(1) The receiver can (except in the case of a farmer under an agricultural charge) only be appointed under a debenture creating a floating charge granted by the company, whereas an administrator can be appointed in respect of the affairs of a substantial business carried on by a sole trader or a partnership (para 499).

(2) The principle motivating the acts of an administrator will be the interests of creditors generally, as contrasted with the receiver who must to a substantial extent look to the interests of the debenture-holder. This principle will influence both the exercise of any statutory powers, and the grant of any discretionary powers.

(3) The administrator has to prepare and submit the statement of affairs himself (para 512) whereas the receiver causes it to be prepared by the directors. The administrator will need greater powers of compulsion than the receiver for the production of information, so from this aspect, the administrator will very closely resemble the receiver appointed by the Court.

(4) Since the appointment of the administrator procures a stay of all proceedings and executions (para 516) which a receivership under a debenture does not, he will need the power to enforce such a stay.

Pension Schemes

Yes

17. (a) Edward says that it might be convenient to make it clear that where the company has a power to appoint new trustees the receiver can exercise the power.

(b) Muir says "Yes" to the question in Note 1, but adds that it requires more detailed drafting,re aspects of pension schemes and trusts.

(c) Duncan feels that the best interests of employees would be served if the Court appointed someone to look after the fund pending a settlement.

PA l.4. where Tees. no longer willing to act, to enable appmt. of new Tees.

(Revised brief for 61st Mtg reissued)

ILRC 62ND MTG

Brief for Item 4 (paras 1-50)

Chapter 16 - Insolvency Practitioners - Powers and Duties

1 Peter Millett makes the following general comments:-

(i) "We do not grapple with the real problem at all. In many situations, the creditors and the debtor's interest are in conflict (eg. if the assets are sold now, the creditors will get 90p, the debtor nothing: if the trustee delays sale for a couple of years, the creditors will be paid in full, and the debtor will receive a substantial sum. The creditors would rather have 90p now(reasonably); the debtor would rather wait (obviously)). Who is to decide? How can the trustee if he owes duties to both? Must the Court decide in every case? And how?"

(ii) "Where are we going to deal with the Centrebind problem? (Shareholders put company into voluntary liquidation - liquidator sells the main asset to the shareholders before the creditors' meeting). We have made the problem worse. I thought that we were going to provide that no liquidator could sell the company's main asset or take any major step pending the creditors' meeting. I don't think we can shrug this one off by saying - we've cured it by insisting on professional qualifications. There are plenty of bad but qualified hats around. Also, Clinton-Davis has proposed an amendment to the Companies Bill to deal with the problem - so we must refer to it and propose our own solution."

(iii) "Borrowing powers - surely, only with the sanction of the committee?"

NOTES. On Peter's first point: it may be more in perspective if one refers to "the debtor" as "the insolvent"; moreover, in Peter's example, he is an insolvent who is unable to either agree a voluntary arrangement with his creditors or obtain a DAO. I would think that most professional trustees would know where their duty lay and that the Courts would soon put an end to any vexatious complaints. In any case, I don't think we are proposing to change the present law on this subject and I don't think we have received any representations of difficulty about it from practitioners, or complaints from others.

On Peter's second point - we have referred to "Centrebind" in para 668, but not to the problem of assets being sold before the creditors' meeting. However, we have recommended that the directors must appoint a provisional liquidator (see para 670). Does not that solve the problem? Can a provisional liquidator dispose of the main assets? OR's are instructed to seek the sanction of the Court if there are good reasons for the disposal of substantial

assets when acting as provisional liquidator following a w.u.o. OR's certainly have no power to sell or dispose of any assets (without Court sanction) when appointed provisional liquidator before a w.u.o. Perhaps we should recommend that, to make the position clear, no provisional liquidator should be able to dispose of assets (other than perishables) without the sanction of the Court.

Peter's third point refers to para 32 which Muir has dealt with extensively (see below)]

2. Edward makes the following general comment:

"There are a number of references to duties owed to 'the debtor, the creditors and other interested parties'. I think we should be clearer as to what we mean by 'other interested parties'. I am far from clear."

para 9. Codes of Duties by Directors.

3. Para 2 - Redraft by Muir:

"In a number of matters, the powers of a liquidator or trustee are subject to the prior sanction of his committee of creditors (at present called "the Committee of Inspection") or, where there is no committee, the Department of Trade or of the Court. We deal with such "Committees of Creditors" (as we propose to rename the Committee of Inspection) in the next chapter; suffice it to say at this stage that, in relation to the exercise of their powers, we consider that the general requirements for such sanctions can be dispensed with. In reaching this decision, with its necessary diminution in the element of "creditor control", we have borne in mind our proposals for comprehensive qualifying requirements for all insolvency practitioners, and our proposals for imposing upon them the statutory duties of care which are discussed below."

Yes

[I am not sure that all of Muir's proposed additions are correct. I believe that our decision was to call them liquidator's/ trustee's/receiver's/administrator's committees as the case might be (thus overcoming the problem of the committee which includes contributories) and I intend to cover this in the next Chapter.]

4. Paras 3 and 4. Substantial drafting amendments have been made in order to improve the draft.

5 Para 5 Peter Millett suggests this para be deleted. Yes.
[I agree.]

6 Para 7 Edward would remove the reference in line 14. ✓

7 Para 9 Edward comments on "fiduciary duty" as follows:

"The reference to "fiduciary duty" is adequate and need not in my view be expanded. It means the duty to act in good faith, not to profit from the position, not to allow a conflict between duty and interest to arise, to account punctiliously and so on. It does not extend to the exercise of care, skill and expedition."

8 Para 9 Redrafts by (a) Peter Millett and (b) Muir:-

(a) "9. We support the general approach of Justice, but we would not go so far as to propose that the duty of care of a trustee - or of any other insolvency practitioner - should be one of the utmost good faith. This goes beyond the ordinary fiduciary duties of a trustee to his beneficiaries, and is in our view inappropriate. The insolvency practitioner will be a professional man charged with the responsibility of managing and realising property belonging to others. He must act honestly, reasonably and prudently, and display proper professional skill and competence. We consider that he should owe to the debtor, the creditors and other interested paties a duty of care appropriate to his professional standing, and the ordinary fiduciary duties appropriate to a professional trustee."

Duties and Standard

Yes + me

[NOTE. This is also in line with a note by John Lapp]

(b) "While we support, generally, the proposals put forward by "Justice", we would not go so far as to suggest that the duty of a trustee - or of any other insolvency practitioner - should be one of the utmost good faith. In our view, such an obligation would go beyond ordinary fiduciary duties, and would imply in particular a duty to report and disclose akin to that owed by one partner to another, or by an assured to an insurer. We do, however, consider that the liquidator or trustee should owe a certain fiduciary duty to the debtor, to the creditors and to other interested parties; the extent and characteristics of that duty will, we think, vary according to the person to whom it is owed."

9. Para 10. Suggestion by Edward:

"Would it be worth mentioning the point that a concomitant of restricting the class of persons qualified to act as insolvency practitioners is to impose on the restricted class a clear duty of care. If they are to be qualified and have the benefit of the office, they must shoulder the burden that the qualification suggests and requires."

10. Paras 10 and 11. Redrafts by Muir (paras 10,11,11A & 11B):-

"10 It ~~could~~ may be argued that if legislation imposed a duty of care upon the liquidator or trustee, equivalent to that of any professional man towards a client, there might be a danger of numerous actions being brought against trustees or liquidators particularly by individual debtors. It is a well-known fact of life in the insolvency world that not only individual debtors, but also the directors of insolvent companies, are very prone to take an ~~very~~ extravagantly optimistic view of the value of the available assets, and ~~tend~~ to take a critical view of their trustees or of the liquidators. If the trustees or liquidators do not

realise the assets at the estimated values put on their in the statement of affairs, the insolvent or the director (or the shareholders) might well feel that this provides them with a prima facie case for complaint. One may even encounter a certain tendency to believe in a conspiracy against the debtor, in which he is the innocent victim.

Redraft.

11. We do not regard these risks in themselves as sufficient reason for precluding the introduction of any such legislation; but it must contain elements of control and provide a sifting process, so as to prevent the trustee or liquidator from being constantly open to attack and harassed in his administration, and in particular from being exposed to frivolous litigation whether by insolvents, directors or creditors. This could be achieved by providing that a debtor (or debtor company, or its directors) should not be allowed to bring such an action without the leave of the Court. Precedents for such leave of the Court being required to bring an action can be found in Section 1 of the Limitation Act, 1963, 1980 in Section 141 of the Mental Health Act, 1959, and in Section 224(1), proviso (c), of the Act of 1948 (controlling petitions sought to be presented by contingent or prospective creditors)

10 + 11

11A. So far as concerns the right to sue a trustee or liquidator [or, on even a more limited field, a receiver or administrator] we are of opinion that, without desiring to impugn the sanity of disgruntled debtors, or to deny them a just relief for their grievances, the following observations of Lord Simon are in point :

[See para 12 below for my note]

> "Section 141 of the Mental Health Act 1959 places a hindrance on the recourse of a class of citizens

to the courts of justice. Although Magna Carta promised that to no man would justice be denied or delayed, it is not unparalleled for the legislature to constitute such lets and conditions. An obvious example is the legislation relating to vexatious litigants. The mischief and the parliamentary objective must be similar. It must have been conceived that, unless such classes of potential litigant enjoy something less than ready and unconditional access to the courts, there is a real risk that their fellow-citizens would be, on substantial balance, unfairly harassed by litigation." (R. v. Bracknell JJ., Ex parte Griffiths (1976) A.C. 314, at p.329).

That Section precludes mentally disordered persons from commencing any proceedings for acts done to them under the Act without the leave of the Court, which must be satisfied that "there is substantial ground for the contention that the person to be proceeded against has acted in bad faith or without reasonable care."

11B. So far as concerns such actions by one creditor, or by a few creditors (as distinct from a majority, or a substantial number of them) we would not envisage any such prior leave to sue being obtained; but the legislation might provide a limited protection by requiring the aggrieved person or persons to prove that he or they had called, or sought to call, a meeting of creditors to ventilate his or their grievances, and might additionally be required by the Court to give security for costs. In the most recent reported case of an action by an

aggrieved creditor (Leon v. York-O-Matic Ltd (1966) 1 W.L.R.1450, where the bankruptcy cases were applied), the Court held that an individual creditor had no locus standi to sue the Liquidator as for a breach of trust (a defect which our proposals would remedy); but on the basis that he could claim to be aggrieved by the Liquidator's act or decision, (analogously with Section 80 of the Act of 1914, referred to above), the judge held that on the evidence he was not satisfied that the Liquidator had not acted bona fide or in a way in which no reasonable liquidator could have acted, and had not, in the circumstances, as commercially judged, sold the company's undertaking at an undervalue, gross or otherwise."

61st NTG Ombudsman.

11. Re the Note to para 11; Peter Millett says creditors and other interested parties should not have to obtain leave of the Court; John Copp disagrees.

agreed

12. Para 12 Muir points out that the paras cited from Ch.8 do not themselves lay down any bases for suing a receiver for misconduct, and this could be the right place for it, or better in his para 11A. The Administrator (Ch.9) does not refer to accountability at all, except quare at para 520.

13. Para 13(b)(c)(d)(e) - Redraft by Muir:-

"

(b) his principal (or primary ?) duty should be to act in a fiduciary capacity, and to deal with the property under his control honestly, and in good faith, and in a commercially reasonable manner; his consequential duties should be to comply promptly and efficiently with all the specific statutory duties and requirements imposed upon him by his office;

(c) default in the performance of his principal (or primary?) duty, and (but only where appropriate) of his consequential duties, should give rise to a cause of action against him at the suit of the debtor (or debtor company) and the creditors and other interested parties for breach of statutory duty, to the extent of any damage sustained by the complainant in consequence thereof, (other than nominal damages);

(d) these provisions should apply to all liquidators, trustees and ~~other~~ others administering insolvent estates; and

(e) they should also apply to receivers and administrators, but only to a limited extent, having regard to the differences between their offices, and those of trustees and liquidators. In the case of receivers, we would refer to our recommendations as to the limited extent of their "accountability", set out in Chapter 8, at paras 442 to 454.

14. Paras 13(b)(c)(d)(e) - Redraft by Peter Millett:-

(b) his duty should be to act in a fiduciary capacity and to deal with the property under his control honestly, ~~and~~ in good faith, ~~and~~ with proper skill and competence and in a ~~commercially~~ reasonable manner;

(c) the provision should give rise to a cause of action on the part of ~~the debtor (or debtor company) and~~ the creditors and other interested parties (or, with the prior leave of the Court, the debtor or dr. co.) for breach of statutory duty, if default has been made and damage sustained in consequence thereof;

(d) the provision should apply to all liquidators and trustees administering insolvent estates; and

(e) the provision should also apply to receivers and administrators.

15. Para 14 Peter Avis suggests that this para should follow para 12, before we go on to "recommendations". Yes

16. Para 15 Muir suggests deleting the last phrase (top of page 6). ✓

17. Para 16 "We recommend" has it. ✓

18 Para 16 Peter Avis suggests this should become para 13(f). ✓

19. Para 17 John Copp suggests adding:-
"This should be co-existent with the right to apply to the Court for permission to bring a civil action (see para 11)."

20 Para 18 Edward suggests:

"I would have thought it worthwhile observing in passing that all we say about duties must apply with equal force to the conduct of liquidators in non-insolvency winding ups."

partially accepted.

21. Para 18 'Note' Of those who have responded to date, two say "Yes" and one says "Probably not".

22. Para 19 Peter Avis suggests an opening para under this sub-heading, which includes the substance of para 22 and leads in to the present para 19; viz:

> **Control by the Court**
>
> **19** We have received many representations concerning the lack of clarity and harmonisation in those areas where control by the court is enlisted on the question of grievances arising out of the power and duties of insolvency practioners. It would seem that some rationalisation is necessary and that one simple provision covering all classes of insolvency practioner, including receivers and administrators, should be introduced. The following instance highlights the problems:-
>
> **(a)** Sections 245(3) and 246(5) of the Act etc
>
> (This takes in paragraph 22, page 7)

23. Para 22 Muir suggests the second sentence be deleted.

24. Para 23

(a) Peter would add "We consider that this is the appropriate measure of his liability."

(b) Muir would add "However, we have proposed in Chapter 15 at paragraph 762, the introduction of compulsory bonding and indemnity insurance for all insolvency practitioners which should go a long way to protect parties injured by their acts."

25. Para 23 Edward asks:

> "Should we not make it plain that a liquidator in breach of his duty of care cannot recover out of the estate: since, by definition, the damage suffered is the reduction in the size of the estate."

26 Paras 24/25 Re-arranged and redrafted by Muir:-

This is my rearrangement and redrafting of paras 24/25

Registered land: Inspection of the Land Registry

24/25 The position in England, as we understand it, is that a folio in the Land Registry cannot be inspected without the written consent of the registered owner. In Northern

[Does this mean only Northern Ireland or all Ireland? MH]

Ireland, by contrast, the Land Register has always been open to general public inspection. We have received submissions from insolvency practitioners that a trustee in bankruptcy or a liquidator should have power to require the Land Registry to disclose the names of the registered owners of land and property, in respect of which he can, by a statutory declaration, depose to his belief that the estate which he is administering may have an interest therein, or may have a cause of action against the registered owners related to the land.

/ NOTE: The submission which came from Mr.R.B.Knight (C17) was changed by the Accountants' Panel to giving the liquidator power to search the register (as in Ireland). We rejected this (by a majority), because we were against giving the liquidator any "fishing" powers. John Hunter, in support of the proposal, pointed out that there would be no breach of confidentiality of the register involved as the liquidator or trustee stands in place of the registered owner. In the Report should we support the original proposal?/

YES

See my para 24 above. MH

[Peter Millett supports the original Note (c) and John Copp agrees with John Hunter's original remarks (in the Note).]

27 Para 25 Edward's view is as follows:

"I would tend to omit this as rather unimportant. However, I still think that the 'fishing' objection is relevant. If the liquidator or trustee is asking questions because he stands in place of the registered owner, he knows who owns what and therefore is unlikely to be asking questions in the first place. As I understand it, the problem to which the suggestion is addressed is this: a liquidator or trustee thinks that Blackacre may be owned by the insolvent debtor, but is not sure and is trying to find out. "

28. Para 28 Muir suggests a sub-heading - "Committee of creditors". [Unfortunately that is not what we have decided to call it!]

29. Para 28 Redraft by Muir:- see Com. of Cs. "members of minutes".

"In the next chapter we put forward proposals whereby in place of the existing Committee of Inspection, a committee of creditors (and of shareholders, where applicable) should be appointed and should be kept informed of the progress of the administration and should be empowered to apply to the Court if they are not satisfied with its progress or any other relevant matter. In view of this proposal, and of the tighter control over who may act as liquidator or trustee, we consider that sanction to employ a solicitor is no longer necessary. The trustee or liquidator should however be required to inform the committee of his intentions to commence or to defend legal proceedings, and thereby to incur costs to be defrayed out of the assets, and if the majority are opposed to the action he proposes, he should only be entitled to proceed with it at the expense of the estate after obtaining the leave of the Court."

[NOTES (1) Propose to accept. yes:

(2) Since preparing the original draft, I've re-read the TUC evidence and am inclined to think that the workforce (whether they are creditors or not) have as much right as contributories both to a "first meeting" and to representation on the committee.]

30 Para 31 Muir queries the phrase in brackets at the end of the para. It was added by the Committee when someone suggested that one member of the committee ought to be able to apply to the Court if he had the support of the other committee members. On reflection, isn't this the same thing as "the committee"?

31 Para 32 Edward agrees that there should be power to borrow, and adds:-

"For instance, there may be money arising - without doubt (perhaps because of a bank guarantee) - in the future under a past realisation, but money is needed immediately for some critical reason such as preserving assets."

32 Para 32 and its 'Note' - Redraft by Muir:-

"Borrowing Powers

32. For the purposes of ensuring the efficient administration of the ~~estate~~ estate, trustees and liquidators may need to raise funds by borrowing upon the security of the assets of the estate. Under the present law, a trustee may only borrow, and then only with the permission of the committee of inspection, and only for the

purpose of paying the bankrupt's debts; (section 56(5) of the Act of 1914) he cannot carry on the bankrupt's business without a similar permission, and then only for the purpose of its beneficial winding up, and it is not expressly stated that he may so borrow for that purpose also (section 56(1)). In the case of compulsory winding up, the liquidator may, without any leave from the committee of inspection, borrow on the security of the assets any money required, but he may not carry on the business of the company without permission, and then only for its beneficial winding up (section 245(2)(c) of the Act of 1948). A liquidator in a voluntary winding up, whether members' or creditors', may both borrow money on the security of the assets, and carry on the business for the purpose of its beneficial winding up, without any permission (section 245(1)(b)). (section 303 of the Act of 1948).

32A. It seems to us that in this field also there should be a harmonisation of the respective powers of the persons administering insolvent estates. We therefore recommend that the powers of the trustee or liquidators be assimilated to that of the voluntary liquidator referred to above (as prescribed in section 303 of the Act of 1948), applying the same formula as suggested in paragraph(28) above, that it to say that the borrowing should be reported to the committee of creditors, as should also be the carrying on of the business for the purpose of its beneficial winding up, with liberty to the committee to object in the manner there indicated. This formula would apply to all the procedures which we are proposing in this Report, and would include the Official Receiver when acting in any capacity in an insolvency matter, and the administrator under Chapter 9. ✓

(Note I hope that the above text sufficiently accepts T.T.'s invitation in his note. MH)

[John Copp favours a power to borrow to enable a call on shares to be met, to avoid forfeiture, and perhaps for other short-term emergencies, but thinks the loan should be limited in time.]

33. Para 35 Peter Millett suggests adding:- Yes
"In such circumstances, a representative action may be brought by a single shareholder or creditor on behalf of the others. It would not, in our view, be appropriate for such proceedings to be brought by the liquidator or trustee."

34 Para 42 Muir suggests:

(a) amending line 3 to read 'destroy general categories of books and papers'; and

(b) adding to para: "but he should retain, or cause to be stored, important documents of record, such as minute books and share registers, for a substantially longer period."

[NOTE: I have sounded out the Department on this one and they see no requirement to distinguish between the various books and documents. In fact, in a compulsory liquidation, the OR normally applies to destroy all books, etc, six months after the liquidator's release (ie. about 18 months before the company is dissolved). Exceptions are made for records which may be required by a receiver, or for prosecutions or civil proceedings, or in respect of records of historical importance. Regarding the latter, the OR contacts interested people (museums) and gets an undertaking that the records will be kept by them to his order.

However there is an anomaly in respect of voluntary liquidations in that under s.341 (to which John Hunter referred us at the 48th Mtg) the liquidator may be ordered to produce books up to 5 years after dissolution, on the footing that they are under his absolute control, seemingly, no matter what instruction he may have received from his committee.]

35 Para 49, last sentence

(a) Peter Millett suggests it be amended to read ".....insolvency practitioners make this requirement unnecessary".

(b) Muir suggests: "our proposals regarding the higher qualifications required by insolvency practitioners seem to us to justify a degree of trust to which the oath adds little further substance. Since the duty to make returns is statutory, inaccurate or improper returns will expose their authors to penalties."

Yes.

36. Para 50 Muir says "No, I do not agree, except in the case of formal or semi-formal applications or applications made ex parte (eg. under s.25 BA 1914). Our judicial system rarely dispenses with sworn evidence, oral or written - see Re Allied Produce Ltd (1967) 3A11 ER 399 a Secretary of State petition."

[NOTE. This para is virtually verbatim from the proposal by J. Hunter which was approved at the 48th Mtg.]

Unopposed

I. L. R. C. 61st MTG

Addendum to Brief for Item 9

Claims Between Spouses

by Peter Millett

An excellent paper. I have only three comments:-

1. Para. 5. The unexplained distinction. I think the reason is to be found in the rationale of Section 3 of the 1882 Act. Before that Act, the wife's assets were available to her husband's creditors, but the husband's assets were not available to his wife's creditors unless she had pledged his credit. Section 3 was, I think, trying to preserve the creditors' rights in the face of the changed law, but without extending them.

2. Man and woman living together as man and wife.

I am strongly in favour of extending the doctrine

to the above. We must not be afraid of supposed difficulties of proof. There are at least six statutory provisions which use the above phrase; and we are proposing to adopt it in relation to "connected persons" in Recovery of Assets: see para. 26.

If some members of the Committee dislike treating unmarried persons living together as if they were married, they should reflect that there are three different cases:-

(i) statutory rights and liabilities inter se (cf rights of maintenance and support, inheritance and family provision, rights to the matrimonial home);

(ii) statutory rights against third parties or the state (cf Social Security);

(iii) statutory liabilities to third parties (cf creditors).

We would, most of us, oppose any extension of the

first beyond the marriage tie; would leave it to Parliament to decide the ambit of the second on an ad hoc basis; but why not extend the third? Why should creditors' rights depend on whether the bed was the marriage bed?

3. I am beginning to think that we may need a single chapter entitled "Connected Persons".

9.7.81.

I. L. R. C. 61st MTG

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9.7.81.

INSOLVENCY LAW REVIEW COMMITTEE

Notw to Members

DRAFT SECTION - CLAIMS BETWEEN SPOUSES

Attached are two copies of a draft on "Claims between Spouses" prepared by John Hunter; he has asked me to direct your attention particularly to his Notes on pages 4, 5 and 6. Please let me have one copy back with any drafting amendments and, if thought necessary, redrafts of paras (see John's Notes 2 and 3) for circulation.

2 The relevant paper is ILRC 146 (Report by WG2) paras 52-57, which was adopted at the 50th Mtg.

3 Regarding the references to "co-habitee" and "mistress" in Note 3: you may recall that we have circumnavigated this one rather nicely when dealing with the Family Home, by saying that the terms "husband" and "wife" should include persons living as husband and wife. If that is accepted, perhaps we can leave it to the Courts to decide whether or not they should be of opposite sexes.

T H TRAYLOR
Secretary
23 June 1981

1. Under section 36(2) of the Act of 1914, where the husband of a married woman is adjudged bankrupt any money or other estate of such woman lent or entrusted by her to him for the purpose of his trade or business is treated as assets of his estate and his wife is not entitled to claim any dividend as a creditor in respect of any such money or other estate until all claims of her husband's other creditors incurred for valuable consideration have been satisfied. This provision is to the same effect as section 3 of the Married Women's Property Act 1882 which it replaced and which had been introduced in consequence of the new rights then conferred upon married women and as a qualification of such rights.

2. It is to be noted that the subsection, in addition to postponing to the claims of other creditors any claim of a wife in the bankruptcy of her husband in respect of money or other estate lent or entrusted by her to him for the purpose of his business, makes the money or other estate of the wife so advanced to her husband assets in his bankruptcy, i.e. makes what is her property available for the benefit of her husband's other creditors. This is only material in so far as the property lent or entrusted to the bankrupt husband is still in his possession at the date of his bankruptcy and has not, for example, been lost in his business, and indeed appears to be unnecessary in relation to a loan of money because money lent always becomes the property of the borrower, although he owes money to the same amount, or more if interest is payable on the loan (see judgment of Lindley L.J. in Re Leng, Tarn v. Emmerson 1895 1 Ch. D. 652 at p. 655).

/3.

3. Section 3 of the Married Women's Property Act 1882 applied only where the husband was a sole trader and did not prevent proof against a partnership firm of which he was a member. This distinction was explained by Cave J. in Re Tuff, ex parte Nottingham (1887) 19 Q.B.D. 88 at p. 91 on the basis that where the husband is a sole trader his wife lends to him and to him only and she will share with him in the whole of the benefits which will arise from the success of the trading, but where he is a partner with others, whilst she will benefit by his success, she will only enjoy that portion of the profits which her husband may be entitled to derive from the firm.

4. Section 36(1) of the Act of 1914 deals with the converse situation where money or other estate has been lent or entrusted by a husband to his wife for the purpose of her trade or business and she becomes bankrupt. In this event the husband's claims to a dividend as a creditor in respect of such loan is postponed to the claims of all other creditors of his wife.

5. This provision was first enacted in the Act of 1913, following a recommendation of the Muir Mackenzie Committee (Report para. 120 (d)). By the same Act a married woman carrying on a trade or business separate from her husband was for the first time made amenable to bankruptcy. The provision is reciprocal to subsection (2) in regard to postponement of the husband's claim but differs from subsection (2) in that the money or other estate lent or entrusted by a husband to his wife is not expressed to be treated as assets of her estate in her bankruptcy. The Muir Mackenzie Committee report does not explain why they proposed to make this distinction from section 3 of the Married Women's Property Act 1882, which was at that time the operative provision in relation to

/loans

loans by a wife to a husband who becomes bankrupt. It appears to reflect a degree of sexual discrimination perhaps not surprising in 1908.

6. It has been represented to us that, particularly since the Sex Discrimination Act 1975, any such distinction between the treatment of a husband's property on the bankruptcy of his wife from the treatment of a wife's property on the bankruptcy of her husband is inappropriate.

7. We accept this criticism and consider that either the provision in section 36(2) of the Act of 1914 that money or other estate of a wife lent or entrusted by her to her husband for the purpose of his trade or business/should not be included in the new legislation or, alternatively, is treated as assets of his estate in his bankruptcy that a corresponding provision should be applied to the case of a loan etc. by a husband to his wife for the purpose of her business. Whichever of these solutions is adopted, the claims of the lending spouse in respect of the loan should continue to be postponed to the claims of the insolvent's other creditors. We agree with the Law Commission that "Marriage is a form of partnership and, on normal partnership principles, neither partner should compete with the partners' creditors" (Law Commission Report No. 25 - Financial Provision in Matrimonial Proceedings).

8. We do not consider that there is any distinction in principle between a loan etc. by one spouse to the other for the purpose of a business carried on solely by him or her from a similar loan etc. to a partnership business of which the spouse is a partner and recommend that the operation of the provision should be so extended.

9. On balance, we favour the application of the second of the alternative solutions referred to in para /7/. We are attracted by

/the

the argument that, as each spouse will normally stand to benefit from the success of a business carried on by the other, property provided by the one to the other for use in his or her business should be regarded, in effect, as if it were capital introduced by a partner and available for the discharge of the liabilities of the business in the event of insolvency. This is in line with the principle enunciated by Bacon C.J. in Re Beale (1876) 4 Ch. D. 246 and endorsed by Romer J. in Re Meade, 1951 1 Ch. 774, that he who provides part of the capital of a business cannot call for payment till the creditors of the business are paid.

10. Our proposals in relation to loans etc. between spouses should apply to ~~all forms of insolvency, administration~~ bankruptcy, liquidation of assets and voluntary arrangement.

NOTE by J.M.H.

1. I have gone beyond the papers before the committee in constructing reasons for the recommendation in para. 56 of ILRC 146, adopted by the committee. I hope that para. 9 of my draft, in particular, will be critically scrutinised by other members and corrected if I have gone wrong. I have deliberately omitted the reference to the reputed ownership doctrine referred to in para. 55 of ILRC 146. It was Chris who invoked this argument in WG2. Although my researches have since revealed that it is supported by a statement in Griffith's Married Women's Property Acts, 5th. edn. 1883, I have also turned up an Irish case, Re Donaldson 1902 2 I.R. 310 where, at p. 314 Holmes L.J. said "I am of opinion that the statement in Mr. Griffith's text book that the third section of the Married Women's Property Act 1882 is an order and disposition clause is calculated to mislead. It seems to me to be a new provision in bankruptcy law called into existence in consequence of the new rights conferred upon a married woman by this statute, and its meaning must be ascertained by reference to its own language, which

/is

is, I think, very clear. It contemplates two things - the wife either lending her money or entrusting her goods to her husband for the purpose of his trade and business." Particularly in view of our recommendation that the order and disposition clause should not be retained, I prefer not to refer to it in this context, but to explain the principle behind section 3 of the 1882 Act by analogy with partnership law. Yes

2. I note that Muir, in his Rider A to the draft chapter on Recovery of Assets refers to the distinction between subsections (1) and (2) of section 36 as inexplicable and suggests that the existence of what he calls "this matrimonial disadvantage" might be mentioned in the context of complaints from consultees. This implies that he in fact would prefer us to adopt the first alternative in para. 8 above, rather than the second, which follows para. 56 of ILRC 146. If so, perhaps he would care to re-draft paras. 8 and 9 so that the committee may make a final decision.

Seen

3. In his note on ILRC 146 Ritchie refers to the oral evidence of the Inns of Court and the Law Society that section 36 of the 1914 Act should be extended to mistresses and he supports this, but proposed to substitute "co-habitee" for "mistress". The minutes of the 50th, meeting when ILRC 146 was discussed make no reference to this proposal, so I have not included such an extension in the present draft. I invite Ritchie to submit an appropriate paragraph if he wishes to pursue the point. Any extension of principles applicable to marriage to a relationship outside marriage seems to me to present the problem of identifying when the relationship has been established. If we do adopt the extension it may be that the quotation from the Law Commission report about marriage being a form of partnership should be omitted.

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4. I have proposed a change in the law so as to apply the postponement provisions to the case of a loan by one spouse to a business of which the other spouse is a partner. We have received no evidence on this nor was it considered by WG2. It seems to me to be logical to extend the law in this respect if the partnership analogy is valid.

18 JUN 1981