Library

A REPORT BY JUSTICE

BANKRUPTCY

CHAIRMAN OF COMMITTEE
ALLAN HEYMAN, Q.C.

£1.25 net

JUSTICE

British Section of the International Commission of Jurists

CHAIRMAN OF COUNCIL
The Rt. Hon. Lord Gardiner, C.H.

VICE-CHAIRMAN
Sir John Foster, K.B.E., Q.C.

CHAIRMAN OF EXECUTIVE COMMITTEE
Geoffrey Garrett

VICE-CHAIRMAN
Lewis Hawser, Q.C.

HON. TREASURER
Michael Bryceson

COUNCIL

Prof. Sir Norman Anderson, O.B.E., Q.C.
Bryan Anns, Q.C.
Peter Carter-Ruck
Michael Ellman
Philip English
Lord Foot
Edward Gardner, Q.C., M.P.
Prof. J. F. Garner
William Goodhart
Percy Grieve, Q.C., M.P.
Prof. C. J. Hamson
Glyn Hardwicke
Sir Desmond Heap
Muir Hunter, Q.C.
Tom Kellock, Q.C.
Philip Kimber
James Lemkin
Blanche Lucas
Edward Lyons, Q.C., M.P.
Ainslie Nairn
Michael Sherrard, Q.C.
Laurence Shurman
Paul Sieghart
Jeffrey Thomas, Q.C., M.P.
Peter Webster, Q.C.
Charles Wegg-Prosser
William Wells, Q.C.
David Widdicombe, Q.C.
Lord Wigoder, Q.C.
J. E. Hall Williams

DIRECTOR OF RESEARCH
Alec Samuels

SECRETARY
Tom Sargant, O.B.E., J.P.

LEGAL SECRETARY
R. C. H. Briggs

12 2 Clement's Inn, London WC2A 2DX E.C.4

A REPORT BY JUSTICE

BANKRUPTCY

CHAIRMAN OF COMMITTEE
ALLAN HEYMAN, Q.C.

LONDON
STEVENS & SONS
1975

Published in 1975 by Stevens & Sons Limited of 11 New Fetter Lane, London, and printed in Great Britain by The Eastern Press Ltd. of London and Reading

This Report has been prepared and published under the auspices of the JUSTICE Educational and Research Trust

SBN 420 44830 6

©
Justice
1975

JUSTICE

British Section of the International Commission of Jurists

THE COMMITTEE

Allan Heyman, Q.C. (Chairman)
Professor R. M. Goode
Alfred Goldman
David Graham
J. H. Farrar
Muir Hunter, Q.C.
Samuel Magnus
Anthony Pugh-Thomas
Daisy Spickett
G. A. Weiss
Wilfred Whitehead
Richard Wright
Michael Crystal (Secretary)

This Report has been endorsed and approved for publication by the Council of JUSTICE

AUSTRALIA
The Law Book Company Ltd.
Sydney : Melbourne : Brisbane

CANADA AND U.S.A.
The Carswell Company Ltd.
Agincourt, Ontario

INDIA
N. M. Tripathi Private Ltd.
Bombay

ISRAEL
Steimatzky's Agency Ltd.
Jerusalem : Tel Aviv : Haifa

MALAYSIA : SINGAPORE : BRUNEI
Malayan Law Journal (Pte) Ltd.
Singapore

NEW ZEALAND
Sweet & Maxwell (N.Z.) Ltd.
Wellington

PAKISTAN
Pakistan Law House
Karachi

PREFACE

THE Committee responsible for this Report was set up in December 1971 to re-examine the operation of the law of bankruptcy in England and Wales and to make recommendations for its improvement.

Its appointment was prompted by the submission to JUSTICE of a number of cases in which the law appeared to have operated harshly. The complaints covered a fairly wide range. Bankruptcy proceedings had been pursued when the complainant was basically solvent. The inquisition and seizure of belongings had been oppressive and had deprived the bankrupt of his self-respect. Valuable assets had been disposed of for far less than their true worth. Claims and legal actions which could have recovered sufficient to pay all the bankrupt's debts and provide a surplus had been abandoned, and there was no avenue of redress. In some of these cases it was clear that the bankrupt had contributed to his own misfortune and had failed to understand in good time what was happening to him, but there was one feature common to them all. The bankrupt had failed to take proper legal advice when he was still in a position to do so and had found it difficult to obtain legal aid once the bankruptcy proceedings had got under way.

Our deliberations soon revealed that the shortcomings we have described were symptomatic of a more general dissatisfaction with certain aspects of the present state of the bankruptcy laws, which have now been on the statute book without any significant alteration for over a century. Our own feelings that some of the essential features of bankruptcy law are long overdue for reconsideration and reform have coincided with an upsurge of public interest in the whole subject of insolvency generally and bankruptcy in particular.

During the time at our disposal it has not been possible for us to undertake a comprehensive review of bankruptcy law [1] nor to examine the operation of the new criminal bankruptcy procedures.[2] We have confined ourselves, so far as possible, to recommendations which are designed to ensure that, where there is no acceptable alternative to bankruptcy, the treatment accorded to the bankrupt and his dependants is no harsher than is reasonably necessary for the protection of the interests of his creditors and of society generally.

We are greatly indebted to David Graham who, despite other heavy commitments, undertook the task of drafting our report, and to Michael Crystal, our Secretary, for his valuable services.

---

[1] Such a study is long overdue, but, to some extent, the ground is at present being covered by the Departmental Committee of the Department of Trade which has been set up to examine the Draft European Convention for the harmonisation of the insolvency laws of the United Kingdom and those of the countries in the EEC.

[2] The concept of criminal bankruptcy was introduced by the Criminal Justice Act 1972, and is now contained in the Powers of Criminal Courts Act 1973.

CONTENTS

page

PREFACE v

para.

INTRODUCTION 1

PART I—THE PRESENT POSITION

Essential features of the present bankruptcy law . 5

History of bankruptcy legislation and reforms recently introduced into Commonwealth countries 18

Some facts and figures 21

PART II—PROPOSALS FOR REFORM

(1) The bankruptcy notice 23

(2) The petition 30

(3) The public examination 41

(4) The discharge 58

(5) The bankrupt's property divisible amongst his creditors 72

(6) Discrimination amongst creditors . . . 77

(7) Complaints against trustees 81

(8) Actions by the bankrupt: legal aid . . . 91

(9) Bankrupts obtaining credit 98

CONCLUSION 101

page

RECOMMENDATIONS 36

INTRODUCTION

1. The purpose of bankruptcy proceedings, which apply to traders and non-traders alike, is, broadly speaking, to provide adequate machinery for the collection and realisation of a debtor's assets and the distribution of the proceeds rateably amongst his creditors. In return for giving up his property in this way the debtor is protected from further proceedings against him by those creditors and in due course he can expect to be discharged completely from all further liability in respect of claims provable in the bankruptcy. The price paid by the debtor for this relief is that he is subjected, so long as he remains a bankrupt, to certain disabilities, such as limitations upon his freedom to obtain credit and to trade and disqualification from holding public office. In the eyes of the debtor as well as of the commercial community and society at large, the indignities associated with the status of bankruptcy are considered to be at the root of and are conveniently summarised in the well-known expression, still frequently encountered, " the stigma of bankruptcy."

2. The Committee considers that by and large it is possible to draw a fairly sharp distinction between two sorts of debtor. On the one hand, there is the debtor who, more or less, has been the victim of misfortune in respect of his financial affairs. For such a debtor the Committee believes that some relaxation of the present law can be justified. For the other category of debtor, namely, the person who, whether in the course of his business dealings or otherwise, has been guilty of fraudulent or reckless conduct, the Committee is as firmly of the opinion that a strengthening of the law is required.

3. In the course of our discussions, it has also become apparent that the structure of the current bankruptcy legislation has over the years worked considerable injustice between various classes of creditors. In this respect we have particularly in mind the advantages given to preferential creditors at the expense of other classes of creditors whose interests in the financial outcome of bankruptcy are thereby in practice severely curtailed. We shall return to the question of which creditors, if any, ought to be accorded preferential treatment in bankruptcy at a later stage in this report.

4. In short, then, we have had at the forefront of our deliberations whether the balance which has in the past been struck between the interests of the debtor, his creditors and society generally ought to be retained unaltered in the light of present requirements. The objectives that have guided us can be stated briefly:

(a) to achieve a significant reduction in the number of debtors forced into bankruptcy, without unduly prejudicing the interests of their creditors and of the commercial and general public;

(b) to alleviate in appropriate circumstances the position of the bankrupt and his family;

(c) to protect the smaller creditor, such as employees, in particular, from the activities of unscrupulous debtors.

PART I

The Present Position

The essential features of the present bankruptcy law

5. As bankruptcy is regarded by many, with some justification to be a technical subject, we think it will be helpful to give a brief summary of the essential features of the law.

6. The crucial step on the road to bankruptcy is the making of the Receiving Order which can be done either at the request of the debtor himself or at the instigation of a creditor. The effect of the Receiving Order is, on the one hand, to liberate the debtor in general from all further proceedings by any of his creditors but, on the other hand, to deprive him of the use of his assets, which are for the time being placed under the control of the Official Receiver; in the event of the debtor being adjudicated bankrupt a trustee in bankruptcy will be appointed to control the assets (see para. 16 *post*). The Receiving Order is advertised and is generally regarded by the public at large as tantamount to the debtor having been made bankrupt. This, strictly speaking, is not the case, the legislature having deliberately intended that there should be a short period between Receiving Order and adjudication during which the debtor is to be at liberty either to apply to the court to rescind the Receiving Order on the ground that he is able to pay his debts in full, or to put before his creditors a proposal for a composition or scheme of arrangement which, if approved by the court, will also enable him to rid himself of the Receiving Order. In the absence of any technical objections to the making of the Receiving Order, such as, for example, a defect in service of the creditor's petition, the processes of bankruptcy are fully launched once the Receiving Order has been made and, except in the limited circumstances described, they will lead inexorably to the making of an order adjudicating the debtor bankrupt (*Re A Debtor* (*No. 12 of 1970*) [1971] 1 W.L.R. 1212, C.A.).

7. The adjudication of the bankrupt undoubtedly brings about a change in his civil status and capacity to which he remains subjected until he obtains his discharge from bankruptcy and, in some respects, even beyond such discharge. It is this aspect of bankruptcy which has in the past given rise to the view that bankruptcy is of a quasi-penal nature. Thus, so long as a person remains a bankrupt, he is precluded from: (i) obtaining credit to the amount of £10 or upwards from any person without informing that person that he is an undischarged bankrupt, (ii) engaging in any trade or business under a name other than that under which he was adjudicated bankrupt without disclosing to all persons with whom he enters into any business transactions the name under which he was adjudicated bankrupt, and (iii) being a director of or participating, directly or

indirectly, in the management of a company. He is also disqualified from standing for Parliament or at a local government election. Furthermore, any property (with certain exceptions) which he acquires before he obtains his discharge belongs to his trustee in bankruptcy, who, if he is able to intercept it, is entitled to it for the benefit of the bankrupt's creditors. Until the discharge the bankrupt is not, strictly speaking, entirely relieved from the claims of those creditors; but their only remedy is to look to the trustee in bankruptcy for the payment of a dividend out of the proceeds of the trustee's realisations. The effect of an order of discharge is to release (with certain specified exceptions) the bankrupt from the claims of all creditors whose debts are provable in the bankruptcy.

8. Bankruptcy proceedings are commenced either by the debtor himself or by a creditor. Where the debtor commences, the procedure is for him to file in the appropriate bankruptcy court his own petition in which he asks for a Receiving Order to be made against him and, almost invariably, for an order that he should forthwith be adjudicated bankrupt.

9. Where the creditor commences, the procedure is much more complicated. He must be able to point to the commission by the debtor of "an available act of bankruptcy," as prescribed in section 1 (1) of the Bankruptcy Act 1914. Such an available act of bankruptcy constitutes a statutory recognition of the debtor's insolvency, and its existence is a prerequisite for the presentation of a bankruptcy petition by a creditor. The most common act of bankruptcy met with in practice is the failure by the debtor to comply with the requirements of a Bankruptcy Notice (see further para. 41 *post*). Other acts of bankruptcy are committed, for example, by a debtor who, with intent to defeat or delay his creditors, departs from his dwelling house or otherwise absents himself or, in the archaic language of the statute, begins to keep house.

10. Once an act of bankruptcy has been committed by the debtor, it remains "available" for the presentation of a petition by a creditor for a period of three months. During that period any creditor with an unpaid debt of £50 or more, or two or more creditors whose aggregated debts amount to at least £50, are entitled to present a petition against the debtor, relying upon any such available act of bankruptcy.

11. The consequences which follow upon the making of a Receiving Order are the same irrespective of whether that order was made upon a debtor's petition or a creditor's petition. The debtor is obliged to attend upon the Official Receiver and to give him a statement which is generally known as "the preliminary narrative," which deals with the background information relating to the history of the debtor and the causes of his failure; he is also required to fill in a standard form of questionnaire in which brief particulars of matters such as his principal assets and liabilities and his earnings are stated. In due course he is obliged to file in the court a full sworn statement of his

assets and liabilities together with a deficiency or surplus account as the case may be.

12. Shortly after the Receiving Order has been advertised a first meeting of the creditors in the bankruptcy is held at which the principal business transacted is the election of a trustee in bankruptcy and a Committee of Inspection and, unless the debtor has already himself consented to adjudication, the taking of a decision whether or not an application for that purpose should be made. Any such application is in fact normally made by the Official Receiver (though it can be and has occasionally been known to be made by a creditor), and the Official Receiver is entitled to apply for such an order notwithstanding that the creditors have voted to the contrary.

13. In due course, unless the bankrupt is so ill as to make his attendance impossible, or unless he is mentally unfit, his public examination takes place in open court. This examination is conducted, in the first place, by the Official Receiver who normally puts to the bankrupt in question and answer form the information, or much of the information, obtained in the course of the preliminary examination at the Official Receiver's office, though he is by no means confined to this information as the basis of his questions. The trustee in bankruptcy or any creditor present (who has proved a debt) are also entitled to question the bankrupt, but no one else. We return to the subject of the public examination at a later stage in this report (para. 41 *post*).

14. Once the public examination has been concluded, the bankrupt is at liberty to apply for his discharge but in practice he will usually allow a fairly considerable period of time to elapse before doing that, if he ever does so at all.

15. The application by the bankrupt for his discharge is also heard in open court. Notification of the date of the hearing is given in advance to the creditors, and at the hearing the Official Receiver is required to submit to the court a report in writing dealing with the history and causes of the bankruptcy, the bankrupt's conduct during the proceedings, and also the results of the administration of the estate by the trustee in bankruptcy. The foundation for the Official Receiver's report will primarily be the answers given by the bankrupt at his public examination. One of the principal objects of the report is to disclose to the court any conduct of the bankrupt that falls within a specified category of " facts " which are contained in section 26 of the Bankruptcy Act 1914, such as that the bankrupt's assets are not of a value equal to 50p in the £ on the amount of his unsecured liabilities, that he has continued to trade after knowing himself to be insolvent, or that he has contracted any provable debt without having at the time of contracting it any reasonable or probable ground of expectation of being able to pay it. If any such facts are found to exist, then the court is precluded from granting an immediate discharge and may take them into account in deciding

whether to grant a discharge at all, and if so, as from what date and upon what terms.

16. The trustee in bankruptcy is the person charged with the collection and distribution of the bankrupt's assets. He is, in the more substantial cases, usually a professional accountant but, where the estate is likely to be small the office is frequently left in the hands of the Official Receiver himself. The trustee is responsible to a Committee of Inspection (s. 20 Bankruptcy Act 1914).

17. The distribution of the proceeds of the bankrupt's assets is carried out by the trustee in bankruptcy in accordance with a specified order of priorities. In brief, after satisfying the costs, charges and expenses of the administration, payment is made to the categories of preferential creditors principally enumerated in section 33 of the Bankruptcy Act 1914, and only when those debts have been paid in full is any distribution made by way of dividend to the bankrupt's other creditors. We return to this subject later in the report; see para. 77 *et seq*.

History of bankruptcy legislation and reforms recently introduced in Commonwealth countries

18. Provisions dealing with bankrupts have formed part of English statute law since at least the time of the reign of Henry VIII. In the succeeding centuries there were many attempts to overhaul and modernise the legislation (which until 1869 was confined to " traders "), culminating with a series of statutes in the first half of the nineteenth century. The present pattern of bankruptcy, as described above, is based on the provisions of the Bankrupcty Act 1883 which, to all intents and purposes, were repeated in the current Bankruptcy Act of 1914. Since then minor modifications have been introduced by the Bankruptcy (Amendment) Act of 1926 and also by the Companies Act 1947, the Theft Act 1968, the Criminal Justice Act 1972, and now the Powers of Criminal Courts Act 1973.

19. The English Act of 1883 was the model for the New Zealand Bankruptcy Act 1908 and for the legislation culminating with the Australian Bankruptcy Act 1924. It is to be observed that Scottish Bankruptcy Law is not in every significant respect uniform with English law.

20. Since the passing of the English Act of 1914 there have been two Government Committees set up to look into the reform of the bankruptcy law. The recommendations of the first Committee, in 1924, were of a limited character and prompted certain amendments to the principal Act which were introduced in 1926. A wide-ranging inquiry was, however, carried out by the Blagden Committee which was set up in 1955 and whose Report was published in 1957. The contents

of that Report have been entirely shelved in this country.[3] However, the recommendations of the Blagden Committee were carefully considered by a Committee, known as the Clyne Committee, appointed to review Australian bankruptcy law, whose report was published in 1962. That Report led to the passing of the Commonwealth Bankruptcy Act 1966 which gave expression to a number of recommendations of the Blagden Report. This trend of adopting some of the thinking behind the Blagden proposals was continued by the draftsmen of the New Zealand Insolvency Act of 1967, and also by the authors of the Tassé Report in Canada[4] which led to major revisions in Canadian Bankruptcy Law enacted in 1971. It is also to be noted that the Scottish Law Commission in a Memorandum dated November 27, 1971, have put forward a number of draft proposals for the amendment of Scottish Bankruptcy Law.[5]

Some facts and figures

21. The Committee has found it useful to consider some of the statistics contained in the General Annual Reports on Bankruptcy prepared by the Department of Trade. A survey of those reports for the years between 1970 and 1973 reveals the following information from which certain inferences may be drawn which are discussed later in this report:

(a) In the year 1970 there were no less than 4,656 Receiving Orders (including orders for the administration of deceased debtor's estates under section 130 of the Bankrupcty Act 1914), and in the following year 4,367. In 1972 the number of Receiving Orders fell to 3,884 and in 1973 was 3,880.

(b) Generally speaking, just over a quarter of the Receiving Orders in the whole country appear to be made in the High Court which acts as the Bankruptcy Court for the London area, the remainder being made in the county courts, sitting in bankruptcy in the provinces.[6] In the High Court the majority of Receiving Orders are made on creditors' petitions whereas in the county court the overwhelming majority are made on the debtor's own petition.

(c) The number of Applications for Discharge heard by the courts in 1972 was 1,171 and in 1973, 1,056. Of these approximately 20 per cent. were refused outright or adjourned generally.

(d) The average dividend paid to unsecured creditors (*i.e.* after the discharge of the costs, charges and expenses of the administration and payment of preferential debts) in cases where the Official Receiver acted as trustee in bankruptcy and where, it must be emphasised, the prospects of realisation are perforce negligible, was 3·4p in the £ in 1970 and 1·9p in the £ in 1971; in other cases (where the trustee was usually a professional accountant) the average dividend paid to unsecured creditors was 11·8p in the £ in 1970 and 11·3p in the £ in 1971. The figures were approximately the same in 1972 and 1973.

(e) The liabilities estimated by bankrupts to rank for dividend amounted in the year 1970 to £22,158,811, in 1971 to £29,410,090, in 1972 to £20,447,464 and in 1973 to £19,685,133; they estimated their assets to be worth £6,621,644 in 1970, £6,649,739 in 1971, £8,357,047 in 1972 and £8,886,560 in 1973. Since all these figures were compiled from estimates provided by the bankrupts themselves, their accuracy should be treated therefore with considerable reserve. It is also relevant to note that the estimated figure for liabilities in 1971 of £29,410,090 was contributed to by two cases where the liabilities were each in excess of £4,000,000.

(f) The average estimated deficiency was £3,273 in 1970, £5,212 in 1971, £3,170 in 1972, and £3,295 in 1973.

[3] In a written Parliamentary Answer on July 30, 1974, the Lord Chancellor stated that the Government was broadly in agreement with the Blagden Committee's conclusion that the basic structure of bankruptcy law, apart from that relating to discharge, was sound and well suited to its purpose; and that the Department of Trade and the Lord Chancellor's Department were considering the question of discharge with a view to legislation when parliamentary time permitted (*Hansard*, 1974, vol. 353, no. 66, cols. 2299, 2300).

[4] *Bankruptcy and Insolvency*—Report of the Study Commission on Bankruptcy and Insolvency Legislation, 1970.

[5] The Committee is also aware that a comprehensive review of Federal Bankruptcy Law is at present being carried out in the United States and that one of the principal questions under discussion is the extent to which the Government should be entitled to rank as a preferential creditor for taxes.

[6] For, *e.g.* the total of 3,380 cases dealt with in 1973 is made up of 973 in the High Court and 2,407 in the county courts.

PART II

Proposals for Reform

22. The Committee has given particular attention to the following aspects of bankruptcy law which, in the light of the considerations by which we have been guided, appear to call for review and reform:

(1) The bankruptcy notice (paras. 23 to 29, *post*).
(2) The petition (paras. 30 to 40).
(3) The public examination (paras. 41 to 57).
(4) The discharge (paras. 58 to 71).
(5) The assets available for creditors (paras. 72 to 76).
(6) Potential discrimination amongst creditors (paras. 77 to 80).
(7) Complaints against the trustee in bankruptcy (paras. 81 to 90).
(8) Actions by the bankrupt: legal aid (paras. 91 to 97).
(9) Bankrupts obtaining credit (paras. 98 to 100).

(1) The bankruptcy notice

23. A creditor, with an unsatisfied judgment, is, generally speaking, entitled to commence bankruptcy proceedings against the debtor by serving him with a Bankruptcy Notice; if the debtor fails to comply with the requirements of that notice he will commit an act of bankruptcy. Provisions dealing with this act of bankruptcy and the contents of the Bankruptcy Notice are contained in section 1 (1) (*g*) and section 2 respectively of the Bankruptcy Act 1914 which can be summarised as follows:

(a) A debtor will commit an act of bankruptcy if a creditor has obtained a final judgment or final order against him for any amount and, execution thereon not having been stayed, has served on him in England or, by leave of the court, elsewhere, a Bankruptcy Notice in the prescribed form, and he fails, within seven days after service of the notice, if the service is effected in England, and in case of service effected elsewhere then within the time limited by the order giving leave to effect such service, either to comply with the requirements of the notice or satisfy the court that he has a counterclaim, set-off or cross-demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid, and which he could not have set up in the proceedings in which the judgment or order was obtained.

(b) (i) The standard form of Bankruptcy Notice is prescribed by Form 6 of the Statutory Forms which are contained in an appendix to the Bankruptcy Rules 1952.
(ii) The notice requires the debtor either to pay to the creditor or his agent within seven days after service of the notice upon him (excluding the day of service) the sum specified in the notice, or to secure or compound for that sum to the

satisfaction of the creditor or his agent or to the satisfaction of the court; alternatively, the debtor is informed that he must satisfy the court that he has a counterclaim, set-off or cross-demand against the creditor equalling or exceeding the sum claimed in the notice and which he could not have set up in the action or other proceedings in which the judgment was obtained.
(iii) On the reverse side of the form in common use there is a statement drawing the debtor's special attention to the consequences of non-compliance with the notice, namely, that he will have committed an act of bankruptcy on which bankruptcy proceedings may be taken against him; he is also informed that if, however, he has an appropriate counterclaim, set-off or cross-demand, then he must, within three days, apply to the court to set aside the notice by filing with the Registrar an affidavit to the above effect.

24. In view of the serious consequences to which non-compliance with a Bankruptcy Notice give rise, *i.e.* the creation of the event on which, in the overwhelming number of cases, the whole of the subsequent bankruptcy proceedings are founded, the Committee has considered whether the time allowed for complying with the notice, if to be served in England, *i.e.* seven days, together with three days for asserting the appropriate counterclaim, etc. is too short. The Committee has in mind that in modern circumstances periods of no more than seven days and three days respectively are totally insufficient to enable a debtor to obtain, on the one hand, professional advice as to how he should deal with the notice, *e.g.* by challenging its validity on technical grounds or by raising the appropriate counterclaim, or, on the other hand, and in the Committee's experience this is undoubtedly the most important consideration, to raise money from his own resources or from a third party to satisfy the creditor.

25. One particularly troublesome aspect of this subject came to the attention of the Court of Appeal in *Re A Debtor* (*No.* 991 *of* 1962) [1963] 1 W.L.R. 51, when the nature of the evidence relating to the existence of the appropriate counterclaim to be submitted to the court within the initial period of three days was considered. Although it was held that such evidence might be of no more than a preliminary character, later capable of being supplemented and amplified by fuller particulars, the Committee feels that the time limit in this regard is much too tight and such as to impose upon the debtor genuine hardship.

26. The Committee has noted that under the New Zealand legislation the time for complying with a Bankruptcy Notice is 14 days after the service of the notice (s. 19 (1) (*b*) of the Insolvency Act 1967), and that in Australia the time both for complying with the notice and for raising the appropriate counterclaim, etc. is "within the time fixed by the Registrar by whom the notice was issued" (s. 40 (1) (*g*) of the Bankruptcy Act 1966).

27. In the view of the Committee it is necessary to strike a fair balance between the interests of the debtor, on the one hand, in raising sufficient money to satisfy the judgment debt or to establish a lawful objection to the notice, and the desire, on the other hand, of a diligent creditor either to be paid out within a reasonable time or to be permitted to petition for a Receiving Order. The Committee therefore recommends that the appropriate periods of time should be as follows:

(a) the debtor should normally have 21 days notice to comply with a Bankruptcy Notice, if served in England;
(b) the debtor should have 14 days in which to file the affidavit raising an appropriate counterclaim; and
(c) the court should be given a much clearer discretion than now appears to exist to prescribe, at the time a Bankruptcy Notice is issued, longer periods when the special circumstances of the case so justify.

28. The foregoing recommendations, in so far as they relate to the time schedule for compliance with a Bankruptcy Notice served in England, would involve amendments to section 1 (1) *(g)* of the Bankruptcy Act 1914. The Committee, however, would also like to see certain minor, but nonetheless significant, alterations made in the prescribed form of Bankruptcy Notice which, we consider, could be achieved quite simply by appropriate modifications to Form 6 of the current forms.

29. The effect of the modifications which the Committee envisages would be, first, to ensure that the format of the Bankruptcy Notice was such as to display more prominently the warning as to the significance of the debtor's failure to deal with the notice promptly and, secondly, to indicate to him that if he is in any doubt as to what he should do with regard to it, he ought as quickly as possible to seek professional advice, *e.g.* from a solicitor or accountant, or from his local Citizens Advice Bureau. In this last connection the Committee would welcome the establishment of some local welfare body or the expansion of existing services from which advice can be obtained, at any rate in the simpler type of cases, by a debtor faced with bankruptcy.

(2) The petition

30. (a) A creditor is not entitled to present a Bankruptcy Petition against a debtor unless there is owing by the debtor to him a liquidated debt amounting to at least £50 or, if two or more creditors join in the petition, the aggregate amount owing to them is not less than £50.

(b) At the hearing of the petition the court requires proof of the existence of such indebtedness, of the service of the petition and of the commission of an available act of bankruptcy; if satisfied with the proof the court may make a Receiving Order in pursuance of the petition. If, however, the court is not satisfied with regard to any of those matters it may dismiss the petition. Furthermore, the petition may be dismissed if the court is satisfied by the debtor that he is able to pay his debts or that for other sufficient cause no order ought to be made. Once presented no petition can be withdrawn without the leave of the court.

31. In practice the court will frequently grant an adjournment of the petition, the most important grounds upon which it normally does so being, first, to enable the necessary technicalities to be complied with, secondly, to enable the evidence on either side to be fully heard, and, thirdly, to enable the debtor in the event of his being able to do so to satisfy the Registrar of his power to pay his debts in full. It is upon the last ground that adjournments are generally granted, but in so doing the court will require to be satisfied that there is a reasonable prospect that the debts will be paid in full and for this purpose it will require to be put in possession of all possible information as to the position of the debtor and as to the state of the negotiations which it is said will result in obtaining funds for the payment of the debts.

32. (a) If the debtor is unable to raise funds to pay off his debts, then, provided the requirements referred to above have been met, the court will be obliged to make a Receiving Order. This it will do notwithstanding that the overwhelming majority of the debtor's creditors might well be prepared to accept a different course, such as the execution by the debtor of a Deed of Arrangement. It follows that a petitioning creditor, however small his debt in relation to the debtor's overall liabilities, can effectively force him into bankruptcy and override the reasonable wishes of a majority of creditors who might be willing to extend some indulgence towards him.

(b) The law does in fact recognise the right of a debtor outside bankruptcy to enter into compromises with the general body of his creditors, and usually these are embodied in the form of a Deed of Arrangement whereunder the debtor is given a release from his liabilities to creditors in return for the assignment of his property to a trustee whose function is to distribute the proceeds amongst those creditors. Although such deeds are registrable under the Deeds of Arrangement Act 1914, from the debtor's point of view they are beneficial in that the stigma of bankruptcy is avoided and the question of a public examination does not arise at all; from the point of view of the creditors, whereas they lose the advantage of a rigorous investigation into the debtor's affairs and are also at a disadvantage in certain other respects, such as the avoidance of voluntary settlements or fraudulent preferences made by a bankrupt, they usually gain by obtaining a substantially larger dividend more speedily than would be the case in a bankruptcy.

(c) In recent years the number of deeds registered under the Act has only once (1969) exceeded 200; in 1972 there were 92 and in 1973, 95. It is the Committee's experience that quite frequently the machinery of a Deed of Arrangement, though somewhat costly to implement

because of the professional expertise required, is utilised by debtors whose affairs, ideally, ought to have been subject to the rigours of an examination in bankruptcy. The Committee finds it disappointing that the more deserving class of debtor appears not to have made much use of the Deed of Arrangement.

33. (a) Once a Receiving Order has been made or adjudication has taken place, the debtor is basically faced with one of two alternatives: either he must provide sufficient funds to enable his debts to be paid in full, in which event the bankruptcy proceedings will normally be entirely undone, or, alternatively, he must accept the status of being bankrupt and apply for his discharge therefrom in due course.

(b) The Bankruptcy Act does in fact provide for an intermediate position whereby the debtor against whom a Receiving Order has been made may, either before or after adjudication, submit proposals for a composition or scheme of arrangement which, if accepted by the requisite majority of his creditors (*i.e.* a majority in number and three-fourths in value) and approved by the court, will have the effect of disposing of the bankruptcy proceedings altogether. However, no such composition or scheme can be approved by the court unless it provides reasonable security for the payment of 25p in the £ in respect of all the unsecured debts provable against the debtor's estate, and until his public examination has been concluded.

(c) In practice the provisions contained in sections 16 and 21 of the Bankruptcy Act relating to such compositions and schemes of arrangement are very infrequently used by debtors. The Committee feels that this may be attributable in large measure not only to the difficulties of preparing a workable scheme, supported by the requisite security, but also to the fact that since the debtor has in any event to undergo his public examination, he may well prefer simply to wait for the time when he can reasonably be sure of obtaining his discharge.

34. The £50 minimum for the petitioning creditor's debt has remained unaltered in England since it was fixed as long ago as the Bankruptcy Act 1869. In Australia and New Zealand, however, recognition of the decline in monetary values has led to recent legislation by which the amount required to support a bankruptcy petition has been substantially increased.

35. The Committee feels that the present minimum in this country is now not only utterly out of date but is such as to have positively harmful effects in relation to the use of bankruptcy proceedings in certain cases. The Committee particularly has in mind the situation where a judgment creditor, with a relatively small debt, *e.g.* less than £100, uses the machinery of bankruptcy to attempt to recover his debt rather than resort to the normal and indeed adequate procedures generally used for the recovery of judgment debts. Not only does the resort to a bankruptcy petition tend to cause unnecessary embarrassment to the debtor but it undoubtedly imposes upon him the additional burden of having to pay, if he wishes to dispose of the petition, the

costs of the petitioner in relation to its presentation and prosecution. In the experience of the Committee a petitioning creditor's costs today, even after taxation by the court, are unlikely to be less than £75.

36. There is an increasing tendency with the minimum debt being so low for the Bankruptcy Court to be used as a debt-collecting agency. This is not only very costly so far as the debtor is concerned but also, and perhaps more significantly, it has the effect of diminishing the status of the Bankruptcy Court itself. In the Committee's view proceedings in the Bankruptcy Court should be reserved for and aimed at the more serious type of case where the debt used as the foundation for the petition is, by current commercial standards, to be regarded as substantial and where, accordingly, the likelihood of there being other creditors, for whose general benefit the proceedings should enure, is consequently greater.

37. The Committee, in short, would like to see reduced the opportunity that exists at present for the unscrupulous creditor to hound his debtor by unnecessary resort to bankruptcy proceedings as an appropriate means of enforcing payment of a debt or otherwise procuring his claim to be met, whether in full or in part. The Committee has no doubt at all that the amount of the debt required to justify the commencement of bankruptcy proceedings should be the subject of a sharp increase, the level to be at the very least £200. However, in view of the prevailing economic conditions and the need to ensure that the level fixed does not too quickly become out of date, some members feel that a substantially higher level would be appropriate. Whatever level is finally chosen, consideration should also be given to the introduction of machinery whereby the proposed increased level can be further raised, as and when necessary, without the need for any further amendment to the substantive Bankruptcy Act, *e.g.* by delegated legislation. The Companies Bill 1973, which has not been proceeded with, contained provisions which would serve as a useful model in this regard.

38. The alternatives presently available to the debtor and to the court at the hearing of a creditor's bankruptcy petition have already been outlined. The Committee, however, considers that these alternatives may not be sufficiently flexible to cover the genuine predicament of some debtors who, though quite unable to satisfy all their debts in full, would nonetheless like to put their affairs in the hands of their creditors, with a view (i) to providing the creditors with some prospect of obtaining the same, or possibly a larger dividend than bankruptcy would produce, and sooner, and (ii) to avoiding for the debtor (and indirectly his family) the unnecessary stigma of bankruptcy.

39. The Committee has considered various alternatives to bankruptcy. It is noteworthy that whereas the legislature has provided one alternative in the shape of the Deed of Arrangement, this method of administration does not now appear to find much favour either with

debtors or their creditors.[7] The Committee has also considered an extension of the provisions of section 16 of the Bankruptcy Act 1914 relating to the approval by the court after the making of a Receiving Order of a scheme between a debtor and his creditors, to the situation prior to the making of a Receiving Order. This would be closely analogous to the provisions relating to schemes of arrangement[8] by limited companies and their creditors contained in section 206 of the Companies Act 1948. The Committee has reluctantly come to the conclusion that such schemes are likely in practice to be cumbersome to achieve and unlikely to commend themselves to creditors.

40. The Committee is, however, conscious of the possibility, open at least to the debtor whose affairs fall within a small compass, of employing the procedure contained in the Administration of Justice Act 1970, known as "the Administration Order." Such a procedure, the extent of which is not yet generally known, has the merit that the administration of the debtor's affairs is regulated by the court (*i.e.* the Registrar of the local county court) with a minimum of formality and expense. It is known that in the United States the Federal bankruptcy legislation contains provisions for what is commonly known as the "wage-earner plan" whereby the smaller debtor's affairs can be regulated under the aegis of the court and provision made out of his present and future earnings for payment over a period to his creditors. We think that the power which already exists to extend by Order in Council the scope of the administration order procedure should be exercised more frequently.

(3) The public examination

41. Every debtor must, as the law now stands, undergo a public examination unless he is excused on the grounds of ill health. Thus the stigma of bankruptcy is compounded by the indignity which the debtor must face in having his financial ineptitude and personal failings aired in open court and particularly in the provinces accompanied by publicity in the local press. This is in marked contrast to the position of a director of a limited company which has gone into liquidation by reason of insolvency. Such a director, except in the most rare circumstances, will not be required to give an account of his stewardship of the company's affairs on oath and in open court.[9]

42. The purpose of and the need for the retention of the public examination in every case has therefore been at the forefront of the Committee's deliberations throughout its meetings. Public awareness of certain possible shortcomings with regard to the present practice and procedure at the public examination has led to the very recent introduction of some amendments which the Committee welcomes. However, the Committee considers that these amendments are of no

[7] Para. 32 (c) *supra*.
[8] Para. 33 (c) *supra*.
[9] Para. 46 (b) *post*.

more than a procedural nature and that they do not deal with or remove the necessity for an answer to the basic question, namely, has the time now come for the abolition of the public examination entirely?

The nature of the public examination

43. (a) Provisions for the public examination of debtors in bankruptcy proceedings are contained in section 15 of the Bankruptcy Act 1914.

(b) By that section every debtor is obliged to attend a public sitting of the court on an appointed day to be examined as to "his conduct, dealings and property." The Official Receiver is under an obligation to take part in the examination, the trustee in bankruptcy (if other than the Official Receiver) may do so and any of the debtor's creditors is entitled to examine him concerning "his affairs and the causes of his failure." It is further provided that the court may put such questions to the debtor as it may think expedient.

(c) During the examination the debtor is under oath and it is his duty to answer all such questions as the court may put or allow to be put to him. Subject to a few limited exceptions the debtor is obliged to answer questions even though his answers thereto might tend to incriminate him and no caution need be given to him before any such questions are put. However, it has always been the established practice of the Bankruptcy Court, now enshrined in Rule 191A of the Bankruptcy Rules 1952 (recently introduced), to adjourn the public examination if criminal proceedings have been or are likely to be instituted in respect of any matter arising out of or connected with the bankruptcy proceedings.

(d) The court has extensive powers to adjourn the examination from time to time and, in particular, where the debtor without showing any sufficient reason has failed to attend the examination or to comply with any order of the court in relation to his accounts, conduct, dealings or property, or where the court is of the opinion that the debtor is not making a full and true disclosure of his affairs, then the examination may be adjourned *sine die*. Such an order is regarded as being of a penal nature. When the court is satisfied that the affairs of the debtor have been sufficiently investigated then it will conclude the examination.

(e) The circumstances in which the court can dispense with a public examination are extremely limited, restricted as they are to those cases where the debtor is suffering from such mental disorder or physical affliction or disability as, in the opinion of the court, to make him unfit to attend the examination.

(f) Until the public examination has been concluded a bankrupt is not at liberty to apply for his discharge under section 26

of the Act nor is the court entitled to approve any scheme or composition with his creditors submitted under section 16 or section 21 of the Act. The answers given by the debtor at his public examination will in practice form the basis of the report which the Official Receiver is obliged to make to the court upon any such application by the bankrupt for discharge or for the approval of such a scheme or composition.

The court

44. (a) In the High Court, which acts as the Bankruptcy Court for the London district, the public examination is heard by one of the permanent bankruptcy registrars who will normally deal with and supervise all aspects of the bankruptcy from start to finish, more especially presiding on what in practice are the three most important occasions, namely (i) the hearing of the petition when the Receiving Order is made, (ii) the public examination and (iii) the bankrupt's Application for Discharge.

(b) In the county court, which acts as the Bankruptcy Court in the provinces, the public examination has hitherto almost invariably been conducted by a County Court Registrar who, in addition to his duties in relation to bankruptcy matters, performs a wide variety of other judicial functions. It is a feature of the administration of bankruptcy matters in the county court that whereas the same registrar will preside at the hearing of the petition and the public examination, the Application for Discharge (save in rare cases) is dealt with by the judge of the court.

The hearing

45. (a) The conduct of the public examination is for the most part in the hands of the Official Receiver, in many cases the hearing being disposed of with the utmost efficiency and expedition. Indeed, it is the experience of the members of the Committee that at the examination the debtor is simply asked to confirm, quite briefly, in question and answer form the substance and accuracy of information previously supplied by him in his Statement of Affairs and in the course of his preliminary examination, *i.e.* during one or more interviews with the Official Receiver's examiner or other members of his staff or obtained from creditors or other sources.

(b) The object of the public examination from the point of view of the Official Receiver is to put on record the size and extent of the debtor's assets and liabilities, the history of his business activities and the circumstances regarding his failure. The Official Receiver is particularly concerned to ascertain whether the conduct of the debtor exhibits any

of the special features prescribed by section 26 of the Bankruptcy Act, the existence of which must be taken into consideration by the court upon the Application for Discharge. Those features include such matters as whether the bankrupt has omitted to keep proper books of account, has continued to trade after knowing himself to be insolvent or has contracted any debt provable in the bankruptcy without having at the time of contracting it any reasonable or probable ground of expectation of being able to pay it, for example, by giving a guarantee.[10]

(c) There are cases, though in the Committee's experience they are by no means frequent, where the public examination is prolonged by reason of the very size and complexity of the bankrupt's affairs and the difficulty of ascertaining to what extent his conduct has fallen short of accepted commercial standards of behaviour.

History of the public examination and analogous provisions in the Companies Act 1948.

46. (a) The public examination has, in one shape or another, been an integral part of English bankruptcy law for well over a century.

(b) Provision is contained in section 270 of the Companies Act 1948 whereby, in the case of a company which is being wound up by the court (*i.e.* a company in compulsory liquidation), if the Official Receiver has made a report stating that in his opinion a fraud has been committed by any person in the promotion or formation of the company, or by any officer of the company in relation to the company since its formation, then the court may, after consideration of the report, direct that such person or officer shall attend before the court on a day appointed by the court for that purpose and be " publicly examined as to the promotion or formation or the conduct of the business of the company or as to his conduct and dealings as officer thereof." The provisions regarding the conduct of those who may participate in such a public examination are *mutatis mutandis* the same as under section 15 of the Bankruptcy Act, and the witness can also be obliged to answer incriminating questions. However, by virtue of the necessity for the Official Receiver to be able to state that in his opinion a case of fraud is involved a public examination under section 270 of the Act of 1948 is extremely difficult to obtain and, at any rate in recent times, no such examination is known to the Committee to have been held.

---

[10] See also para. 15 *supra*.

The public examination in other countries

47. (a) In Australia a public examination takes place in every case except in small bankruptcies, *i.e.* where it appears to the court that the bankrupt's liabilities do not exceed 4,000 Australian dollars (the equivalent of £2,268 sterling). In such cases there is no public examination "unless a creditor, by notice in writing to the trustee, requires such an examination to be held or the trustee is of the opinion that such an examination ought to be held": sections 69, 185 and 186 of the Bankruptcy Act 1966.

(b) In New Zealand section 69 of the Insolvency Act 1967 provides that if the assignee, at any time after adjudication and before the making of any absolute Order of Discharge, files in the court a statement to the effect that it is desirable that the bankrupt should submit to a public examination, or if the creditors, at any meeting before the making of an absolute Order of Discharge, pass an ordinary resolution to the like effect, and a copy of the resolution certified by the assignee or chairman is filed in the court, then a public examination shall take place.

(c) In Northern Ireland we understand that the procedure at the public examination, held in all cases, is often confined to the debtor merely being asked to confirm the contents of the Official Receiver's written summary of the Statement of Affairs and observations regarding the case which have previously been circulated to creditors: compare Form OR12 in this country.

(d) In Scotland the regulation of the public examination is dealt with by sections 83 to 91 of the Bankruptcy (Scotland) Act 1913.

The purpose of the public examination

48. The public examination has in the past been regarded as serving a wide variety of purposes of more or less significance of which the following is by no means an exhaustive list:

(a) Investigatory, *i.e.* to discover the true state of the bankrupt's affairs and the causes of his failure, to locate his assets or the assets which under the various provisions of the Bankruptcy Act and other enactments are capable of being recovered by the trustee in bankruptcy for the general body of creditors.

(b) Informative, *i.e.* to acquaint the creditors as well as the public at large with the circumstances of the bankruptcy, to give an opportunity to those creditors to question the debtor and also, through publicity, to make known to other creditors, whose existence may not have been disclosed by the debtor or otherwise come to light, the fact that bankruptcy has taken place.

(c) Protective, *i.e.* to warn potential future creditors of the bankrupt's previous conduct and also, through the publicity attaching to the examination, to have a deterrent or perhaps reformative effect upon members of the trading community, in particular by improving the standards of commercial practice and integrity.

(d) Precautionary, *i.e.* to ascertain whether the bankrupt ought ever to be relieved of those disabilities which are imposed upon him by virtue of his status as a bankrupt and also from the stigma to which such status still appears to expose him in the eyes of society generally.

Reasons for abolishing the public examination

49. The Committee has considered a number of arguments the impact of which either individually or taken together is claimed to warrant the complete abolition of the public examination and they can be summarised as follows:

(a) The examination is frequently no more than a formality, a waste of time and quite unnecessary in that it elicits no information or no useful information beyond that which is already known to the Official Receiver.

(b) It is unjustifiably costly, in particular, having regard to the time and energy devoted to its preparation by the Official Receiver and his staff, on the one hand, and the lack of any worthwhile information obtained thereby, on the other, both in relation to the recovery of assets and regarding the true causes of the bankrupt's failure.

(c) The debtor is given no real opportunity at the examination to defend himself, the occasions on which he will be legally represented or be in a position to obtain legal representation (notwithstanding the Legal Aid Scheme) being rare and, moreover, he can be compelled to answer questions of an incriminating nature without any caution being administered.

(d) The public examination can occasionally be used by a creditor as a means of victimising his debtor.

(e) Answers can be given at the examination which might be damaging to the reputation of third parties not represented or even competent to be represented at the hearing.

(f) In so far as information obtained from the debtor is required in connection with subsequent aspects of the bankruptcy, such as the discharge application, the Official Receiver could rely upon the answers given in the course of the preliminary examination to which the provisions of the Perjury Act 1911 are made applicable.

(g) In so far as any further information is required from the debtor, it could be obtained at a private examination before the court under section 25 of the Act of 1914, either at the suit of the Official Receiver or the trustee in bankruptcy or, exceptionally, at the suit of a creditor.

(h) The public examination has outlived any usefulness it may once have been thought to possess and it is no longer necessary to expose bankrupts to the indignity which it occasions.

Reasons for retention of the public examination

50. These may be summarised as follows:

(a) The public examination can assist a trustee in bankruptcy with regard to the location of assets; it is the experience of many members of the Committee that a liquidator of a limited company is in this respect at a great disadvantage and would welcome the opportunity of having an examination in public of those responsible for the downfall of the company.

(b) It is thought to be more likely that if the examination is held in public, as opposed to the privacy of chambers, then, because of the publicity surrounding it, (i) it may cause a bankrupt to be less evasive and (ii) it may help to elicit information from other sources which, but for the publicity, could not have been obtained.

(c) At the examination the debtor is given an opportunity of publicly refuting, in the presence of his creditors, allegations made against him as to his conduct and integrity.

(d) Society at large and, in particular, the commercial community, has a right to know to what extent the facilities by which credit is extended have in any particular case been abused.

Should the public examination be abolished?

51. While the Committee is of the opinion that in appropriate circumstances the public examination can perform an important and useful function in bankruptcy proceedings, it also recognises that there are a considerable number of other cases where the full scale procedure of such an examination is of little or no practical value. The difficulty is how best to draw a satisfactory distinction between the two categories.

52. It is well-known that bankrupts tend to exhibit varying degrees of culpability in relation to their affairs and that it is in practice not too difficult to separate the less serious cases from the others. There are, for example, those bankrupts whose failure is attributable more or less to misfortune and whose conduct merits sympathy rather than blame; there are, however, intermediate cases where the bankrupt's conduct can be regarded as having been improvident; in some cases it may more aptly be described as reckless; the extreme case is where the bankrupt's activities border on the criminal and his conduct deserves to be regarded as reprehensible.

53. In the light of the figures relating to the number of bankruptcies in London and in the provinces to which reference was made in paragraph 21 of this report, the Committee is convinced that there are far too many unnecessary bankruptcies each year and that steps can and ought to be taken to achieve some reduction not only to ensure that those who have to administer the bankruptcy law should not be expected to have to deal with a considerable volume of trivial

cases, but also to eliminate from the net of bankruptcy altogether, so far as practicable, those debtors whose conduct and affairs have not been such as to warrant the application of the rigorous machinery of the bankruptcy court. Any such elimination of the less serious cases would, we feel, reserve the processes of bankruptcy, and especially the public examination, for what in short can be described as " the bad cases."

54. The Committee is of the firm opinion that merely because a debtor does in fact find himself in the bankruptcy court, it should not automatically follow that he will be obliged to submit to a public examination. The Committee would welcome and recommends the introduction of machinery whereby the court can be given a much greater degree of latitude to dispense with the public examination in appropriate cases.

55. The Committee feels that in all cases where the unsecured liabilities disclosed by the debtor in his Statement of Affairs exceed £10,000 he should be obliged to give an explanation in public to account for his failure. Accordingly the Committee recommends that in such cases a public examination should always be held. On the other hand, in cases where the unsecured liabilities disclosed by the debtor in his Statement of Affairs are less than £10,000, the Committee recommends that the law should be altered and that there should be no public examination unless (i) the court is satisfied upon the application of the Official Receiver, the trustee in bankruptcy or a creditor, that such a hearing should take place, or (ii) the debtor has been bankrupt on a prevous occasion.

56. The criteria for ordering a public examination in cases where the disclosed debts do not exceed £10,000 will include, for example, where the debtor has been conducting a business, whether or not he has kept such proper books of account as are customarily maintained in such a business.

Reform of practice and procedure at the public examination

57. (a) *County Court Judge to hold the examination in certain cases*

The Committee considers that under the present rules, as implemented by appropriate practice directions for each county court exercising bankruptcy jurisdiction, the conduct of the public examination, in more serious cases, should generally speaking be entrusted in the provinces to the judge of the court as opposed to the registrar. Where the amounts involved are substantial or the issues are of a complex or grave nature, the debtor, it is felt, should have the additional protection of the judge and he should manifestly be seen to have such protection.

(b) *Possibility of itinerant bankruptcy registrars*

In London the practice is for the public examination in all cases to be heard by one of the permanent bankruptcy registrars attached to the High Court. The Committee feels that consideration could usefully be given to the possibility of sending these registrars on circuit from time to time with a view to ensuring consistency of practice.

(c) *The use of irrelevant or scandalous material at the public examination*

It is the view of the Committee that if the guidelines stated by Lord Hailsham L.C., albeit extra-judicially, in the course of a speech in the House of Lords (*Hansard*, February 8, 1973, cols. 1228 *et seq.*) are adhered to, then no problems or at any rate serious problems are likely to occur. The presiding judge or registrar in any proceedings will always strive to exclude all irrelevant and scandalous matters, and there is no reason to think that Bankruptcy Courts have not in the past striven and will not continue to strive in the future to prevent the introduction of such material into the public examination. There does however appear to be some doubt as to the jurisdiction of the Bankruptcy Court to strike out irrelevant or scandalous matters from the transcript of the public examination (which is invariably prepared by skilled shorthand writers) although the practice certainly in London appears to be for the court to order such material to be struck out. We feel that the Bankruptcy Act should be suitably amended to confer express power upon the Bankruptcy Court to do so.

(d) *Adjournment of the public examination where there is a likelihood of criminal proceedings*

The Committee has been very conscious of the difficulty in laying down hard and fast rules in relation to the adjournment of the public examination where criminal proceedings are pending or are likely to be commenced, for the existence or indeed possible existence of such proceedings should not be capable as such of halting the examination in its entirety. The matter should be left to the good sense of the court to be decided upon in the light of the particular circumstances of each case: sometimes those circumstances will warrant the complete adjournment of the public examination until the criminal proceedings are terminated, others will be such as to justify the continuance of the examination but excluding therefrom matters relating to the pending criminal proceedings.

The provisions of Rule 191A of the Bankruptcy Rules 1952, already referred to above,[11] are such as to constitute, by and large, an express recognition of the practice hitherto consistently followed by the Bankruptcy Court in this regard. Although those provisions do not specifically deal with the continuance of the public examination in relation to non-criminal topics, it is to be hoped that the practice will be observed of permitting the public examination to continue as respects those matters, for otherwise the mere suggestion by the bankrupt of the possibility of criminal proceedings might too easily be resorted to as a means of avoiding completely or halting the public examination.

[11] Para. 43 (c), *supra*.

(e) *Participation in the conduct of the public examination by strangers to the bankruptcy*

As regards the persons entitled to participate in the public examination, the Committee sees no reason why the present category should in any way be extended; at the moment it comprises the Official Receiver, the trustee in bankruptcy, any proved creditor and the debtor. The wider the category, the more likelihood that the proceedings will become unnecessarily protracted and in consequence unduly expensive, such expense having to be shouldered largely by the bankrupt's estate and, to that extent, by the general body of his creditors. In any event, if at a particular hearing strangers to the proceedings are referred to in derogatory terms, they will not normally be present in court at the time and will not hear of the remarks until afterwards; the Committee considers that if the examination has by then been concluded an extremely strong case would be required to justify the reinstatement of the public examination so that their side of the case could be put to the debtor. In the view of the Committee such cases are likely in practice to be so rare as not to justify any departure from the present position. The protection of the reputation of third parties can, the Committee feels, safely be left to the Bankruptcy Court to deal with by such measures as insisting on anonymity or itself emphasising that the third party has not had an opportunity of putting his side of the case or of cross-examining the debtor in regard thereto.

(4) The discharge

58. No debtor can obtain a discharge from bankruptcy without an application to the court which, save in the rarest cases, must be heard in public. The purpose of the discharge application is to enable the debtor to persuade the court that, having regard to the length of time he has been bankrupt and in the light of the particular circumstances of his case, it would be appropriate for him to be released from the status of bankruptcy, to be permitted to resume a normal commercial life, if he so wishes, and to rid him once and for all from the burden of the debts provable in the bankruptcy.

59. The procedure at the hearing has already been described in paragraph 15 this Report. The practice is for the Official Receiver to read to the court (in London one of the permanent bankruptcy registrars, in the provinces almost invariably the judge of the county court) his report and sometimes, but by no means always, the debtor will be required to go into the witness box and to answer questions put to him by the Official Receiver, the trustee in bankruptcy or any creditor present and by the court. Normally this questioning is limited to one or two topics such as "Why do you want your discharge?" or "If you were given a discharge, what sort of contribution could you make for the benefit of your creditors by way of a fixed sum payable at once or by regular instalments out of your present and any increased earnings in the future?" The trustee or a creditor is entitled to address the court but again, in practice, any such participation, particularly on the part of the creditors, is of a limited nature and is rarely found. Finally, the debtor or his advocate is entitled to make such observations to the court with regard to the contents of the report and other matters which may be germane to the issue whether it is opportune for the discharge to be granted.

60. The principal considerations which guide the court in determining whether to grant or refuse the application include such matters as the length of time the debtor has been bankrupt, the size of his liabilities and the amount available for distribution amongst the creditors, the nature of the circumstances giving rise to the bankruptcy, the debtor's future prospects and any attempts made by him, prior to the application, and likely to be made by him in the event of a discharge being granted, to contribute something to his trustee out of his earnings and, generally speaking, the debtor's conduct during the bankruptcy proceedings.

61. The court is given, under section 26 of the Bankruptcy Act, extremely wide discretionary powers with regard to withholding or granting a discharge and, in the latter event, with regard to the imposing of terms, such as the period of time before which the discharge is to become effective, if an immediate discharge is not appropriate, and the amount and method of payment of any contributions which the debtor will be required to make to his estate out of his future earnings.

62. The general experience of the Committee is that no application for discharge is likely to fail completely, unless it is presented prematurely, *i.e.* at a time unreasonably close to the conclusion of the public examination, or unless the circumstances of the bankruptcy are of a particularly reprehensible nature and the court concludes therefrom that it would be against the public interest for the debtor to be at liberty to return to a full and unfettered commercial life. Except for such unusual cases, no debtor will, the Committee has found, be expected to languish in bankruptcy indefinitely.

63. From the debtor's point of view, if he cannot obtain an immediate discharge (which in practice is frequently not possible under the provisions of section 26 of the Bankruptcy Act) the shorter any period of suspension imposed before the discharge takes effect the better, for so long as that period is still running he remains an undischarged bankrupt and is accordingly still subject to the disabilities of that status; reference has already been made in paragraph 7 of this Report to some of these disabilities. It is important to realise, furthermore, that at this stage of the bankruptcy, until the discharge finally takes effect, any property acquired by the debtor, *e.g.* a legacy from a member of his family, will vest in and belong to his trustee in bankruptcy for the benefit of the creditors.

64. In short it follows that if a bankrupt never applies at all for a discharge he will be subject to all the disabilities and all the provisions regarding the vesting in his trustee of his after acquired property until the day he dies. The figures currently available show that in the overwhelming number of cases no application for discharge is made at all by the bankrupt. The Blagden Committee in 1957 estimated that there were then perhaps as many as 20,000 undischarged bankrupts at that time in the country and, since during the subsequent 17 years the figures do not disclose any appreciable increase in the average number of applications for discharge each year, it follows that the number of undischarged bankrupts today must therefore be considerably larger. Given present economic conditions, it is unlikely that there will be any decline in the incidence of bankruptcy in the future, and this problem is likely to be exacerbated.

65. The Committee considers that the evidence that so many bankrupts appear never to avail themselves of the machinery for obtaining a discharge is one of the most disquieting features of the present system of bankruptcy law in this country, particularly since it also seems likely that if they were to apply the majority of them would almost certainly be successful. The Committee has a distinct impression that, in practice, it is the less culpable bankrupt who is least likely to apply for a discharge whilst, on the other hand, the bankrupt whose affairs give rise to far more serious concern to the commercial community will be sufficiently aware, whether through legal advice or otherwise, of the desirability of ridding himself as soon as practicable of the status of being a bankrupt. We also feel that many bankrupts are at the moment deterred from returning to the court a second time after the ordeal of the public examination, though they would, if they did so, discover that their cases were appropriate for a discharge to be granted and that the procedure in relation thereto, notwithstanding the possibility of publicity, was considerably less burdensome than that which they encountered at the public examination.

66. The Blagden Committee in 1957 was particularly alive to the plight of the debtor described in the last paragraph and accordingly,

to alleviate his position, recommended the introduction of machinery to enable " an automatic discharge " to be given in appropriate cases. Nothing has as yet been done in this country to implement these proposals. Bearing in mind the increase in the number of undischarged bankrupts since 1957 the need for such machinery is, in the view of the Committee, even more pressing now than it was then. We are pleased to note that the principle of automatic discharges has been adopted and made part of bankruptcy law in Australia (in 1966) and in New Zealand (in 1967).

67. We would welcome a system in this country under which the prospect of the debtor obtaining a discharge would be directly related to the question whether his affairs had been such as to require him to submit to a public examination. This report has already dealt with the circumstances in which the Committee feels that there is no longer any justification for the bankrupt to be publicly examined: (see paras. 51 to 56 *ante*.)

68. In those cases where no public examination is to be held, and the debtor has not been bankrupt on a previous occasion, he should, in the Committee's view, be granted an automatic discharge after a period of three years has elapsed from the date of his adjudication as a bankrupt, unless the Official Receiver, the trustee or any creditor has successfully applied to the court for a " caveat " or caution to be entered on the bankruptcy file against such an automatic discharge. The entry of such a caveat or caution would mean that the debtor would be obliged to apply to the court for a discharge in accordance with the present procedure. Furthermore, even if no caveat or caution had been entered, the debtor would still be at liberty to apply to the court for a discharge, in accordance with the present procedure, before the expiry of the three year period.

69. In those more serious cases where, if our proposals were accepted, the debtor would still be required to undergo a public examination, the automatic discharge system referred to above should still apply, but with this modification, namely, that the relevant period between the date of adjudication and automatic discharge should be five years and not three years. Once again there should be provisions with regard to the entry of a caveat or caution as described above and for the debtor to apply to the court for a discharge before the expiry of the five year period.

70. The Committee is particularly concerned that debtors made bankrupt under the present system should also have the benefit, in appropriate cases, of machinery for automatic discharge. To achieve this result we recommend that every bankrupt undischarged at the date of the coming into force of the amending legislation should be automatically discharged three years thereafter, subject to the entry of a caveat or caution in the manner already described, and by the persons already described and subject to the right of the bankrupt to

apply for a discharge earlier than that date in accordance with the present procedure.

71. The Committee feels that these proposals have a considerable number of advantages over the present system:

(a) They provide a much more satisfactory way of dealing with the problem of the discharge of debtors from bankruptcy.

(b) The majority of debtors would be subject to the status of bankruptcy for a definite period which would be known to them from the start; in so far as bankruptcy is to be regarded as a punishment, it is in the view of the Committee most important that the extent of such punishment should, so far as is consistent with the interests of society generally, have such an element of certainty; there is no reason why bankruptcy should in this respect be any different from any other branch of the law.

(c) There would be, in the course of time, a substantial decrease in the number of bankrupts who remained undischarged quite needlessly, from their own point of view as well as from that of society.

(d) The caveat or caution would in effect enable the harsher features of the present system to be retained for the more serious cases. In this way the distinction between less culpable bankrupts on the one hand and the more serious cases on the other hand will be made with much sharper emphasis.

(5) The bankrupt's property divisible amongst his creditors

72. The purpose and design of the Bankruptcy Act 1914 is, quite simply, to divest the debtor substantially of the whole of his assets and to make them available through his trustee in bankruptcy for distribution amongst the general body of his creditors; in return, as has been seen, the debtor is afforded protection from further pursuit by individual creditors.

73. By section 38 of the Act all such property as may belong to the bankrupt or be vested in him at the commencement of the bankruptcy or may be acquired by or devolve on him before he obtains his discharge, is made available for distribution amongst his creditors. The definition of property for this purpose (in s. 167 of the Act) is extremely comprehensive. Nonetheless the Act does recognise that there must be some limitation upon the creditors' rights in this regard and accordingly provision is made for the exclusion from the ambit of section 38 of two categories of property, namely,

(a) property held by the bankrupt on trust for any other persons;

(b) the tools (if any) of his trade and the necessary wearing apparel and bedding of himself, his wife and children, to a value, inclusive of tools and apparel and bedding, not exceeding £20 in the whole.

74. The Co
whether the
satisfactory at
aspect of bank
self but also
provisions sho
bankruptcy up
minimum. As
relatives took
bankruptcy aff
and be distress
for example,
necessary wear

75. Once the
made by the O
home to make
enable the trust
is entitled to.
humiliating exp
that in the ove
tact and discre
generally speak
deprive the ba
but that, on th
attitude in rela
cases he will
reasonable pric
have no more t

76. The Com
section 38 (2)
in their breac
date. It makes t

(a) there sho
wearing
include
(b) there sho
of the ba
(c) the bank
either o
of any p
(d) both the
increased
considers

(6) **Discriminat**

77. The basi
of the bankrup

be one month in place of one week with a limit of £200 per employee;

(b) the category of employee to which this preferential treatment would have been accorded was, presumably, intended to be limited to clerks, servants, labourers and workmen, as at present specified in section 33 of the Bankruptcy Act. We hope that when legislation is introduced the opportunity will be taken of clarifying the position by the use of language more suited to modern conditions, *e.g.* by the use of the word "employees."

(7) Complaints against trustees

81. In the vast majority of cases the bankrupt has no financial interest at all in the outcome of the administration of his estate by the trustee in bankruptcy. The figures (see para. 21 *ante*) show that the general body of creditors are extremely fortunate if they obtain anything beyond a modest dividend; the prospects of any surplus for the bankrupt are usually negligible.

82. In the absence of any real likelihood of a surplus, the bankrupt is not, generally speaking, entitled to interfere in the administration of his estate or to make any complaint with regard to the trustee's conduct of his affairs.

83. Prior to the Bankruptcy Act 1883, even if there was a surplus for the bankrupt or, but for the trustee's action or inaction, there might have been a surplus, the bankrupt was not entitled to institute proceedings complaining about the trustee's misconduct. Thus in one case (*Motion* v. *Moojen* (1872) L.R. 14 Eq. 202) where the trustee was party to a fraud involving the disposal of the bankrupt's property at a gross undervalue, the bankrupt was held to have no right to complain, at any rate in the bankruptcy, even though the court was of the opinion that he had been "cruelly wronged" by the trustee.

84. The Bankruptcy Act 1883 introduced provisions which to some extent alleviated the position of the bankrupt in this regard. The position is now dealt with by section 80 of the Bankruptcy Act 1914 (replacing s. 90 of the Act of 1883). Under the present law, if the bankrupt, or any of his creditors or any other person, is aggrieved by any act or decision of the trustee, he may apply to the court, and the court may confirm, reverse or modify the act or decision complained of, and make such order in the premises as it thinks just. It is also to be observed that under section 105 (1) of the Act of 1914, every court having jurisdiction in bankruptcy has full power to decide all questions which may arise in the bankruptcy or which the court may deem it expedient or necessary to decide for the purpose of doing "complete justice" or "making a complete distribution of property."

85. The courts have consistently adopted a narrow construction of the provisions of section 80 so as, in practice, to deny the bankrupt

any effective right of complaint in all but the most exceptional cases. There is in fact no reported case where the bankrupt has ever successfully invoked the jurisdiction under that section. The cases show that if a bankrupt is to have any real prospect of calling upon the trustee to account for his management, or rather mismanagement, of the estate, he will have to establish that there is, or would, or might (but for the trustee's conduct) be a surplus in the trustee's hands after satisfying in full all the claims of the creditors. Even then, there is a limit to the bankrupt's rights under the section. The court will not, in the absence of fraud, interfere in the day-to-day management of the estate, nor may the bankrupt question the exercise by the trustee in good faith of his discretion nor hold him accountable for an error of judgment. In *Re A Debtor, ex parte The Debtor* v. *Dodwell* [1949] Ch. 236, 240, Harman J., as he then was, also expressed the view that administration in bankruptcy would be impossible if the trustee was obliged to answer at every step to the bankrupt for the exercise of his powers and discretions in the management and realisation of his property.

86. The effect of the decision in the *Dodwell* case, which was followed by Plowman J. in *Leon* v. *York-O-Matic Ltd.* [1966] 1 W.L.R. 1450, is that, notwithstanding the probability of a surplus, the bankrupt's proceedings against his trustee based on an allegation of mismanagement of the estate will fail unless he can point to the exercise by the trustee of his discretion in bad faith or unless he can persuade the court that the trustee has done that which is so utterly unreasonable or absurd that no reasonable man would have so done.

87. However, the Bankruptcy Act contains several little-known provisions whereby the bankrupt can to some extent complain of his trustee's activities, *e.g.* under section 82 (3), if he can satisfy the Department of Trade that the trustee's remuneration is "unreasonably large," the Department of Trade is authorised to fix the amount.[13]

88. The Committee is well aware that many of the grievances felt by bankrupts towards their trustees are, when fully investigated, without substance and unmeritorious.[14] Today the overwhelming number of trustees is professionally qualified and highly experienced in bankruptcy matters. Their appointment is subject to certification by the Department of Trade under section 19 (2) of the Act and their

---

[13] There is also s. 93 (objections to release of trustee) which enables the court to charge the trustee with the consequences of any act or default contrary to his duty.

[14] The usual complaint is that the bankrupt's property has been disposed of at an undervalue or that the trustee has failed to collect what are alleged by the bankrupt to be, and disclosed in his Statement of Affairs as, perfectly good book debts, or to prosecute litigation previously commenced by the bankrupt.

activities generally are conducted under the aegis of that Department as well as of the Committee of Inspection.

89. Nevertheless, the Committee realises that there must be a hard core of cases, albeit very few in number, where the bankrupt's complaints do contain some substance. Under the law as it stands at present it is exceedingly difficult for the bankrupt to have any such complaints adequately ventilated, let alone for him to obtain redress for them against the trustee; the onus of proof which he must discharge is an extremely heavy one.

90. The Committee would welcome the introduction into the Bankruptcy Act of provisions whereby the duty owed by the trustee in bankruptcy to the bankrupt, as well as the general body of his creditors, was expressly defined, *e.g.* a duty of the utmost good faith, giving rise to a cause of action on the part of the bankrupt and the creditors for breach of statutory duty, if default has been made and damage sustained in consequence thereof.

(8) Actions by the bankrupt: Legal Aid

91. A cause of action belonging to the debtor prior to his bankruptcy, *e.g.* for damages for breach of contract, will, under section 38 of the Bankruptcy Act, vest upon his adjudication in his trustee in bankruptcy. The effect of such a transfer of the cause of action to the trustee is to bring to an end any legal aid certificate of which the debtor previously had the benefit. If the estate is without assets or the creditors are not prepared to indemnify the trustee against the costs of proceeding with that action or instituting fresh proceedings, the bankrupt may be severely prejudiced, *e.g.* in a case where success in the action might make available sufficient funds for the payment of his debts in full.

92. The justice of the debtor's position in this regard has more and more been recognised by the courts in recent years, *e.g.* in one case [15] where the Receiving Order was rescinded by the Court of Appeal and an interim Receiver, in the shape of the Official Receiver, was appointed under section 8 of the Bankruptcy Act, to afford to the debtor a reasonable opportunity of obtaining the fruits of pending litigation which would have been sufficient to discharge his debts in full.

93. There is at present some considerable obscurity as to whether a trustee in bankruptcy is entitled to obtain a legal aid certificate at all to prosecute a cause of action which may have become vested in him as the bankrupt's trustee in bankruptcy. Under the prevailing Legal Aid Regulations, the problem is whose means are to be taken

[15] *Re Glick* (1969) 113 S.J. 72.

into account in granting the certificate, the trustee personally, the creditors in the estate, or the bankrupt.[16]

94. The Committee considers it to be reasonable that those who are to profit from the outcome of litigation should normally be expected to finance it. In the case of a bankruptcy, the costs of an action should normally be met either out of the assets in the estate, or by the creditors from their own resources, and the costs ought not to fall on public funds. However, there must, we think, be exceptional cases where the trustee should be able to obtain a legal aid certificate, irrespective of his own resources, or those of the creditors, to prosecute or defend litigation.

95. So far as the granting of legal aid to the bankrupt himself is concerned, the Committee considers that in a case where the successful prosecution of an action would be likely to produce a surplus for him, then if the trustee is not himself prepared in such circumstances to prosecute the litigation, machinery should exist whereby the cause of action can be transferred by the trustee to the bankrupt so that it can be prosecuted by him with the benefit of a legal aid certificate, if he can obtain one.

96. The cases where a debtor, prior to the Receiving Order, or indeed during the course of the subsequent proceedings, has had the benefit of a legal aid certificate so that he can obtain legal advice regarding his position are, the Committee suspects, fewer than they should be. In this Report we have already drawn attention to the serious consequences for the debtor of bankruptcy, *e.g.* the effect of his answers at the public examination,[17] and accordingly we would welcome a much greater use of the legal aid machinery being made by bankrupts in connection with the proceedings against them. We consider that one disadvantage of the present system is that even if the bankrupt obtains a certificate, it does not cover the services of an accountant. We would welcome such modifications to the existing regulations as may be required to enable a bankrupt to obtain accountancy as well as legal advice in all appropriate cases.

97. The Committee is also aware that in a handful of cases it becomes apparent to the court in the course of proceedings that the debtor or bankrupt is not doing justice to himself for one reason or another and that he might benefit from some outside assistance. Under Rule 297 of the Bankruptcy Rules 1952 the court has power, of its own motion, in a case where it appears that the debtor is mentally unfit to appoint such person as it thinks fit to appear for or represent him. The Committee would welcome an extension of this principle to

[16] See Halsbury's "*Laws of England*," 4th ed., vol. 3, Bankruptcy, para. 553.

[17] See para. 43 (c) *supra*.

give the court jurisdiction to appoint a person, such as the Official Solicitor, to assist the debtor in an appropriate case, even though he be not necessarily mentally unfit.

(9) Bankrupts obtaining credit

98. Without having considered in detail the provisions of the Bankruptcy Act 1914, as amended, dealing with criminal offences, the Committee has examined one particular provision and has concluded that this, in its present form, is capable of causing substantial injustice. Section 155 *(a)* of the Bankruptcy Act 1914 provides that where an undischarged bankrupt, either alone or jointly with any other person, obtains credit to the extent of £10 or upwards from any person without informing that person that he is an undischarged bankrupt then he commits a criminal offence.

99. The decision of the Court of Appeal in *R.* v. *Hartley* [1972] 2 Q.B. 1 shows the potential dangers facing all bankrupts who obtain credit, whatever the amount involved. The Committee feels that the continued existence of the £10 limit in the subsection is unnecessary and out of touch with the realities of the 1970s.

100. In these circumstances the Committee recommends that the £10 limit be dropped altogether and the offence be restructured to make the essence of the offence failure to pay a debt incurred within a specified time of incurring it (after the lapse of such period of grace as has been permitted by the creditor). On the expiry of the specified time the bankrupt would commit an offence unless he could establish that he had reasonable prospects of paying the debt at the time he obtained the credit. The onus of proving such reasonable prospects should be on the bankrupt.

CONCLUSION

101. As we said at the beginning of this Report, bankruptcy legislation has remained substantially unaltered for over a century. On the one hand it may be said to have stood the test of time; but on the other it is clear that the needs of society have altered greatly since the legislation was enacted. The Lord Chancellor's expression of the Government's views on bankruptcy law (see para. 20 *supra*) has more than a tinge of complacency about it. The structure of the 19th-century machinery of bankruptcy is ill-adapted to the needs both of the small debtor and of his creditors—as well as of society generally. If economic forecasts are to be relied on that machinery may be expected to have wider use in the future. On general principles a society should keep its laws up to date; in the case of bankruptcy the need is pressing. We hope that our Report will provide a constructive basis for the re-shaping of what is an essential part of the social mechanism.

RECOMMENDATIONS

(1) *The Bankruptcy Notice*

(a) A debtor should normally have 21 days' notice to comply with a Bankruptcy Notice served in England;

(b) A debtor should have 14 days in which to file an affidavit raising an appropriate counterclaim;

(c) The court should be given a much clearer discretion than now appears to exist to prescribe, at the time a Bankruptcy Notice is issued, longer periods when the special circumstances of the case so justify;

(d) Form 6 of the current bankruptcy forms, which prescribes a standard form of Bankruptcy Notice, should be modified:

(i) to ensure that the format of the Bankruptcy Notice is such as to display more prominently the warning as to the significance of the debtor's failure to deal with the notice promptly;

(ii) to indicate to him that if he is in any doubt as to what he should do with regard to it, he should as quickly as possible seek professional advice, *e.g.* from a solicitor or accountant, or from his local Citizen's Advice Bureau.

(e) The establishment of some local welfare body or the expansion of existing services from which advice can be obtained, at any rate in the simpler type of cases, by a debtor faced with bankruptcy (paras. 27, 28 and 29).

(2) *The Petition*

(a) The amount of the debt, at present £50, required to justify the commencement of bankruptcy proceedings should be the subject of a sharp increase; the minimum should at the very least be £200.

(b) In view of the prevailing economic conditions and the need to ensure that the level fixed does not too quickly become out of date, machinery should be introduced whereby any increased level can be further raised, as and when necessary, without the need for any further amendment to the substantive Bankruptcy Act, *e.g.* by delegated legislation.

(c) Consideration should be given to extending the scope of the administration order procedure available under the Administration of Justice Act 1970, at present limited to cases where the debts amount to no more than £1,000, by increasing the financial ceiling from time to time (para. 40).

(3) *The Public Examination*

(a) (i) In all cases where the unsecured liabilities disclosed by the debtor in his statement of affairs exceed £10,000 he should be obliged to give an explanation in public to account for his failure and accordingly in such cases a public examination should always be held.

(*ii*) In cases where the unsecured liabilities disclosed by the debtor in his statement of affairs are less than £10,000, the present law should be altered and there should be no public examination unless,

(*a*) the court is satisfied upon the application of the Official Receiver, the Trustee in Bankruptcy or a creditor, that such a hearing should take place, or

(*b*) the debtor has been bankrupt on a previous occasion (para. 55).

(b) Appropriate practice directions for each county court exercising bankruptcy jurisdiction should be introduced to provide that the conduct of the public examination, in more serious cases, is entrusted to the judge of the court as opposed to the registrar (para. 57 (a)).

(c) Consideration should be given to the possibility of sending the permanent bankruptcy registrars attached to the High Court on circuit from time to time with a view to ensuring consistency of practice throughout the country (para. 57 (b)).

(d) The Bankruptcy Act should be suitably amended so as to confer express power upon the court at the public examination to strike out from the transcript irrelevant or scandalous matters (para. 57 (c)).

(e) Notwithstanding the provisions of Rule 191A of the Bankruptcy Rules 1952, which has recently been introduced, relating to the adjournment of the public examination where criminal proceedings are pending against the debtor, the practice should be observed of permitting the examination to continue in relation to non-criminal topics (para. 57 (d)).

(f) The protection of the reputation of third parties mentioned in the course of the public examination should be left to the Bankruptcy Court to deal with by such measures as insisting on anonymity or emphasising that the third party has not had an opportunity of putting his side of the case or of cross-examining the debtor in regard thereto (para. 57 (e)).

(4) *The Discharge*

(a) (i) Where no public examination of the bankrupt is required to be held a debtor who has not been bankrupt on a previous occasion should be entitled to an automatic discharge after a period of three years has elapsed from the date of his adjudication as a bankrupt, unless the Official Receiver, the trustee or any creditor has successfully applied to the court for a " caveat " or caution to be entered on the bankruptcy file against such automatic discharge.

(ii) The entry of such a caveat or caution would mean that the debtor would be obliged to apply to the court for a discharge in accordance with the present procedure as would the debtor who has been bankrupt on a previous occasion.

(iii) Even if no caveat or caution was entered, the debtor would still be at liberty to apply to the court for a discharge, in

accordance with the present procedure, before the expiry of the three year period (para. 68).

(b) In cases where the bankrupt is required to undergo a public examination, he should still be entitled to an automatic discharge, but, in such a case, the relevant period between the date of adjudication and the taking effect of the automatic discharge should be five years and not three years. The provisions with regard to the entry of a caveat or caution as described above and for the debtor to apply to the court for a discharge before the expiry of the five year period would apply (para. 69).

(c) As regards debtors already made bankrupt under the present system, those undischarged at the date of the coming into force of any amending legislation should be automatically discharged three years thereafter, subject to the entry of a caveat or caution in the manner above described, and by the persons there described and subject to the right of the bankrupt to apply for a discharge earlier than that date in accordance with the present procedure (para. 70).

(5) *The assets available for creditors*

The provisions of section 38 (2) of the Bankruptcy Act 1914 relating to the exemption of assets should be amended as follows:

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

(b) there should be a limit of £200 in relation to the tools, if any, of the bankrupt's trade;

(c) the Bankruptcy Court should be given a discretion to increase either of these limits in special circumstances at the instance of any person interested;

(d) both the £500 and £200 limit should be capable of being increased from time to time if the Secretary of State for Trade considers it to be desirable (para. 76).

(6) *Discrimination amongst creditors*

(a) In the absence of a wholesale abolition of the present system of preferential claims, the claims of employees as a preferential class should be upgraded and turned into a super-preferential category of creditor;

(b) The extent of such super-preferential debt should be one month's arrears of wages, with a specified maximum amount capable of being increased from time to time by the Secretary of State for Trade.

(c) The expression "clerks, servants, labourers and workmen" used in section 33 of the Bankruptcy Act 1914 should be replaced by language more suited to modern conditions, *e.g.* by the use of the word "employees" (paras. 78 and 80).

(7) *Complaints against trustees*

There should be introduced into the Bankruptcy Act provisions whereby the duty owed by the trustee in bankruptcy to the bankrupt,

as well as to the general body of his creditors, is expressly defined, *e.g.* as a duty of the utmost good faith, giving rise to a cause of action on the part of the bankrupt and the creditors for breach of statutory duty, if default has been made and damage sustained in consequence thereof (para. 90).

(8) *Actions by the bankrupt: Legal Aid*

(a) In a case where the successful prosecution of an action would be likely to produce a surplus for the bankrupt, then if the trustee is not himself prepared in such circumstances to prosecute the litigation, machinery should exist whereby the cause of action can be transferred by him to the bankrupt so that it can be prosecuted by the bankrupt with the benefit of a Legal Aid Certificate, if he can obtain one (para. 95).

(b) The existing Legal Aid Regulations should be modified to enable a bankrupt to obtain accountancy as well as legal advice in all appropriate cases (para. 96).

(c) The provisions of Rule 297 of the Bankruptcy Rules 1952 under which the court has power, of its own motion, to appoint such person as it thinks fit to appear for or represent a debtor who appears to be mentally unfit should be extended to give the court jurisdiction to appoint a person, such as the Official Solicitor, to assist the debtor in an appropriate case, even though he be not necessarily mentally unfit (para. 97).

(9) *Bankrupts obtaining credit*

The provisions of section 155 (*a*) of the Bankruptcy Act 1914, whereby a bankrupt commits a criminal offence if he obtains credit to the extent of £10 or upwards without disclosing the fact that he is an undischarged bankrupt, should be amended so that the £10 limit is repealed and the offence becomes one of failure to pay the debt incurred within a specified time of incurring it, the bankrupt having a defence if he can establish that he had reasonable prospects of paying the debt at the time he obtained the credit (para. 100).

JUSTICE PUBLICATIONS

The following reports and memoranda published by JUSTICE may be obtained from the Secretary:

Published by Stevens & Sons	Non-Members	Members
The Law and the Press (1965)	75p	60p
The Citizen and his Council—Ombudsmen for Local Government? (1969)	50p	35p
Privacy and the Law (1970)	80p	57p
Administration under Law (1971)	75p	50p
Litigants in Person (1971)	£1.00	70p
The Unrepresented Defendant in Magistrates' Courts (1971)	£1.00	70p
Living it Down (1972)	65p	50p
The Judiciary (1972)	90p	70p
Compensation for Compulsory Acquisitions and Remedies for Planning Restrictions (1973)	£1.00	70p
False Witness (1973)	£1.25	85p
No Fault on the Roads (1974)	£1.00	75p
Going to Law (1974)	£1.00	75p
Bankruptcy (1975)	£1.25	
Parental Rights and Duties and Custody Suits (1975)		
Published by Charles Knight & Co.		
Complaints against Lawyers (1970)	50p	35p
Published by Barry Rose Publishers		
Going Abroad (1974)	£1.00	70p
Published by JUSTICE		
The Prosecution Process in England and Wales (1970)	40p	30p
Insider Trading (1972)	25p	20p
The Redistribution of Criminal Business (1974)	25p	20p
Evidence of Identity (1974)	50p	35p
Compensation for Accidents at Work (1975)	25p	20p

The following reports in the Stevens series are out of print but photostat copies may be obtained from the Secretary on application:

Title	Price
Contempt of Court (1969)	50p
Legal Penalties and the Need for Revaluation (1959)	20p
Preliminary Investigation of Criminal Offences (1960)	40p
The Citizen and the Administration (1961)	£1.25
Compensation for Victims of Crimes of Violence (1962)	40p
Matrimonial Cases and Magistrates' Courts (1963)	30p
Criminal Appeals (1964)	£1.25

Trial of Motor Accident Cases (1966)	75p
Home Office Reviews of Criminal Convictions (1968)	40p
Home Made Wills (1971)	20p

Duplicated Reports and Memoranda

Report of Joint Working Party on Bail	15p
Evidence to the Morris Committee on Jury Service	15p
Evidence to the Widgery Committee on Legal Aid in Criminal Cases	15p
Report on Planning Enquiries and Appeals	20p
Rights of Minority Shareholders in Small Companies	15p
Civil Appeals: Proposals for a Suitors' Fund	15p
Complaints against the Police	15p
Eleventh Report of Criminal Law Revision Committee	20p
Transcript of JUSTICE Conferences on—	
"Perjury" (1971)	£1.00
"The Law and the Press" (1972)	£1.00
"Eleventh Report of Criminal Law Revision Committee" (1972)	£1.00
"The future of Trial by Jury" (1973)	£1.00

Memoranda by Committee on Evidence

1. Judgments and Convictions as Evidence	10p
2. Crown Privilege	10p
3. Court Witnesses	10p
4. Character in Criminal Cases	10p
5. Impeaching One's Own Witness	10p
6. Identification	10p
7. Redraft of Evidence Act, 1938	10p
8. Spouses' Privilege	10p
9. Availability of Prosecution Evidence to the Defence	10p
10. Discovery in Aid of the Evidence Act	10p
11. Advance Notice of Special Defences	10p
12. The Interrogation of Suspects	15p
13. Confessions to Persons other than Police Officers	10p
14. The Accused as a Witness	10p
15. Admission of Accused's Record	10p
16. Hearsay in Criminal Cases	10p

Published by International Commission of Jurists

The Rule of Law and Human Rights (Principles and Definitions)	60p

Back numbers of the Journal, Bulletin and Review and special reports of the International Commission of Jurists are also available.

JUSTICE

British Section of the International Commission of Jurists

JUSTICE is an all-party association of lawyers concerned, in the words of its constitution, " to uphold and strengthen the principles of the Rule of Law in the territories for which the British Parliament is directly or ultimately responsible: in particular, to assist in the administration of justice and in the preservation of the fundamental liberties of the individual." It is also concerned to assist the International Commission of Jurists in its efforts to promote observance of the Rule of Law throughout the world.

JUSTICE was founded in the Spring of 1957 following a joint effort of leading lawyers of the three political parties to secure fair trials for those accused of treason in Hungary and South Africa. From this co-operation arose the will to found a permanent organisation. A preamble to the constitution lays down that there must be a fair representation of the three political parties on the governing Council, which is composed of barristers, solicitors and teachers of law.

In the eighteen years of its existence, JUSTICE has become the focal point of public concern for the fair administration of justice and the reform of out-of-date and unjust laws and procedures. It has published authoritative reports on a wide variety of subjects, the majority of which are listed at the end of this report. Many of them have been followed by legislation or other government action. In Commonwealth countries, JUSTICE has played an active part in the effort to safeguard human rights in multi-racial communities, both before and after independence.

Membership of JUSTICE is open to both lawyers and non-lawyers and inquiries should be addressed to the Secretary at 12 Crane Court, Fleet Street. London, E.C.4. Tel.: 01-353 9428.