SCOTTISH LAW COMMISSION

VOL 2: Parts IV – VI & Appendices

MEMORANDUM No: 16

INSOLVENCY, BANKRUPTCY AND LIQUIDATION IN SCOTLAND

27th November 1971

The Scottish Law Commission will be grateful if comments are sent in by 31 March 1972. All correspondence should be addressed to:-

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Part IV PROPOSED AMENDMENTS IN DETAIL, UNDER REFERENCE TO THE SECTIONS, IN ORDER, OF THE BANKRUPTCY (SCOTLAND) ACT 1913

Sections 2 and 26 The term "company" used in sections 2 and 26

In terms of section 2 "company" is defined as including bodies corporate, politic or collegiate and partnerships. Such bodies may be sequestrated under the provisions of the 1913 Act. We have given careful consideration to the matter and recommend that the reference to the sequestration of bodies corporate, politic or collegiate should be deleted from the definition of "company" contained in section 2.

We also consider that a partnership however large should be sequestrated only and not wound up under the Companies Acts but that otherwise the present law should be left unchanged. We further recommend that the sequestration process should be confined to individuals, partnerships, limited partnerships and deceased persons' estates.

Section 10 Equalisation of Diligences

We consider that the principle of equalisation of diligences is satisfactory but we think that the periods laid down in section 10 might with advantage be standardised. We suggest that all arrestments and poindings which have been used within a period of three months prior to the constitution of public insolvency or within three months thereafter should rank pari passu as if they had all been used of the same date.

Section 11 1st.(B) Statement of residence or place of business of bankrupt in petition to be presumed correct

We recommend that section 11 1st.(B) should be amended to the effect that the statement of residence or place of business of the bankrupt which is contained in the petition for sequestration should be presumed to be correct if not challenged by the bankrupt, and that in the event of challenge the onus of proof should be placed upon the bankrupt.

Sections 11 and 16

The jurisdiction of the Sheriff Court should be placed on the same footing as that of the Court of Session

With regard to the question of the grounds of jurisdiction of the Sheriff Court in dealing with bankruptcies, we support the recommendation of the Grant Committee (see paragraph 96 of Cmnd. 3244) that the grounds of jurisdiction in the Sheriff Court for sequestrations should be similar to those at present governing sequestrations in the Court of Session. We propose that the Sheriff should have jurisdiction in bankruptcy if at any time within the year before the date of presentation of the petition for sequestration the debtor had resided or had a dwellinghouse or a place of business within the Sheriffdom. We recommend that section 16 of the 1913 Act should be amended accordingly. We appreciate that the effect of this recommendation may well be that in practice the Sheriff Court will have almost exclusive jurisdiction in bankruptcy; we gave serious consideration to the question whether it was necessary to retain the jurisdiction of the Court of Session. We decided that it was, having in mind in particular the interests of a foreign creditor. We are fortified in our decision by reason of the fact that there are a number of cases where a creditor would be unable to establish jurisdiction against the debtor in the Sheriff Court and that, in addition, only the Court of Session can grant warrant to apprehend a bankrupt residing furth of Scotland and bring him before the Court for public examination. We also recommend the enactment of a provision which would enable a Sheriff in appropriate circumstances to remit a sequestration from one Sheriffdom to another.

Section 14 — Interim Preservation of Estate

We have given careful consideration to the question whether the power to appoint a judicial factor to take immediate measures for the interim preservation of the bankrupt's estate which is contained in section 14 should be retained. We are of the opinion that, despite our proposal that the interim trustee should be given the powers of a permanent trustee, which would enable him to deal with urgent matters such as disposal of perishable stock or payment of wages of staff, there are nevertheless certain circumstances in which it is desirable that a judicial factor rather than an interim trustee should be appointed. We accordingly recommend that the power of the court to appoint a judicial factor under section 14 should be retained.

Section 16 — Competency of second award of sequestration where previous sequestration is undischarged

We have observed that in the case of Cook v M'Dougall 1923 S.C.86 the court held that section 16 of the 1913 Act did not have the effect of making incompetent the award of a second sequestration against an undischarged bankrupt when the new application was made to the same court which had previously awarded sequestration, and that in the circumstances a new award of sequestration should be pronounced. In this case sequestration was pronounced in the Sheriff Court of Lanarkshire in 1900. The trustee was subsequently discharged, but the bankrupt never obtained his discharge. He continued, however, to carry on business and incurred new debts. In 1922 one of the new creditors presented a petition in the Sheriff Court of Lanarkshire for sequestration of the debtor's estates.

The Court held that the proviso to section 16 "that no

sequestration shall be awarded by any Court after production of evidence that a sequestration has already been awarded in another Court, and is still undischarged," did not preclude the court from granting sequestration of new when the first sequestration was in the same court as is asked to grant the second sequestration. The court held that the purpose of the fasciculus of sections 16 to 19 inclusive of the 1913 Act is to determine the appropriate forum of a sequestration and to ensure that different processes of sequestration of the estates of the same person should not be concurrent and competitive in different jurisdictions. Goudy (4th Edition) says at page 126 "The power to award sequestration of new, though a previous one is undischarged, is of importance in cases where the bankrupt has been allowed after the first sequestration to carry on trade and acquire new estate, or where part of his original estate having been abandoned by the trustee, he has incurred new debts on the credit of it."

We consider that if, in a similar case, the bankrupt had moved to another Sheriffdom and had there incurred new unpaid debts the terms of section 16 would have made it incompetent for either the Sheriff Court of that Sheriffdom or for the Court of Session to award sequestration of new since in that event there would have been a sequestration which had already been awarded "in another Court" and which was still undischarged. A new award of sequestration is, however, the only way in which the new creditors of a bankrupt who has been trading since his previous sequestration can obtain a ranking. There would, therefore, appear to be a defect in the present bankruptcy procedure which we recommend should be rectified by an appropriate amendment to the proviso to section 16.

Section 17 Time for Publication of Notice of Remit

The Institute of Chartered Accountants point out that the time presently allowed for the publication of a remit of a

later sequestration stands at four days after a copy of the deliverance of such a remit could be received by post in Edinburgh and propose that the period should be extended to seven days. After giving the matter careful consideration, however, we recommend that the period should remain four days.

Section 20 — Bankrupt's trade or profession to be stated in petition for sequestration and decree awarding sequestration

The Accountant of Court advises us that it is common practice for the Department of Trade and Industry and the Scottish Home and Health Department to seek information from him regarding the number of bankrupts according to trades and professions in any one year to enable them to compile statistics and to answer Parliamentary questions. He explains that the statutory register of sequestrations does not always show the kind of information required as it is frequently not contained in the petition for sequestration. The Accountant therefore suggests that in each case the bankrupt's trade or profession should be given in the petition for sequestration and in the deliverance of the award of sequestration. The difficulty about giving effect to this suggestion is that in many cases the bankrupt's trade or profession will be unknown to the petitioning creditor and it might well put him to considerable trouble to ascertain this. We therefore recommend that this information should be stated in the petition for sequestration so far as known but that it should not be mandatory to provide it.

Section 22 — Simplification of procedure regarding execution of petitioning creditor's oath outside the United Kingdom

The Law Society suggest that the requirements for execution of the petitioning creditor's oath outside the United Kingdom should be simplified. Since we are proposing,

however, that the oath should be superseded by a new statutory form of claim which is not to be signed on oath we recommend that section 22 should be repealed as no longer necessary.

Section 23 — Requirement of statement of bankrupt's residence etc.

The Law Society say that the creditor will frequently have no knowledge of the personal residence of the bankrupt and that this requirement should be deleted. Section 23 provides, however, that when a petition is presented for the sequestration of the estates of a deceased debtor the creditor shall specify the place where the debtor resided or had a dwelling-house or carried on business in Scotland at the time of his death. It appears to us that the supplier of goods and/or services must normally know the address of either his debtor's personal residence or his place of business in order to transact business with him and that therefore there would appear to be no good reason why this information should not be inserted in the petition. We accordingly recommend that, apart from the references to the oath, section 23 should remain unchanged.

Sections 25 and 26 — Mode of citation of company and individual partners

We have observed that in the case of Central Motor Engineering Co. v Galbraith 1918 S.C. 755 there was a difference of judicial opinion as to the correct mode of citing individual partners where the company is also being cited and, in particular, whether the individual partners should have been cited under section 25 or under section 26 of the 1913 Act. We have considered the matter and recommend that, for the avoidance of doubt, service in terms of section 26 should be effective not only against the company, but also against the partners thereof.

Section 26 — Special requirements for service on partnership

The special requirements for service on a partnership contained

in section 26 are considered by the Law Society to be unnecessary. They suggest that citations should be effected in the manner prescribed by the Sheriff Courts (Scotland) Acts 1907 and 1913. Having given the matter careful consideration, however, we are of the opinion that, apart from the point with which we have dealt above, section 26 has worked quite satisfactorily and should not therefore be repealed.

Section 27 — Induciae - whether citation periods prescribed in the Sheriff Courts (Scotland) Acts 1907 and 1913 should be adopted

The Law Society propose that the special requirements contained in section 27 should be deleted and the normal citation periods prescribed by the Sheriff Courts (Scotland) Acts 1907 and 1913 substituted therefor. As in the case of section 26, however, we consider that the provisions of section 27 have proved in practice to work efficiently and should therefore remain unchanged.

Section 30 — Period for presenting petition for recall of award of sequestration

After careful consideration we have decided to recommend that the period of 40 days laid down in section 30 during which a petition may be presented to the Lord Ordinary for recall of the award of sequestration should be reduced to 30 days and that otherwise the section should not be altered since we consider that the procedure provided by section 30 should remain unchanged.

Section 32 — Proceedings in Sequestration not to be stayed

The Faculty of Advocates have suggested to us that, pending the determination of an appeal against an award of sequestration, the sequestration should proceed and that any transactions bona fide carried out should be valid. We would point out, however, that section 32 provides that, pending any petition for recall and until the sequestration be finally recalled,

the proceedings in the sequestration shall go on as if no such petition had been presented. It seems that, since the point raised by the Faculty is already adequately covered by section 32 as it stands, no alteration in the present law is required.

Section 35 — Time for application for sist of sequestration

Both the Law Society and the Institute of Chartered Accountants consider that the 4 days which are allowed for applying for a sist of sequestration should be extended to 7 days. We agree, and we accordingly recommend that the necessary amendment be made to section 35.

Section 40 — Provision to be made for expenses incurred by petitioning or concurring creditor before election of trustee to be a first charge on the funds of the estate

The Law Society and the Institute of Chartered Accountants both consider that section 40 should be amended to provide for payment of the expenses necessarily incurred in preparing for the first meeting of creditors. We agree that all preliminary expenses approved by the commissioners incurred prior to the first meeting of creditors should be a first charge on the funds of the estate and recommend that section 40 should be amended to this effect.

Sections 45 to 47 — Ranking of Claims

Sections 45 to 47 are all expressed in relation to the creditor's oath. As we are recommending the abolition of the oath these references should now relate to the new statutory form of claim which we suggest should replace the present affidavit and claim.

Section 46 — Return of vouchers supporting claims to creditors

The Institute of Chartered Accountants are of the opinion that vouchers supporting claims should remain with the trustee in bankruptcy unless they include documents actually required by creditors. We have given this suggestion careful consideration but do not agree.

Section 46 — Dispensing with initialling by trustee

The Law Society consider that there is little merit in the trustee initialling the oaths (now claims) and grounds of debt and that it would be sufficient to provide that he shall keep proper records of the receipt of claims and vouchers. We agree and we therefore recommend that section 46 should be amended accordingly.

Section 47 — Power of Trustee to point out errors in the form or content of a claim

The Law Society consider that the procedure for correction of a claim on application to the Sheriff should be abolished and suggest that the trustee should have power to point out to a creditor errors in the form or content of the claim and that (as in a liquidation) it should be possible for a creditor to lodge an amended claim at any time up to adjudication upon the particular claim by the trustee. We would point out, however, that section 47 provides that either the Sheriff or the trustee may call upon the creditor to rectify his claim. We therefore consider that it is unnecessary to amend the section.

Section 48 — Interest and discounts should be shown separately from principal sums in claim

The Law Society remark that section 48 is the basic ranking section and has operated satisfactorily. They consider, however, that it should be provided that interest and discounts should be shown separately from principal sums in the new claim form. We are in agreement with this suggestion and recommend that the necessary amendment should be made to section 48. The Accountant of Court suggests that where a surplus emerges after paying the debts, the trustee should inform all creditors, intimating that they have a specified time in which to claim interest upon their debts "in terms of law" from the date of sequestration. We agree, and consider that the specified time should be one month. The creditors so claiming would each be entitled to receive simple interest on their debts at 5% per

annum in respect of the period from the date of sequestration (that is, the date of the first deliverance,) to the date of payment. We also consider that a secured creditor should receive either interest at the contract rate or simple interest at 5%,whichever is the higher.

Section 58 Trustee may require conveyance of security by creditor on 20% addition to his own valuation

We have considered the provisions of this section in relation to its general scheme, the adequacy of the periods of time prescribed and the comparable provisions in the bankruptcy law of England.

This section in effect specifies two periods:-

(A) 21 days after voting during which the trustee may take over the security at the creditor's valuation of it plus 20%, but the creditor is not permitted to re-value.

(B) From the expiry of period (A) until 2 months after voting during which

(i) the trustee may take over the security at the valuation plus 20% and the creditor may re-value it, but

(ii) if the trustee takes over the security the creditor may not thereafter re-value it, and

(iii) if the creditor re-values before the trustee takes over, the trustee may still take over the security at the new valuation plus 20%.

The comparable provisions of English law are contained in paragraph 12 of Schedule 1 to the Bankruptcy Act 1914. In effect there is only one period, 28 days after voting, during which

(i) the trustee may take over the security at the valuation placed upon it by the creditor plus 20% and the creditor may re-value, but

(ii) if the trustee takes over the security, the creditor may not re-value thereafter, and

(iii) if the creditor re-values, the trustee may still take over but only at the new valuation without the 20% addition.

We have examined the different provisions which operate in Scotland and England in the light of modern conditions, and have reached the following conclusions:-

(1) The period during which the trustee should be permitted to take over the security should be extended. Apart from the difficulty of valuing certain securities such as life policies and unquoted shares, the business of granting securities, and particularly securities over reversionary interests, is becoming more sophisticated and securities are often complex. The English period of 28 days is manifestly too short and even the Scottish period of 2 months is rather short. We consider that the period should be extended to 3 months after voting.

(2) For similar reasons we consider that the period within which the creditor may re-value the security should be extended and that he should be entitled to re-value at any time before the trustee has exercised the right to take over the security.

(3) We consider that there is good sense in the English rule that, once a creditor has re-valued his security, the trustee should be entitled to take it over at the new value without the addition of 20%. If a creditor takes the trouble of amending his valuation he presumably does so as the result of further investigation into its value or of receiving more accurate information. In these circumstances, he should not be permitted with impunity to under-value it to the extent of 16⅔%.

The result of these views, if acceptable, would be to effect some simplification and the position would be:-

(a) The trustee could take over the security at any time within 3 months after voting at the value placed upon it by the creditor plus 20%.

(b) The creditor could re-value it at any time before the trustee had exercised his right to take over.

(c) If the creditor re-valued, the trustee could still take over within the 3 month period but at the new valuation without the addition of 20%.

Section 60 Persons acquiring debts after sequestration not to vote

Section 60 provides that any person who shall acquire after the date of the sequestration, otherwise than by succession or marriage, a debt due by the bankrupt shall not be entitled to vote in the election of the trustee or commissioners. We agree with the Law Society's proposal that a person who acquires a debt due by the bankrupt for full value after the date of sequestration (for example, a cautioner who has paid in full after sequestration and before the first meeting of creditors) should be entitled to vote in the election of the trustee or commissioners, and recommend that section 60 should be amended accordingly. We also recommend that the words "or marriage" should be deleted from section 60.

Section 61 Valuation of securities for payment of dividend

We received representations, particularly from the Law Society and the Institute of Chartered Accountants, to the effect that this section was defective in certain respects and presented difficulties in construction.

Some of the criticisms relate to matters of principle but there was general criticism that the wording of the section required clarification. We consider these criticisms below and suggest radical amendments to the expression of the section.

The Law Society suggested that the trustee should be entitled, as an alternative to taking over the security, to require it to be realised. We agree that there may be circumstances in which a trustee, although he may suspect that a security is undervalued, will not wish to undertake the responsibility of borrowing funds in order to take it over. In English law there is provision for the trustee requiring the realisation of the security and we consider that such a provision could with advantage be introduced into the law of Scotland.

The Law Society also suggested that, where a security is valued but not taken over nor realised, the trustee should be empowered to grant an absolute title to the secured creditor. We appreciate that the present law may be justified on the view that the original contract between the debtor (now bankrupt) and the creditor was that the creditor obtained security for his debt and on default by the debtor the creditor could enforce his security which normally (depending upon the terms of the security documents) would involve realisation in the open market, whereas the proposal that the creditor should receive an absolute title to the security from the trustee would involve substituting the trustee's opinion of the creditor's valuation for the more reliable test of the market. On the other hand there would be little likelihood

of the trustee accepting a valuation which was to any material extent too low, especially if he had the option, as suggested above, of requiring realisation. Even if the creditor was permitted to acquire at an undervaluation there would be no loss to the bankrupt except in the unusual circumstances that the bankrupt's estate yielded more than 100p in the £1; the losers in any other circumstances would be the general body of creditors who appointed the trustee and who must rely on his commercial judgment in this matter as in many others. Moreover, the proposal has reasons of convenience in that it would avoid needless expense to the creditor in calling up and realising the security since that expense would increase his claim for any unsecured balance and so diminish the dividend to the general creditors. For this proposal also there is precedent in the law of England. On balance we favour the suggestion.

A further matter of principle emerged in the course of our consideration of the section. At present the law is that, after bankruptcy has commenced, a cautioner who pays a debt of the bankrupt to a creditor and receives an assignation of the creditor's claim is unable to set off what he has paid to the creditor against a debt which the cautioner himself is owing to the bankrupt. It was suggested that the law in this respect should be altered to permit set off in such circumstances, and also to permit the cautioner to use any security which he held over the bankrupt's estate for the purpose of recovering the amount paid to the assigning creditor, even although that creditor held no security. The present rule is designed to prevent the estate of the bankrupt available for his general creditors being depleted by voluntary transactions made after

sequestration. The argument for admitting the proposed qualification of this rule is that in the circumstances stated the transaction would not be voluntary on the part of the cautioner since it stemmed from a contingent pre-sequestration claim which became prestable after sequestration and so was not a transaction engineered after sequestration. We agree that the existing rule operates unfairly against the cautioner and we accept the argument that it should be relaxed to the extent suggested.

We agree with the criticisms that the section as at present drafted is lacking in clarity. We suggest that it be re-framed to contain provisions on the following lines (which incorporate the alterations in the law which are proposed above).

1. If a secured creditor realises his security before ranking, he may be ranked for the balance due to him, after deducting the net amount realised.
2. If a secured creditor surrenders his security to the trustee for the general benefit of the creditors, he may be ranked for his whole debt.
3. If a secured creditor does not either realise or surrender his security, he shall, within 28 days after being required by the trustee to do so, put a specified value on his security and deduct that value from his debt, and he shall be ranked only for the balance due to him after such deduction.
4. Where a security has been so valued:-
   (a) The trustee may, with the consent of the commissioners, require from the creditor a conveyance or assignation of the

security at the expense of the estate on payment to the creditor of the value so specified.

(b) If the trustee is dissatisfied with the value specified in respect of a security he may require the property comprised in the security so valued to be offered for sale on such terms and conditions as may be agreed upon between the creditor and the trustee, or as, in default of such agreement, the court may direct. If the sale is by public auction the creditor, or the trustee on behalf of the estate, may bid or purchase.

(c) The creditor may at any time, by notice in writing, require the trustee to elect whether he will or will not exercise his power of requiring a conveyance or assignation of the security or of requiring it to be realised, and if the trustee does not, within six months after receiving the notice, signify in writing to the creditor his election to exercise the power, he shall not be entitled to exercise it; and the creditor shall then be entitled to require the trustee to grant to him a conveyance or assignation of the property comprised in the security at the expense of the creditor, and the amount of the creditor's debt shall be reduced by the amount at which the security has been valued after deducting the expense of such conveyance or assignation.

(d) The creditor may, at any time before the trustee has exercised his rights under rule 4(a) or 4(b) or the creditor has required an election by the trustee under rule 4(c), correct the valuation by a new claim on showing to the satisfaction of the trustee, or of the court, that the valuation and claim were made bona fide on a mistaken estimate or that the security has diminished or increased in value since its previous valuation.

5. Where a valuation has been amended in accordance with rule 4(d) the creditor shall forthwith repay any surplus dividend which he may have received in excess of that to which he would have been entitled on the corrected valuation, or as the case may be, shall be entitled to be paid out of any money for the time being available for dividend, any dividend or share of dividend which he may have failed to receive by reason of the inaccuracy of the original valuation, before that money is made applicable to any future dividend, but he shall not be entitled to disturb the distribution of any dividend declared before the date of the correction.

6. If a creditor after having valued his security subsequently realises it, or if it is realised under the provisions of rule 4, the net amount realised shall be substituted for the amount of any valuation previously made by the creditor, and shall be treated in all respects as a corrected valuation made by the creditor.

7. If a secured creditor does not comply with the foregoing rules he shall be excluded from all share in any dividend.

8. Subject to the provisions of rule 4, a creditor shall in no case receive more than one hundred pence in the pound, and interest either at the contract rate or simple interest at 5% per annum, whichever is the higher.

9. If a co-obligant with or cautioner for the bankrupt holds a security over any part of the estate which, because he is not ranked on the estate, is not deducted from the total amount of the claims upon the estate, he shall compensate the estate so as to produce the same dividend for the general benefit of the creditors as they would have received if the security had been held by the creditor for whose debt the co-obligant or cautioner was liable and that creditor had deducted the value of the security from his debt and ranked only for the balance thereof, and the provisions of the foregoing rules in relation to a secured creditor shall be applicable to the co-obligant or cautioner.

10. If a co-obligant or cautioner for a debt due by the bankrupt makes payment thereof, or of any part thereof, to the creditor entitled thereto after the date of sequestration, and receives an assignation of the debt or part thereof from the creditor, the co-obligant or cautioner shall be entitled to set off the amount so paid against any debt due by him to the bankrupt or to utilise any security held by him over the bankrupt's estate as security for the amount so paid.

Section 64 Procedure to be followed at the first meeting of creditors at which the trustee is elected

Both the Institute of Chartered Accountants and the Law Society have criticised section 64 and suggested that an amended section should be enacted. In the light of the various representations we recommend that a new section 64 should be provided in amending legislation on the following lines:-

(a) The creditors or their mandatories will assemble at the time and place fixed for the election of the trustee with power to adjourn the meeting, provided that the adjournment does not postpone the meeting beyond the limit allowed under the new Bankruptcy Act.

(b) If two or more creditors gave notice to the Sheriff, the Sheriff will attend the meeting, which must then be convened in the Sheriff Court Building and will preside. In such a case the Sheriff-clerk will act as the clerk to the meeting.

(c) If the Sheriff is not present at the meeting the creditors will elect a chairman and a clerk. The person presiding at the meeting will no longer be described as the "preses" (as in sections 64 and 66) but will in future be referred to simply as the chairman of the meeting.

(d) The chairman will initial the claims lodged and will in due course sign the minutes.

(e) The clerk will write the minutes, listing therein the names and addresses of the creditors or their mandatories and the amounts of their respective claims, and the minutes will be completed and signed by the chairman within 7 days of the date of the meeting or adjourned meeting.

(f) The creditors or their mandatories who have produced claims will elect a trustee.

(g) It shall not be competent to elect as trustee the bankrupt or any person who is not a member of either (i) a recognised body of accountants which, in the opinion of the Accountant of Court, requires of its members suitable training in the law and practice of bankruptcy in Scotland, or (ii) the Law Society of Scotland, holding a current Practising Certificate.

Section 65 Judgment of Sheriff as to trustee

Section 65 provides that where the Sheriff is present at the election of trustee and there is a competition or objection to the candidates or any of them the Sheriff shall if necessary make a note of the objections and answers on which he shall within 4 days after the meeting hear parties and declare the person trustee whom he shall find to have been duly elected. We agree with the Institute of Chartered Accountants that it is desirable to standardise the timing in this case by replacing 4 days by 7 days and recommend that the necessary amendment should be made to section 65.

Section 66 When Sheriff not present

Section 66 provides that when the preses (now chairman) has been elected by the creditors he shall forthwith report the proceedings to the Sheriff; and if there is a competition or objection the parties shall within 4 days of the meeting lodge with the sheriff-clerk notes of objections and the Sheriff shall forthwith hear parties thereon and give his decision. The Institute of Chartered Accountants

consider that it would be an improvement to substitute 7 days for 4 days; we agree, and accordingly propose that the appropriate amendment should be made to section 66.

Section 72 Sometimes less than 3 creditors prepared to act as commissioners

Section 72 is worded in such a way that it assumes that even if there are only 3 creditors they will all be prepared to act as commissioners. We are advised that in practice this is not always the case and we accordingly recommend that in a new Bankruptcy Act section 72 should be amended in such a way as to provide that the creditors shall elect not more than 5 commissioners, without specifying a minimum number.

Sections 72 and 73 Provision required for reimbursement of out of pocket expenses of commissioners

Both the Institute of Chartered Accountants and the Accountant of Court point out that while sections 72 and 73 make provision for the election and removal of commissioners and related matters they do not provide for such commissioners being reimbursed any reasonable expenses which they may incur as a result of their attendance at meetings. The Law Society propose that commissioners should be entitled to payment of outlays necessarily incurred. We agree with this proposal and recommend that sections 72 and 73 should be amended to provide that commissioners should be entitled to claim and receive reimbursement of all reasonable expenses necessarily incurred and that any disagreement about such expenses should be settled by the Accountant of Court. We also support the proposal of the Accountant of Court that section 72 should incorporate a provision that the

solicitor in the sequestration cannot also act as a commissioner and recommend that section 72 should be amended to this effect.

Section 74 Payments to bankrupt by trustee

The Institute of Chartered Accountants are of the opinion that section 74 should be redrafted to provide for the trustee, with the concurrence of the commissioners, whom failing of the Accountant of Court, making payments to the bankrupt, such payments being for services rendered to the trustee only during the period of the sequestration and their amount being at the discretion of the trustee and the commissioners. We agree with this suggestion and recommend that section 74 should be amended to provide that the trustee should have power to make payments to the bankrupt for services rendered to the trustee only, the amount of such payments being at the discretion of the trustee and the commissioners. The Law Society suggest that the existing scheme of social security benefits may render unnecessary the provision contained in section 74 for the payment of an allowance by the trustee to the bankrupt. In view of the fact that social security benefits are now available for the maintenance of a bankrupt and his family we consider that the provision for maintenance payments being made to the bankrupt by the trustee is no longer required and therefore recommend that it should be deleted from section 74.

Section 75 Record of abbreviate of the trustee's confirmation

The Institute of Chartered Accountants point out that section 75 provides that the trustee must, within 10 days after his election is confirmed, record an abbreviate of

his confirmation in the register of inhibitions and adjudications and suggest that this time should be brought into line with the other standard times proposed by altering 10 days to 14 days. We agree with this proposal and recommend that it should be given effect to in a new Bankruptcy Act.

Section 76 Powers of Trustee

The Institute of Chartered Accountants recommend, and we agree, that section 76 should be expanded to include certain further powers. First, the power to order the Postmaster General to deliver a bankrupt's letters to the trustee should be transferred from section 187. Furthermore, the trustee should have power to call on the Inland Revenue for copies of the bankrupt's returns of income and assessments to income tax for a period of six years preceding the sequestration. We consider that the trustee should be able to obtain from the Inland Revenue details of the earned personal and business income of the bankrupt, but that other information contained in the bankrupt's Income Tax returns, such as the income of the bankrupt's wife and children, should not be made available to the trustee. We also recommend that it be provided that the inventory of the bankrupt's estate and effects should be made up by the trustee within 14 days after the second meeting of creditors. The words "and the annual revenue" are unnecessary, and may be deleted from the section.

Section 77 Bankrupt to make up a statement of his affairs

The Law Society suggest that under the new voluntary bankruptcy procedure the bankrupt should make up or give up information for a statement of affairs. We agree with this suggestion and have proposed (at paragraph 39) that there should be annexed to the declaration of insolvency

signed by the insolvent person a brief inventory of his assets and liabilities as declared by the bankrupt. In relation to the creditors' bankruptcy procedure, the Law Society suggest that the bankrupt should be required to lodge the statement of affairs with the trustee within 7 days of the award of sequestration. We have given careful consideration to this proposal and have come to the conclusion that the bankrupt should be required to lodge a statement of his affairs with the trustee within 7 days from the date of appointment of the trustee. We therefore recommend that section 77 should be amended to this effect.

Section 78 — Trustee to manage, realise and ingather the estate

Section 78 provides that the trustee shall manage, realise and ingather the estate, may insure the life of the bankrupt, requiring the bankrupt to submit for medical examination, and shall bank all moneys. The Institute of Chartered Accountants suggest that this section will require amendment consequential on the alterations proposed by them to section 64 which we have dealt with above. We do not consider that it is reasonable to require an individual to submit himself for medical examination and feel that the trustee's right to insure the life of the bankrupt need not be specifically provided for in the section. We consider that such a right falls under the trustee's general powers to manage, realise and recover the estate but we are of the opinion that it should be exercised only where the trustee can obtain the bankrupt's consent. The Law Society suggest that the trustee should be given power to invest the funds of the estate in suitable investments such as local authority or building society deposits rather than merely lodge the funds on deposit receipt and propose that as a condition of such investment prior intimation should require to be given by the trustee to the cautioner. Since in a large sequestration, such as that of a building firm, the sums received by the trustee may well be considerable and there

will inevitably be delays before payment of dividends to ordinary creditors, we support the Law Society's suggestion that the trustee should be entitled to invest the funds of the estate in trustee securities but consider that the trustee should not be required to make prior intimation of investment to the cautioner.

We propose that section 78 should be redrafted to provide that the trustee shall manage, realise, recover and ingather the estate belonging to the bankrupt according to the directions given by the creditors and by the commissioners. We also consider that the trustee should have power to take all necessary steps to protect the estate.

Section 79 Limit of penalty should be raised to £250

The Law Society consider that the limit of £50 which the trustee is presently allowed to retain in his hands is now too low and should be raised to £250, penal interest being applied thereafter. They also suggest that the penalty of dismissal for retention in excess of the limit unless from "innocent causes" should be made discretionary and not mandatory. In view of the difference in the value of money since the 1913 Act was passed we recommend that the limit should be increased from £50 to £250; we also agree that the penalty for retention in excess should be made discretionary rather than mandatory, and that the commissioners should be granted the right to modify or waive the penalty charge in the case of a genuine mistake.

Section 80 Trustee to keep a sederunt book and send copy of accounts to the Accountant of Court

The Law Society suggest that the requirement for the trustee to send to the Accountant of Court copies of all accounts

and circulars issued by him can hardly be justified and could be dispensed with. The Accountant of Court, however, explains that the accounts prepared by the trustee and lodged with him are abstracted and retained by the Accountant and that this information enables him to deal more satisfactorily with enquiries from creditors. For that reason we are of the opinion that section 80 should be left unchanged.

New Section after section 81

New section after section 81 which sets out the duties of commissioners

We recommend, on the advice of the Accountant of Court, that a new section should be included in amending legislation on the following lines:-

"Where no commissioners have been appointed the Accountant of Court is empowered to carry out all the duties of the commissioners as laid down in section 81 and, in particular, where the funds ingathered will not permit of the payment of a dividend to creditors, the Accountant of Court is empowered to supervise the distribution of the funds by the trustee."

Sections 83 to 91

Alteration of place of examination of bankrupt

The Institute of Chartered Accountants point out that in section 83 the place of examination of the bankrupt is stated as the Sheriff Court House while Schedule F to the Act contemplates that the meeting be elsewhere. We agree that the position should be clarified and recommend that section 83 should be amended to provide for the examination of the bankrupt to take place in the Sheriff Court House or other convenient place . The Law Society consider that where a formal examination before the Sheriff is to take place, which may be competent under either the voluntary or creditors' bankruptcy process, such examination should always take place in open court. We consider, however, that in the case of a voluntary bankruptcy, the examination of the bankrupt

need not necessarily take place before the Sheriff in the Sheriff Court House but that a public examination of the bankrupt might be conducted by the trustee in his office. The date and place of the bankrupt's examination would, of course, require to be advertised by the trustee in the usual way. In the case of a voluntary bankruptcy, the diet of examination would take place not less than 7 days from the date on which it was advertised in the Gazette but, where the trustee requires to obtain a warrant from the Sheriff to compel the bankrupt or others to attend for examination, the date of the examination would be not less than 14 nor more than 28 days from the date of the necessary petition to the Sheriff. The period of 14 to 28 days would also apply in the case of the creditors' bankruptcy procedure.

Sections 88 and 91 — Record of examination to be kept in sederunt book

The Accountant of Court considers, and we agree, that the record of the examination of the bankrupt should be entered by the trustee in the sederunt book and a copy thereof lodged in process and that a copy of the oath should also be lodged in process.

Section 92 — Notice of second meeting of creditors should be published in newspaper in the district

The Law Society consider that the statutory second meeting of creditors and the preparation of a report by the trustee after the bankrupt's examination should be retained and that notice of the meeting should be published in a newspaper circulating in the appropriate district as well as in the Gazette. We agree that the second meeting should be so advertised and also favour the retention of the trustee's report and accordingly recommend that the necessary amendments as to advertisement should be made to section 92.

Sections 93 to 96 — Meetings of creditors to be held not necessarily within the Sheriffdom of the bankrupt

The Law Society are of the opinion that meetings of the creditors should be held in any place which the trustee considers to be reasonably convenient for the majority of those concerned and need not necessarily be held within the Sheriffdom in which the bankrupt resided or carried on business. We agree that the present provisions are unduly restrictive and support the Law Society's proposals for amendment.

Section 94 — Extension of time for adjournment of meetings of creditors to any day within the following 7 days

The Institute of Chartered Accountants consider that the adjournment of meetings of creditors to the following day is impracticable in many cases and suggest accordingly that the adjournment should be allowed to be to any day within the following 7 days. We agree with this proposal.

Section 96 — Increase amount from £20 to £50

Both the Institute of Chartered Accountants and the Law Society consider that the rule in section 96 that no creditor whose debt is under £20 is to be considered in number but his debt may be computed in value is in need of amendment as the amount is out of line with present day conditions. They therefore suggest, and we agree, that the £20 should be increased to £50.

Section 97 — Bankrupt should be permitted to retain basic necessities

The Institute of Chartered Accountants consider that section 97 should be amended to provide for the retention by the bankrupt and his family of certain basic necessities such as furniture and effects. We are of the opinion that the bankrupt should be permitted to retain such articles as are considered by the trustee and commissioners to be reasonable necessities

and recommend that section 97 should be amended to this effect.

Section 98 — Power of trustee to apply to court to fix amount to be paid by bankrupt from his earnings

The Institute of Chartered Accountants consider that there should be some specific requirement for the bankrupt making available a portion of his earnings for the benefit of his creditors. We would point out that in the case of Caldwell v Hamilton 1919 S.C. (H.L.) 100 it was held that the instalments of a bankrupt's salary as they accrued from time to time (and in so far as they exceeded what was required for the reasonable maintenance of the bankrupt) vested in the trustee, under section 98(1) of the 1913 Act, as acquirenda of the bankrupt and that it was competent for the Court to pronounce an order for payment to the trustee of instalments of salary receivable in the future, under reservation to the trustee and the bankrupt or other persons interested of the right to apply to the Court in the event of a change of circumstances. Since there is already statutory authority under section 98(1) of the 1913 Act for making a portion of the bankrupt's salary available to his creditors no alteration in the existing law is therefore required.

Section 104 — Right of arrester or poinder to a preference for expenses after obtaining decree

The Institute of Chartered Accountants consider that any arrester or poinder in the circumstances envisaged by section 104, that is before the date of the sequestration, should be entitled to a preference in respect of the expense incurred by him after obtaining decree. This view is in accordance with the decision in the case of N.V. Elementenfabriek "Utrecht" v Gellatly (1932) 24 Sh. Ct. Rep. 103 in which it was held that the preference allowed by section 104 extends to the expenses of ordering and procuring the extract decree and of executing diligence thereon but not to the expense of obtaining the

decree itself. The Institute suggest that the last 15 words of section 104 should be replaced by the words "expenses subsequent to obtaining decree". We agree that the decision in this case is a correct statement of the law on this matter but we consider that it would be of advantage in a new Bankruptcy Act to clarify the situation: we accordingly recommend that section 104 should be amended by deleting the last 15 words of the section and substituting therefor the words "expenses of ordering and procuring the extract decree and of executing diligence thereon but not for the expense of obtaining the decree itself".

Sections 108 to 116 — Sale of Heritable Property

(a) The existing law in relation to a sale of the bankrupt's heritage by his trustee in sequestration is contained in sections 108-116 of the 1913 Act.

(b) We consider that the procedure for the sale of the bankrupt's heritable property should be altered to bring it more into line with the procedure for the sale of heritable property belonging to a limited company which is in liquidation.

(c) In detail our proposals are as follows. (1) In the sale of heritable property the trustee should only be able to sell with the consent of the commissioners or, if there are no commissioners, of the Accountant of Court. This consent should be evidenced by a minute by the commissioners or a letter from the Accountant of Court and there should be no necessity for the commissioners or the Accountant to execute the disposition. (2) The right of sale of a heritable creditor whose security is preferable to the right of the trustee must remain, subject to the obligation to account to the trustee for any reversion. The provisions of section 109 of the 1913 Act as to the trustee

selling with the concurrence of a heritable creditor should continue subject to the necessity of the trustee getting the consent of the commissioners or of the Accountant of Court.

(d) The provisions relating to sale by public roup have given rise to some difference of opinion. The Law Society suggested to us that the heritable estate should, with the consent of the commissioners (if any), be exposed to public roup at an upset price to be fixed by the trustee and commissioners. If this figure were not reached the subjects should be re-exposed at the original upset price reduced by not more than 20 per cent. Further necessary re-exposures would take place with proportional reductions in upset price. This procedure has been criticised on the grounds of its complication and expense; an alternative suggestion is that the trustee should have power to sell without the necessity of any resolution by the creditors, the upset price being fixed by the trustee without the necessity of the consent of the commissioners. The heritable creditors should be unable to interfere so long as the upset price is sufficient to pay all sums due to them. This alternative suggestion has also been criticised on the grounds that too great an onus is placed upon the trustee in so far as he does not require to get the consent of the commissioners in fixing the upset price. A possible compromise would be for the trustee to fix the first upset price with the commissioners with the help where appropriate of a professional valuation and that thereafter there should be no necessity for him to consult the commissioners if the first roup failed to get a sale. We think there should be further consultation on which, if any, of these proposals would be acceptable.

(e) In connection with sale by private bargain, we propose that the trustee should have power to sell at his own hand in whole or in lots, but that the consent of the commissioners, or of the Accountant of Court where there were no commissioners, would be necessary. This consent should be evidenced by an appropriate minute or letter. There should be a duty on the trustee to advertise the property and to take all reasonable steps to ensure that the terms of the sale as regards price and other relevant considerations are the most satisfactory which can reasonably be negotiated. We do not consider that there should be a statutory requirement for the trustee to obtain an independent valuation. Such a valuation is not always necessary as in the case of many properties the value is reasonably well established and the test of it is advertisement and offers. In these cases a professional valuation is a needless expense. No such provision is made in relation to sales by a liquidator. If the property is of such a character that a valuation would be helpful, the duty to "take all reasonable steps" would include the instruction of a valuation. We consider that the duty of the trustee should not merely be to obtain the best price possible. In certain circumstances this would be unduly restrictive as it might well be in the interests of the trustee to accept a slightly lower but unconditional offer rather than a slightly higher but conditional offer.

(f) We consider that the trustee should be under a duty to make up a scheme of ranking and division of the claims of the heritable creditors on the price. We take the view, however, that there is no need to provide for reporting the scheme to the court or for the judgment of the court being a necessary warrant for payment of the price against the purchaser. The

purchaser will be bound in terms of the contract of sale to pay to the trustee and there will be no necessity for a court order.

(g) Section 113 of the 1913 Act makes provision for the court to grant interim warrant for payment of preferable claims out of the price but we consider that this procedure is unnecessary and accordingly recommend that the section should be repealed.

(h) The Law Society propose that the right of poinding of the ground preserved to a restricted extent by section 114 of the 1913 Act should be abolished. We consider that this is unsound. The effect of this section is to restrict in a question with the trustee a right otherwise preferable without limit based upon a preferential security. We cannot justify taking away completely a remedy competent under a preferential security lawfully created before bankruptcy and accordingly we consider that section 114 should remain.

(i) Similarly we consider that the landlord's hypothec expressly saved by section 115 of the 1913 Act should remain unaffected by any amending legislation.

(j) At present, in terms of section 116 of the 1913 Act, a creditor may only purchase estate belonging to the bankrupt when it is sold publicly; the trustee or commissioners or any solicitor employed by the trustee in connection with the sequestration or any partner of such solicitor are not in any circumstances entitled to purchase. It has been suggested to us that the partner of the solicitor employed in the sequestration should not be debarred from purchasing. We are unable to support this recommendation. We do not consider, however, that the right of a creditor to purchase the bankrupt's property should be restricted to purchase at a public sale;

in our view opening up the field of purchasers in this way would not be in any way detrimental to the interests of any of the parties concerned with the sequestration. We therefore recommend that the word "publicly" should be deleted from section 116.

Sections 119 to 133 — Procedure regulating the trustee's accounts, adjudication of claims, payment of dividends and remuneration of trustee

After giving careful consideration to the various representations made by the Accountant of Court, the Institute of Chartered Accountants and the Law Society we make the following recommendations:-

(a) To entitle a creditor to payment of a first dividend his claim must be lodged with the trustee within six months of the date of bankruptcy (being the date of the award or, in the case of a voluntary bankruptcy, the date of registration of the declaration of insolvency) provided that the trustee will be permitted to accept a valid claim thereafter and to rank it for dividend if it is in his hands at least one month prior to the date of payment of the dividend.

(b) The trustee's accounts should be made up for periods of six months commencing with the date of bankruptcy and shall be submitted to the commissioners within one month of the date to which they are made up.

(c) The trustee's accounts duly certified should be submitted to the Accountant of Court within one month of the date on which they are laid before the commissioners.

(d) The commissioners should audit the accounts of the trustee but the commissioners should also have the right to have each period's accounts professionally audited.

(e) We consider that it is undesirable to state in a new Bankruptcy Act the precise wording of the audit report but we recommend that it should be obligatory to have a report affixed and signed as relative to the accounts.

(f) At any time after the first six months from the date of bankruptcy the trustee shall have the right to pay a dividend, interim or final, subject to the approval of the commissioners, or if there are no commissioners, the approval of the Accountant of Court.

(g) Provision should be made for the trustee to circularise creditors informing them of their rankings and giving them fourteen days within which to object and appeal and also notifying them of the payment of a dividend.

(h) Notice of the date and amount of the dividend to be paid should be published in the Edinburgh Gazette and also in one newspaper circulating in the appropriate district within fourteen days of the decision to make the distribution.

(i) Payment of the dividend should be made at any time after one month from the date of such notice.

(j) Any objection to the trustee's adjudication should state the grounds of the objection and the ranking claimed by the creditor.

(k) In order to eliminate delay in the payment of a dividend the amounts of the dividends under dispute as claimed by the objecting creditor or creditors should be placed on deposit receipt and on determination of the appeal a supplementary dividend should be paid to the other creditors or the difference should be carried forward to a subsequent dividend distribution.

(l) At any time after the initial period of six months

from the date of bankruptcy and subject to the whole estate having been ingathered it should be competent for the trustee to prepare a final account and scheme of division and have it approved by the commissioners, whom failing by the creditors or the Accountant of Court.

(m) There should be no change in the amount of the penalty charge on the trustee or in the permitted duration for holding money. The amount which the trustee is presently allowed to retain in his hands should be increased from £50 to £250 and the penalty for retention in excess should be made discretionary rather than mandatory and the commissioners should be granted the right to modify or waive the penalty charge in the case of a genuine mistake.

(n) Throughout the section, wherever commissioners are mentioned provision should be made for the creditors to act if no commissioners are appointed.

(o) The trustee's remuneration should be fixed by the commissioners, whom failing by the creditors, with the right to the trustee to appeal to the Accountant of Court if he feels that such remuneration is inadequate.

(p) Where the trustee's remuneration is fixed by the commissioners the trustee should, within fourteen days thereafter, intimate the amount so fixed to the creditors and to the bankrupt, and any creditor or the bankrupt should have the right of appeal to the Sheriff, or in the case of a Court of Session bankruptcy, to the Lord Ordinary.

(q) If the trustee requires evidence regarding a claim lodged he should be entitled (as is presently permitted under section 123) to examine the bankrupt, any creditor or any other party, on oath.

(r) Prior to the declaration of a dividend the trustee would complete a list of the creditors entitled to dividend, specifying the amount of their debts and differentiating between ordinary, preferential and contingent debts.

Sections 121 and 122 — Remuneration of Trustee

We consider that the system of remuneration of the trustee provided in sections 121 and 122 should, in essence, be retained. We recommend, however, that it should be made clear that the commissioners, whom failing the creditors, whom failing the Accountant of Court, should, in fixing the trustee's remuneration, take into account all work done including, for example, work done in adjusting claims.

Sections 134 to 142 — Discharge of the Bankrupt on Composition

We have received representations from the Accountant of Court which show that discharge on composition has been granted on two occasions only during the past five years.

We are anxious that the sections should not be too detailed and unwieldy in view of the few occasions on which they are required; but in consequence of certain recommendations by the Accountant of Court and the Institute of Chartered Accountants we propose certain amendments and clarification of the procedure as follows:-

(a) An offer of composition should be open for acceptance if made at any time after the election of a trustee and the lodging of a state of affairs by the bankrupt.

(b) It should be open to the bankrupt, at or before the meeting of creditors called to consider the offer, to amend the offer provided that the amendment is, in the opinion of the trustee, beneficial to the creditors.

(c) The trustee with the approval of the commissioners (or if there are no commissioners of the Accountant of Court) should be empowered either (i) to reject the offer, if he considers it so inadequate as not to merit consideration, or (ii) to call a meeting of creditors, giving fourteen days' notice thereof in writing to known creditors and by advertisement in the Edinburgh Gazette and in a newspaper circulating in the appropriate district.

(d) In the event of the trustee rejecting the offer as above the bankrupt should have the right to appeal to the Sheriff within seven days.

(e) At the meeting of creditors convened to consider the composition offer the trustee would produce his estimate of the position of the bankrupt's estate showing the possible dividend to the ordinary creditors, the statement of affairs by the bankrupt, details of the composition offer and an estimate of the expenses to be met including provision for the trustee's remuneration and final costs of the bankruptcy proceedings based on the assumption that the offer will be accepted. Subject to the offer securing payment of preferential creditors and of such outlays, fees and expenses, the offer would be voted upon by the creditors other than preferential creditors who have lodged claims. If passed by a three-quarters majority in number and value the composition offer should be

accepted.

(f) The remuneration of the trustee should be fixed by the commissioners with a right of appeal by the trustee to the Accountant of Court but where there are no commissioners the trustee's remuneration should be fixed by the Accountant of Court.

(g) The trustee should administer the composition and obtain suitable letters of discharge from all the creditors and lodge the same with a report listing the creditors with the Accountant of Court.

(h) During the period in which the composition offer is open for acceptance and until the bankrupt's discharge the bankruptcy would continue but the trustee would restrict his actings to the preservation of the estate. Upon a composition offer being accepted the formal procedure would be:-

(1) When a composition offer had been approved at a meeting of creditors and the necessary undertakings and guarantees or security had been given or provided to the satisfaction of the trustee, the trustee would transmit to the Sheriff a report containing brief particulars of the composition offer and the resolution of the meeting and a statement that payment of the composition had been undertaken and/or guaranteed or secured to his satisfaction.

(2) Notice of the report would be published in a newspaper circulating in the district where the bankrupt carried on business or resided and in the Edinburgh Gazette.

(3) The Sheriff, after hearing any objections by the trustee or dissenting creditors, might refuse or defer the granting of a discharge or might pronounce a deliverance approving the composition offer, declaring

the sequestration at an end, discharging the bankrupt and revesting his property (so far as not used for payment of the composition and subject to any securities granted in respect of the composition) in the bankrupt (or his legal representatives).

(4) An abbreviate of the deliverance would be recorded in the Register of Inhibitions and Adjudications and in the Register of Bankruptcies within 7 days of extract, which would have the effect of discharging all incumbrances and diligences affecting the bankrupt's estate registered prior to and in respect of the sequestration.

(5) An extract of the deliverance would be sufficient evidence of the title of the bankrupt (or his legal representatives) to the property (so far as not used for the composition and subject to any securities granted in respect of the composition), and could be used for completing title to any heritable and moveable property comprised therein.

(6) If the suggestions in the above paragraphs are adopted it would also be necessary to provide for the case where instalments of composition payments had not been met or where for some reason the composition could not proceed without undue delay, or where it was subsequently discovered that there had been fraud on the part of the bankrupt (e.g., non-disclosure of assets). The remedy would be to entitle the trustee to apply to the court for annulment of the composition scheme and renewal of the bankruptcy. That would necessarily be without prejudice to the validity of any transactions duly made in pursuance of the scheme.

The provisions of sections 140 and 141 should be re-enacted, subject to the period of two years mentioned in section 141 being amended to one year.

Sections 143 to 149 — Discharge without Composition

See Part III paragraphs 94-100.

Section 147 — Discharge of Crown Debts

This section is much wider than the equivalent section 28 of the 1914 (English) Bankruptcy Act, which exempts from the effect of discharge, debts on recognisance and debts due to the Crown or other person for offences against revenue statutes, etc., unless with the consent of the Treasury. By section 151 of the 1914 Act the Crown, "save as provided in this Act" is bound by the effect of a discharge. In view of section 26 of the Crown Proceedings Act 1947, whereby the Crown's rights of execution are equated with those of a subject and which, according to Williams on Bankruptcy (18th Edition p. 557) "would seem to have destroyed what remains of the Crown prerogative" in this connection, we recommend that section 147 of the 1913 Act should be amended so that the Crown is bound by the effect of a discharge in Scotland, except possibly in relation to debts arising out of the operation of the criminal law. This is in line with the recommendations of both the Law Society and the Institute of Chartered Accountants.

Section 152 — Sederunt Book to be lodged with Accountant of Court for examination and if in order Accountant will issue an entitlement to trustee to apply for discharge

The Accountant of Court points out that neither section 152 nor section 153 refers to the need for the Accountant to examine the Sederunt Book but that it is nevertheless a pre-requisite to obtaining a discharge. We agree with the Accountant that section 152 should give statutory authority to the already established practice and accordingly recommend that the proposed amendment should be made to section 152 by adding a clause between the word "trustee" and the words "and he may" occurring on the tenth line of the section to the effect

that the Sederunt Book shall then be lodged by the trustee with the Accountant for examination and that if it is found to be in order the Accountant shall issue an acknowledgment and entitlement to the trustee to apply for his discharge.

Section 153 Proposals for lodgment in bank of unclaimed funds

The Accountant of Court proposes that section 153(1) should be amended to read as follows:-

> "Every trustee in any sequestration shall before his discharge, lodge in a bank in Scotland in name of the Accountant of Court any unclaimed dividends and any unapplied balances and shall transmit the deposit receipts therefor to the Accountant; and a Register of such consigned funds shall be kept in the office of the Accountant, and inter alia shall show the amount held for each creditor and the name of the Bank; and the Register shall contain an alphabetical index of the names of the creditors and of the sequestrations and shall be open to inspection by all persons".

We consider that the Accountant's proposals in relation to sections 152 and 153 have the effect of tidying up the order of these sections and recommend that these changes should be made in a new Bankruptcy Act.

Section 154 Law Accounts to be taxed

This section provides that the solicitor's accounts incurred by the trustee shall be taxed either by the auditor of the Court of Session or by the Auditor of the Sheriff Court as the creditors direct. The Accountant of Court suggests, and we agree, that to eliminate this requirement where the amounts involved are small*, such accounts should be submitted to the

*We had in mind that this should apply to amounts not exceeding £250.

Accountant who should be given power either to authorise them to be paid or to require taxation thereof in accordance with the section.

Section 155 — Where surplus emerges interest to be paid on debts by bankrupt

We have given careful consideration to this question and recommend that, since a creditor has been precluded by sequestration from obtaining a decree which would have entitled him to obtain interest thereon, where a surplus emerges the creditors should each be entitled to receive simple interest on their debts at 5% per annum, the interest being payable from the date of sequestration (that is, the date of the first deliverance,) until the date of payment. We also consider that a secured creditor should receive interest either at the contract rate or at 5% whichever is the higher and recommend that section 155 should be amended accordingly.

Section 155 — Right of bankrupt to surplus

The Report of the Blagden Committee on Bankruptcy Law Amendment recommended that, where a dividend of 100p per £1 has been paid, plus interest to creditors entitled to it, the surplus should re-vest in the bankrupt without the need for any conveyance, assignment or transfer. The obvious difficulty, envisaged by the Blagden Committee, is that sequestration operates to vest the bankrupt's estate in his trustee so that some form of conveyance or transfer would normally be necessary to re-vest it in the bankrupt.

In Scotland the problem of re-vesting the bankrupt's estate in the bankrupt or his successors has been solved by the Court of Session pronouncing a decree of declarator in the exercise of its nobile officium, since the 1913 Act made no provision for the situation (see the case of Gray's Executrices - Petitioners 1928 S.L.T. 558).

We have come to the conclusion that provision should be made

by statute for re-vesting the surplus estate in the bankrupt or his representatives. We therefore recommend that the new Bankruptcy Act should include a provision on the following lines:-

(1) After payment in full of all creditors whose claims have been admitted, with interest either at 5% per annum or at the contractual rate, and of the expenses of and incidental to the sequestration, the bankrupt or his legal representatives shall be entitled to any surplus remaining, and such surplus, whether consisting of heritable or moveable property, shall belong to and re-vest in the bankrupt or his legal representatives without any conveyance, assignation or transfer whatsoever; and

(2) Within three months after the date gazetted for payment of the debts in full, with interest, the trustee shall lodge in court a certificate setting out the amount of the debts claimed and admitted and an inventory of the assets remaining and the estimated values thereof and stating the date gazetted for payment of the debts in full with interest. On receipt of such a certificate the court shall pronounce a deliverance declaring the sequestration at an end and re-vesting the remaining assets in the bankrupt or his legal representatives. Within 7 days an abbreviate of the deliverance shall be registered in the Register of Inhibitions and Adjudications and in the Register of Bankruptcies and will have the effect of discharging all incumbrances and diligences affecting the bankrupt's estate registered prior to and in respect of the sequestration. An extract of the deliverance shall be sufficient evidence of the title of the bankrupt or his legal representatives to the remaining assets

and may be used for completing title to any heritable and moveable property comprised in the remaining assets.

Section 156 Accountant to keep register of sequestrations

The Institute of Chartered Accountants consider that the provisions of section 156 do not make it clear that the register of sequestrations which is kept by the Accountant of Court is available to members of the public. The Institute accordingly suggest that an amendment should be incorporated in section 156 clarifying that the register of sequestrations is available to all members of the public during normal business hours and providing for the payment of a fee for inspecting it. We agree with the Institute that it would be advantageous to clarify the wording of the section and recommend that an amendment should be made on the lines proposed by the Institute. Section 156 also provides that the sheriff-clerk shall, "every six months", transmit to the Accountant of Court the particulars necessary to enable him to make entries in the register of sequestrations. We recommend that the words "every six months" contained in section 156 should be deleted and the word "forthwith" substituted therefor.

Section 157 Trustee to make an annual return to the sheriff-clerk and the sheriff-clerk to the Accountant

Both the Institute of Chartered Accountants and the Accountant of Court are of the opinion that section 157 is no longer operative and should therefore be deleted. We agree that since the provisions of section 157 are no longer operative the section will obviously not be required in a new Bankruptcy Act and therefore recommend that it should be repealed.

Section 159 The Accountant of Court to superintend annual returns

The Institute of Chartered Accountants consider that section

159 is also no longer operative and will not be required in future bankruptcy legislation. The Accountant of Court advises us that in practice the annual report as described in section 159 has been suspended and in his view this may continue. The Accountant accordingly suggests that the first part of section 159 should be deleted, the section commencing with the words "The Accountant shall have power" ... and terminating with the words "winding up of the estate". The last sentence in the section should, in the Accountant's view, be deleted. We agree with the Accountant's suggestions regarding section 159 and recommend that they should be given effect to in a new Bankruptcy Act.

Section 163 — Judicial factor on estates of persons deceased - relevant date for ranking of claims

The Department of Health and Social Security draw our attention to section 163 which deals with the administration of the estates of deceased persons where the appointment of a judicial factor becomes necessary. In such cases the rules as to ranking are those obtaining in sequestrations, with this difference, that under Rule 201 of the 1965 Rules of Court the date of the judicial factor's appointment is to be the date equivalent to the date of sequestration. In other cases of sequestration of the estates of a deceased debtor section 118(4) of the Act provides that the relevant date for the purpose of preferential payments shall be the date of his death. In view of the time that can elapse after the date of death before the appointment of a judicial factor we recommend that the proposed new legislation should provide that in all such cases the preferential period should be calculated by reference to the date of death.

Sections 163 and 164 — Judicial factors on estates of persons deceased

Sections 163 and 164 provide for the appointment of a judicial

factor at the instance of any creditor or party having an interest in the estate and the Law Society point out that, while it will be competent to deal with the estate of a party deceased under the new creditors' bankruptcy procedure which we propose, these sections might well be retained to deal with the various cases which arise where the question of possible insolvency of the deceased's estate is in doubt. The Law Society add that, as recommended by the Grant Committee (Cmnd. 3248 paras. 161-165), there should be no £500 limit of jurisdiction in the Sheriff Court. We consider that the procedure for the appointment of a judicial factor is most useful to deal with those cases where there is considerable doubt as to whether a deceased person's estate is solvent or not and we therefore recommend that sections 163 and 164 should be retained. We also recommend the abolition of the £500 limit of jurisdiction in the Sheriff Court.

Section 166 — Review of Sheriff's judgments

We recommend that there should be an appeal either to the Sheriff Principal or to the Court of Session against any decision of the Sheriff relating to ranking or preference. The decision of the Sheriff, however, on any appeal against any decision of the trustee, commissioners or meeting of creditors on any matter other than one relating to ranking or preference, being administrative rather than legal in character, should, we consider, be final and not subject to review on any ground whatsoever.

Sections 174 to 177 — Abolition of Summary sequestration procedure

In Part III hereof (paras. 57 to 60) we recommend the abolition of the summary sequestration procedure. Sections 174 to 177 which relate to summary sequestrations should therefore be repealed.

Sections 178 to 182 — Criminal prosecutions

We consider that sections 178 to 182 are, by modern standards, very unhappily drafted. For example, the fasciculus is headed "Punishment of fraudulent debtors"; whereas the sections also deal with fraudulent creditors and fraudulent bankrupts. Again, the opportunity should be taken to delete the references to imprisonment with hard labour. Many of the acts which are described as offences in section 178 appear to be acts of neglect or maladministration, yet are punishable by imprisonment without the option of a fine unless the accused proves to the satisfaction of the Court that he had no intent to defraud. We do not minimise the necessity for severely punishing fraudulent conduct in the field of bankruptcy, where very strict standards ought to be maintained, but we do not consider that the provisions to which we have drawn attention ought to find a place in a modern criminal code. We do not consider that such a Working Party as this is well qualified to recommend detailed changes in the criminal law: we recommend that the penal provisions be carefully reconsidered when any necessary legislation is being drafted.

By section 180 a duty is laid upon a trustee who suspects the commission of an offence to make a report to the Lord Advocate. This may be an elaborate and time-consuming piece of work, yet no provision is made for his remuneration. There is no reason why the creditors should pay for it, or why the trustee should do it gratuitously. We are also given to understand, though this may be outside our terms of reference, that such reports are apt to receive a chilly welcome, since our criminal investigation resources do not include a Fraud Squad, as in England. We think these points might be considered by the Crown Office.

Section 178 — Time limit for proceedings to be extended

The Crown Office point out that the 1913 Act makes no provision

for an extension of the six months' time limit for the commencement of proceedings allowed by section 23 of the Summary Jurisdiction (Scotland) Act 1954. The Crown Office state that offences under section 178 of the 1913 Act are usually reported by the trustee under section 180 thereof, and that more often than not the report comes too late to start proceedings within six months. In the circumstances, if the case is not worth an Indictment, no proceedings can follow. The Law Society are concerned with the increasing prevalence of cases where bankrupts have obtained credit fraudulently and are of the opinion that the penal sections of the Act should be more strictly enforced. We therefore recommend that a new Bankruptcy Act should include a provision extending the six months' time limit for the commencement of proceedings to one year.

Section 182 — Increase £10 to £50 in respect of credit obtained by undischarged bankrupt

Both the Law Society and the Institute of Chartered Accountants consider that the figure of £10 or upwards in respect of which it is an offence for an undischarged bankrupt to obtain credit without disclosing his financial situation, is unrealistic under present day conditions and suggest that the figure of £10 should be increased to £50. We agree with this proposal and recommend that section 182 should be amended so as to make it an offence for an undischarged bankrupt to obtain credit in excess of a total of £50 from any one or more sources without disclosing that he is an undischarged bankrupt.

The Crown Office point out that while section 182 makes it an offence for an undischarged bankrupt to obtain credit to the extent of £10 or upwards without disclosing that he is an undischarged bankrupt it was held in the case of Kaye v H.M. Advocate 1957 J.C. 55 that this only applies to a Scottish bankrupt. Thus a Carlisle bankrupt can cross the border

and obtain credit in Dumfries without committing any offence if he fails to disclose his bankrupt state. It seems very doubtful whether this was the intention of Parliament. We accordingly recommend the inclusion of a provision in the new legislation to the effect that an offence is committed if the undischarged bankrupt obtains such credit in Scotland whether the bankruptcy is Scottish, English or Northern Irish.

Section 183 — Frauds and disabilities

The Law Society draw attention to the fact that section 183 of the 1913 Act incorporates with modifications section 32 of the Bankruptcy Act 1883 and includes many disqualifications no longer applicable, such as exercising the office of guardian or overseer of the poor or membership of a "select vestry". We accordingly recommend that section 183 should be brought up to date by making the disqualifications to which an undischarged bankrupt is subject appropriate to present day conditions. The details of the various amendments we would leave to the Parliamentary draftsman.

Section 185 — Not required if our proposed Voluntary Declaration of Insolvency procedure is adopted

The Law Society suggest, and we agree, that if our proposals for the replacement of the trust deed for creditors system by a new voluntary bankruptcy procedure are accepted the provisions of section 185 will no longer be required and should therefore be deleted.

PART V PROPOSALS RELATED TO LIQUIDATION, UNDER REFERENCE TO THE RELEVANT SECTIONS OF THE COMPANIES ACT 1948

Comparatively few criticisms of liquidation procedures were received and these related to matters of detail rather than considerations of general principle. We do not consider that the law relating to the liquidation of incorporated companies, whether by way of members' or creditors' voluntary winding-up or winding-up by or under the supervision of the court, is in need of any comprehensive review or fundamental alteration. There are, however, a number of matters of detail which appear to require amendment. We therefore restrict our proposals on the law relating to liquidation to suggestions for remedying particular defects in procedure which we have found in the course of our examination or which have been brought to our attention. Wherever possible we have dealt with the various matters under reference to the relevant sections of the Companies Act 1948.

Section 217 Provision as to Married Women

We consider that this section regarding the liability to unpaid calls of married women whose marriage was prior to 1881-82 could well be repealed either when the 1948 Act is amended or by the Statute Law Revision procedure.

Section 220 Jurisdiction of the Sheriff Court to wind up Companies

In order to give effect to the change in the value of money, we recommend that a winding-up should be competent in the Sheriff Court where the nominal capital does not exceed £50,000.

Section 223 Demand for Payment of Sum Due

We agree with a suggestion by the Law Society that the demand for payment in terms of this section should state explicitly that winding-up may follow failure to comply with the demand, and that the demand is made in terms of the section.

Section 229(2) Commencement of Winding-up by the Court

The Registrar of Companies has pointed out that when a petition for the winding-up of a company is presented to the court no immediate intimation of this fact appears on the file of the Registrar of Companies, nor is there any provision for advising the company, although if the petition is successful the winding-up is deemed to commence on that date. This could result in prejudice to a creditor, or in the commission of an offence by the company acting in ignorance of the true position. It has been suggested that it is necessary to make provision, in the interests of the public, for some disclosure of the presentation of the petition to appear immediately on the Registrar's file and for the company to be advised forthwith. We agree with this proposal and recommend that section 229(2) should be amended to this effect.

Sections 238 and 245 Powers of Provisional Liquidators

Our attention was drawn to the uncertainty of the present position regarding the powers of provisional liquidators. It appears that at present a provisional liquidator would require to apply to the court for powers under section 245(2) of the Companies Act 1948 (the section dealing with powers of a liquidator not requiring sanction) as well as under section 245(1) which deals with powers requiring sanction. This means in particular that a provisional liquidator wishing to exercise the power under section 245(2)(e) "to raise on the security of the assets of the company any money requisite" would require to apply to the court for the necessary authority. The wording of subsections 238(1) and 238(4) of the 1948 Act appears to indicate that the powers of a provisional liquidator are simply those of a liquidator subject to any limitations or restrictions imposed by the court in the order appointing him but in the case of Levy v Napier 1962 S.C. 468 the provisional

liquidator was authorised by the Lord Ordinary to exercise the powers contained in section 245(1)(b) and in the Inner House powers under section 245(1)(a) and (c) were substituted. There is, so far as we are aware, no direct authority for the exercise by a provisional liquidator of powers under section 245(2). The position therefore is that, while it may be that a provisional liquidator has the same powers as a liquidator subject to any limitations or restrictions imposed on him, there is no direct authority for this proposition.

Difficulties may arise in practice, for example, where a provisional liquidator wishes to borrow money from a bank to pay wages. If, in the present state of the law, he considers that he has no authority to do so he may disclaim personal responsibility or liability for the loan. In this situation if the bank does advance the money required for wages to the liquidator it has no security for its loan, yet the acceptance of this risk by the bank may well have the effect of increasing the dividend finally payable by the liquidator.

We therefore recommend that, for the removal of doubt, there be expressly conferred on a provisional liquidator all the powers of a liquidator except in so far as the court may limit or restrict his powers by the order appointing him.

Section 253 Committee of Inspection

Subsection (1) provides that a committee of inspection shall consist of creditors and contributories of the company, or persons holding powers of attorney from them, but there is no statutory limit to the number of members of the committee as in the case of a voluntary liquidation where the maximum is five (see section 295). Subsection (7) states that on a vacancy occurring in the committee, the liquidator shall forthwith summon a meeting of creditors or contributories, for the purpose of appointing a new member of committee. If, however,

the liquidator is of the opinion that it is unnecessary for the vacancy to be filled, having regard to the position of the winding-up, he can apply to the court for an order to dispense with filling the vacancy. We recommend that this latter dispensation should be left to the remaining members of the committee of inspection provided, that at the time in question, their number is not less than three.

Section 235 Statement of Affairs to be required in winding-up by the Court

This section does not apply to Scotland. It appears that in a winding-up by the court in Scotland there is no statutory requirement for a statement of affairs to be submitted as provided for in England under section 235. We consider, however, that in Scotland also such a statement should be required, as in section 235, to be submitted to the official liquidator.

Section 278 Voluntary Winding-up

This section provides that a company may be wound up voluntarily when it passes a special resolution that the company be wound up voluntarily or, alternatively, if it passes an extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business and that it is advisable to wind up.

The notice to be given to the shareholders is determined by the Articles of Association of the Company. Section 293 requires that the company convene a meeting of its creditors to be held either on the same day or the day after the passing of either of the above resolutions. If, however, the company has a small number of shareholders it is relatively easy to obtain the approval of the shareholders to their dispensing with the requisite notice of the meeting of members. We recommend that if the shareholders dispense with the statutory notice the meetings of the members and creditors may be held on not less than 7 days' notice.

Section 283 Declaration of Solvency

The declaration of solvency is effective if made within the five weeks preceding the winding-up resolution. The period of five weeks is considered, however, to be too short since the time required for a special resolution plus the time for preparation and postage of notices convening the meeting may well take four weeks. We therefore recommend that the period be increased to three months. Moreover, the declaration must embody a statement of assets and liabilities as at "the latest practicable date". This might be twelve or more months prior to the declaration; accordingly we recommend that it be re-phrased "the latest practicable date but, in any event, not more than six months prior to the date of the declaration".

Section 287(1) Members' or Creditors' Voluntary Winding-up

The phrase in the second line of this section "altogether voluntarily" presumably means a members' or creditors' voluntary winding-up. The wording might, therefore, be improved and we recommend that the word "altogether" should be deleted from the section.

Section 287(6) Arbitration arrangements

We propose that the 1948 Act be amended so as to incorporate the relevant arbitration arrangements in order to avoid the inconvenience of referring to the Companies Clauses Acts of 1845.

Section 288 Proposals relating to Members' Voluntary Winding-up

Where it is found that a company, being wound up by way of a members' voluntary winding-up, will be unable to pay its debts in full the liquidator, under this section, is obliged, under penalty of a fine not exceeding £50, to call a meeting of creditors. We recommend that it should be provided in these circumstances that:-

(a) The creditors appoint a liquidator of their choice or confirm the appointment of the existing liquidator (similarly to the procedure in section 294); and

(b) The creditors appoint a committee of inspection (similarly to the procedure in section 295).

We consider that the penalty of £50 is inadequate and accordingly recommend that it should be increased to £250 for the reasons already stated.

Section 289 Duty of Liquidator to call annual General Meetings

This section requires the liquidator in a voluntary liquidation to summon annual meetings of shareholders and creditors. In the case of a winding-up by the court it is not necessary to convene meetings of shareholders. We recommend that the liquidator should be required to hold an annual meeting of shareholders unless the committee of inspection consider it unnecessary and that this requirement should apply to both court and voluntary liquidations.

Section 293(3) Attendance of Directors at Creditors' Meeting

The Law Society suggests that all directors of the company be required to attend at the meeting of creditors, it being thought that this might have a salutary effect in combating the lack of interest sometimes displayed by directors of insolvent companies. We recommend that directors should be required to attend at the first meeting and that section 293(3)(b) should be amended accordingly.

Section 293(4) Chairman at Creditors' Meeting

The Institute of Chartered Accountants draws attention to section 293(4) of the Companies Act whereby it is the duty of a director to preside at the meeting of creditors, i.e., the first meeting. The Institute suggests that there might be

advantages in having a chairman who is not a director and that a director should preside only until a chairman has been elected by the creditors. We agree with the Institute's proposal and recommend that section 293(4) should be amended to this effect.

Section 299(1) Duty of Liquidator to call meetings of company and creditors at end of each year

We understand that the interpretation of this subsection has given rise to some difficulty. We recommend that, to avoid the possibility of misinterpretation, the words "to be held" should be inserted after the word "creditors" and before the word "at" occurring in the third line of this subsection which would then read as follows:-

> "In the event of the winding-up continuing for more than one year, the liquidator shall summon a general meeting of the company and a meeting of the creditors to be held at the end of the first year from the commencement of the winding-up, and of each succeeding year, or at the first convenient date within three months from the end of the year or such longer period as the Board of Trade may allow, and shall lay before the meetings an account of his acts and dealings and of the conduct of the winding-up during the preceding year".

Sections 289(2) 299(2) and 300(6) Fines on Liquidator for non-compliance

In view of the change in the value of money, the fines for non-compliance should, we consider, be increased from £10, £10 and £50 to £50, £50 and £250 respectively.

Sections 290 300 and 342 Proposed style of Liquidator's Accounts

The style of the return of the liquidator's transactions is unsatisfactory under these sections. We recommend that one

style should suffice both for the interim and the final accounts and that it be re-designed in the style of Appendix C annexed hereto.

Section 309 Costs of Voluntary Winding-up

We accept the suggestion of the Institute of Chartered Accountants and of the Law Society that the costs of winding-up, which are given priority to other claims, should include the "necessary costs" of convening the preliminary meetings of shareholders and creditors including preparation of the statement of affairs. We also propose that all such preliminary expenses should be approved by the committee of inspection.

Section 323 Disclaimer of Onerous Property

See the proposals which we make with regard to disclaimer by a trustee or liquidator in Part III para. 105.

Section 327(1)(b) The effect of the existence of an inhibition on the sale of heritable property by a liquidator

When an owner of heritable property becomes bankrupt his trustee in bankruptcy may sell notwithstanding the existence of inhibitions against the bankrupt provided that he gives effect to the inhibitions in the ranking (see Bankruptcy (Scotland) Act 1913 sections 97(2) and 100). It has been pointed out to us, however, that in the case of a limited company in liquidation the Companies Act 1948 does not contain any express provision to the same effect (see section 327(1)(b) of the 1948 Act). We do not consider, however, that the difference in terminology between the latter part of section 327(1)(b) of the 1948 Act and the latter part of section 103 of the 1913 Act is material. The effect of both sections is to give power to the trustee expressly and to the liquidator impliedly to realise the estate, in the one case vested in him and in the other under his control, for the benefit of the creditors according to their rights, with the exception of

heritable estate over which creditors hold real rights. Since an inhibition does not confer an active real right on the inhibitor the liquidator's power under section 327(1)(b) to deal with heritable property is not limited by the existence of an inhibition.

We are of the opinion therefore that there is no real difference in the two situations and that the liquidator may in fact sell heritable property belonging to the company which is being wound up notwithstanding the existence of the inhibitions so long as he gives effect to the inhibitions in the ranking.

We understand that there is at present some doubt among legal practitioners as to whether or not a liquidator has to clear the record of inhibitions before he is able to sell heritable property subject thereto. In these circumstances we believe that there is advantage in putting the matter beyond doubt. We accordingly recommend the introduction of a provision into liquidation procedure making it clear that an inhibitor is in the same position in a liquidation as in a sequestration.

Section 327(1)(c) The ambiguity created by the application by section 327(1)(c) of the 1948 Act of section 111 of the Bankruptcy (Scotland) Act 1913

It was pointed out by the Bankruptcy Committee of the Institute of Chartered Accountants that the application in section 327(1)(c) of the 1948 Act of section 111 of the 1913 Act was illogical. The Accountant of Court draws attention to the same matter. Section 111 authorises the trustee to sell the heritable property of the bankrupt by private bargain with the concurrence of a majority of creditors in number and value, the heritable creditors and the Accountant of Court. Section 327(1)(c), which applies to every mode of winding-up,

provides that inter alia section 111 shall, "so far as is consistent with this Act", apply to the realisation of heritable estate of a company in liquidation affected by heritable rights and securities valid against the liquidator. The application of section 111 is confined to the case of heritable property which is affected by such heritable rights and securities and does not affect the sales of any other heritable property of the company. The difficulties of construing this provision of the Companies Act have already been discussed judicially (Liqdr. of Style & Mantle Ltd v Prices Tailors Ltd 1934 S.C. 548 - referring to the comparable section 270(1)(c) of the Companies Act 1929). Plainly, the ambiguity should be removed.

We therefore recommend that, in accordance with the decision in that case, it should be made clear in amending legislation that, notwithstanding the provisions of section 327(1)(c) of the 1948 Act which applies to every mode of winding-up the provisions of inter alia section 111 of the 1913 Act, a liquidator is authorised (under either section 245(2)(a) or section 303(1)(b) of the 1948 Act) to sell the heritable estate of a company in liquidation and authorise a title to be granted, without obtaining the consent of the committee of inspection or of the ordinary creditors or of the Accountant of Court. We consider that it should be clearly provided that the liquidator is not obliged under any circumstances to obtain the consent of the ordinary creditors to the sale and that he has an unqualified and unconditional power of sale of the heritable property of the company by public auction or private contract, subject, of course, to such preferable heritable rights and securities (if any) as existed at the date of commencement of the winding-up and are valid and unchallengeable (see section 327(1)(b) of the 1948 Act).

Section 332 Responsibility for Fraudulent Trading of Persons Concerned

The Law Society suggested that an additional offence might be created where directors of a company with limited capital and resources can be shown to have traded in a reckless fashion and with complete disregard to the company's ability to satisfy its creditors. We consider, however, that the difficulties of identifying this offence are so great that we are unable to recommend the proposal.

Miscellaneous Matters

Registration of Liquidations

The Accountant of Court has stated that although the Companies Registration Office deals with the registration of companies, there is no supervisory office for liquidations in Scotland and as a result many enquiries regarding procedure are often made at the Accountant's office by liquidators or agents. Accordingly he suggests the provision of a supervisory office for liquidations.

We consider that the procedures are such that a liquidator seldom requires advice other than that of his solicitor; we are of the opinion that the requirements of registration, making returns, etc. by a liquidator to such an office would create in the realm of liquidation the procedural complexities which we are seeking to minimise in relation to the bankruptcy of individuals. For these reasons we are unable to support the Accountant of Court's proposal.

Limitation of Votes of Associated Companies

The Institute of Chartered Accountants draws attention to certain cases where the liquidator is elected largely on the vote of associated companies, directors, past directors and controlling shareholders (who presumably are also creditors) contrary to the wishes of the other creditors and suggests that the claims of such associated companies, etc. be limited

in voting for the liquidator's appointment. This suggestion is in conflict with our views as to the rights and privileges of creditors in general and we are therefore unable to recommend its acceptance.

Press Notices regarding Companies in Liquidation

It was pointed out to us that public notices published in the press relating to limited companies in liquidation frequently omit to give the address of the company. We consider that this omission may lead to confusion and that the better practice is to give the company's address thus making it more readily identifiable. We therefore recommend that such public notices should contain the address of the company concerned, the address shown in the press notice being any principal place of business of the company.

Power to Remedy Defects in Procedure

We agree with the recommendation of the Faculty of Advocates, namely, that in liquidation procedure the Court of Session, or in the case of a Sheriff Court liquidation the Sheriff, should be empowered to authorise acts to be done out of time, and that in the case of the Court of Session applications should be made, not to the nobile officium, but in the Outer House.

Reputed Ownership

It was suggested by the Faculty of Advocates that the English rule that in bankruptcy (but not in liquidations) the property of the bankrupt divisible among his creditors should comprise "all goods ... in the possession ... of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof" (see Bankruptcy Act 1914 section 38) should be adopted for Scottish liquidations. We understand that the increase of hire-purchase "has considerably reduced the scope

of the reputed ownership clause", (Williams on Bankruptcy 18th Edn p. 337, and see the Hire Purchase Act 1965 section 53(2)). This may well be a good reason for not extending the rule to Scottish bankruptcies. We also observe that the Blagden Committee on Bankruptcy Law Amendment in its Report recommend (at paragraph 110) that the reputed ownership clause embodied in section 38 of the Bankruptcy Act 1914 should be repealed on the ground that, since no creditor nowadays assumes that goods in the possession of the debtor are the debtor's own property, the reputed ownership clause serves no useful purpose. The recommendation that the reputed ownership clause should be repealed is also endorsed by the Crowther Committee on Consumer Credit (see paragraph 5.7.82 of its Report[1]). It is said, however, that property in the possession and reputed ownership of a company in liquidation is not infrequently found to be in the true ownership of a closely related company, and that this can give rise to frauds upon creditors. We have given careful consideration to the Faculty's proposal that the English rule relating to reputed ownership should be adopted for Scottish liquidations, but have decided that, in the absence of specific evidence to support this suggestion, we are unable to make any recommendation on the matter.

Sections in the Companies Acts 1947 and 1948 which refer to the Bankruptcy (Scotland) Act 1913

In the course of our examination of liquidation we have observed that certain sections of the Bankruptcy (Scotland) Act 1913 have been incorporated by reference into the procedure for the winding-up of companies registered in Scotland by the Companies

[1] 1971 Cmnd. 4596

Acts 1947 and 1948 respectively. Unfortunately, as judicially noted in the case of Style and Mantle Ltd v Prices Tailors Ltd 1934 S.L.T. 504, to which we have already referred, the powers and provisions of the 1913 Act which have been imported into liquidation procedure, although appropriate in relation to bankruptcy proceedings in which the bankrupt is immediately divested of his own property which thereupon vests in the trustee for behoof of his creditors, are not always appropriate in a liquidation where the company in liquidation is not divested but remains the owner of its property, the liquidator having merely a power of control and administration over it. The most obvious example of this is the ambiguity created by the application by section 327(1)(c) of the 1948 Act of section 111 of the 1913 Act. We have made proposals for amending this difficulty at page 118 above.

There are also a number of other cases where we consider that the provisions of the 1913 Act should be re-stated clearly and in full as amended by the Companies Acts 1947 and 1948 respectively. Examples of this are subsections (1) and (3) of section 115 of the Companies Act 1947. In the case of the Companies Act 1948 we recommend that the same procedure should be carried out in relation to sections 318, 327(1)(c) and 344 of that Act. We propose that the language of section 320 of the 1948 Act should be modernised by substituting the words "an illegal preference" for the words "a fraudulent preference" wherever they occur in that section.

As section 318 of the 1948 Act imports into liquidation procedure by reference the provisions of sections 45 to 62 and of sections 96 and 105 of the 1913 Act and section 327(1)(c) of the 1948 Act similarly incorporates the provisions of sections 108 to 113 and of section 116 of the 1913 Act, consequential amendments will in any case be required to

the 1948 Act in the event of our proposals relating to bankrupcy receiving effect in the form of a new Bankruptcy Act.

Whether additional responsibility should be placed upon directors of limited liability companies in the event of their companies going into liquidation

The Confederation of British Industry (Scottish Council) have suggested to us that more responsibility should be placed upon directors of companies going into liquidation, in terms of liability and of guarantee to ordinary creditors and have proposed that such directors should be held responsible for all liabilities exceeding the issued share capital of the company. We have given careful consideration to this proposal and consider that some possible solutions to the difficulty would have the unfortunate effect of unduly restricting legitimate business enterprise. One possibility is that heavier penalties could be provided for offences under the Companies Acts. Alternatively, the Companies Acts could be amended to provide that a company's nominal capital must be not less than, say, £1,000 of which at least one half must be issued. On the whole matter, however, we have come to the conclusion that, while a problem undoubtedly exists, the solution to it is not one which lies within our terms of reference and that accordingly in these circumstances we can do no more than draw attention to the situation.

Rules of Court

The Faculty of Advocates suggest that the absence in Scotland of a detailed set of winding-up rules, such as exists in England, is in some cases a disadvantage. We agree with the Faculty that the present Rules of Court relating to companies are unsatisfactory and accordingly recommend that new Rules should be made which are at the same time more detailed and more clearly expressed.

PART VI SUMMARY OF RECOMMENDATIONS

	Paras
1. While the basic principles contained in the Bankruptcy (Scotland) Act 1913 have operated fairly and equitably, the detailed machinery of the bankruptcy procedures is in need of substantial amendment to simplify, improve and streamline it, and in carrying out these amendments the same principles should, so far as possible, be applied in both bankruptcy and liquidation.	13
2. The whole enactments relating to insolvency and bankruptcy should be re-stated in a single statute.	14
3. The new Bankruptcy Act should contain definitions of practical and absolute insolvency; and notour bankruptcy should now be known as public insolvency.	15 to 18
4. One of the ways in which notour bankruptcy (public insolvency) is constituted should be by the debtor calling a meeting of his creditors and submitting to them a statement of affairs showing practical or absolute insolvency.	19
5. Gratuitous alienations should no longer be reducible at common law but only under the new Bankruptcy Act which should lay down in detail the circumstances set out in paragraph 24 in which it is proposed that they may be reduced.	24

Paras

6. Fraudulent (illegal) preferences should no longer be reducible at common law, but only under the new Bankruptcy Act which should lay down in detail the circumstances set out in paragraph 27 in which it is proposed that they may be reduced. 27

7. A new central Register of Bankruptcies should be provided in which all sequestrations, whether voluntary or creditors', would be registered. 28

8. The post of official receiver should not be introduced into the bankruptcy law of Scotland in view of the administrative cost of setting up such a system. 33

9. A new system should be provided which would enable a trustee to be appointed in all bankruptcies even where the debtor's assets are insufficient to meet a private trustee's fees and disbursements. 35

10. Each sheriff-clerk should maintain a register of suitably qualified persons (accountants or solicitors) who are prepared to act as a trustee in bankruptcy when nominated either by the bankrupt or by the sheriff-clerk. 35

11. The existing method of voluntary trust deeds by private arrangement should be replaced by a system of voluntary bankruptcy initiated by the insolvent party. 38

Paras

12. In this new voluntary bankruptcy procedure, the bankrupt would voluntarily execute an attested document to be called the "declaration of insolvency". 39 to 44

13. In this procedure the trustee should be entitled to arrange for the bankrupt and others to attend on the trustee for examination without applying to the court for a warrant, but, in the event of the bankrupt or others failing to do so, the trustee should be able to obtain a warrant from the Sheriff to compel them to attend for examination. 43

14. The procedure in a creditors' bankruptcy (amended as after suggested) in relation to such matters as the meetings of creditors, payment of dividends and discharge of the bankrupt should mutatis mutandis apply also to the new voluntary declaration of insolvency procedure in order that the two procedures may be equiparated so far as possible. 45

15. A new "streamlined" creditors' bankruptcy procedure, as detailed in paragraphs 46 to 55, should be introduced which would simplify and improve the existing procedure. 46 to 55

16. That all petitions for bankruptcy should be competent both in the Court of Session and in the Sheriff Court irrespective of the amount of the estate. 54

Paras

17. That the requirement of a bond of caution should be retained in the case of the creditors' bankruptcy procedure only. 56

18. That the summary sequestration procedure should be abolished. 57 to 60

19. That the new Bankruptcy Act should provide that in the event of any failure, by error or neglect, to comply with any statutory provision, it should be competent for the trustee to apply to the Court of Session or to the Sheriff Court, as the case may be, for authority at the court's discretion to remedy the same. 61

20. The period in respect of which a local authority should be entitled to a preferential claim for rates should be one year before the date of commencement of sequestration or the date of death of a deceased debtor or the date of the concourse of diligence for distribution of the estate of a party being notour bankrupt, (the relevant date). 63

21. That the Inland Revenue should be entitled to a preferential claim for the income tax due in respect of the period of twelve months preceding the relevant date. 70

22. In the case of Long Term Capital Gains Tax, Surtax and Corporation Tax, the Inland Revenue's preferential claim should be in respect of the period of two years preceding the relevant date. 71 to 73

Paras

23. The Inland Revenue should be entitled to a preferential claim in respect of P.A.Y.E., due in respect of the period of twelve months preceding the relevant date. 74 to 75

24. The Department of Health and Social Security should be entitled to a preferential claim in respect of the National Insurance contributions due for the period of twelve months preceding the relevant date. 76

25. The Commissioners of Customs and Excise should be entitled to a preferential claim in respect of the arrears of Purchase Tax due for the period of one year preceding the relevant date. 77

26. On the bankruptcy of an individual or firm or liquidation of a company, the trustee or liquidator should be empowered, within the period of 3 months from his appointment, to appeal against the outstanding estimated tax assessments made by the Inspector of Taxes. 80

27. The rules as to preferential claims in bankruptcy should be assimilated to those obtaining in liquidation so that, in particular, in the case of the bankruptcy of an individual or firm, as well as in the liquidation of a company, monies advanced for the purpose of paying salaries and wages would enjoy the same privileges as do arrears. 84

Paras

28. The payment in lieu of the minimum period of notice to which an employee is entitled under the Contracts of Employment Act 1963 should only rank as a preferential debt provided that the statutory limit for a preferential claim for arrears of wages, or for the amount advanced for wages, has not been reached, and to the extent of the surplus so remaining. 87

29. The same preference should be accorded to claims for compensation under Part II of the National Service Act 1948 as to those under the Reinstatement in Civil Employment Act 1944, that is, a limit of two hundred pounds applicable in cases of company liquidation as well as bankruptcy. 88

30. The Department of Employment and Productivity should rank as an ordinary creditor only in respect of their claim to an insolvent employer's share of the payment made from the Redundancy Fund to a redundant employee of an insolvent employer under the Redundancy Payments Act 1965. 89

31. The amount of wages and salary in respect of which a preferential claim can be made should be £300 and over a period of not more than 3 months; since the financial limit may again become out of date, the Secretary of State should be given power to alter it, from time to time, by Statutory Instrument. 90 to 92

32. For the avoidance of doubt, the new Bankruptcy Act should include a provision that the twelve months' period for the ranking of preferential debts should be calculated from the date of commencement of sequestration, that is, the date of the first deliverance on any petition for sequestration or, in the case of a voluntary bankruptcy, from the date of registration of the declaration of insolvency in the register of bankruptcies. 93

33. A bankrupt who has not already obtained his discharge (without composition) should, without any requirement as to dividend or concurrence of creditors, be automatically discharged 3 years after the date on which the examination of the bankrupt has been concluded. 96

34. A bankrupt should also be entitled to make application for an earlier discharge (a) with concurrence of all creditors at any time, (b) with concurrence of majority in number and value of creditors and dividend of 50p per £1 at 12 months from conclusion of his examination, and (c) with concurrence of majority in number and value of creditors and dividend of 25p per £1 at 24 months from conclusion of his examination; in the case of applications by the bankrupt under conditions (b) and (c) above, the consent of the trustee and commissioners or, if there are no commissioners, of the Accountant of Court should also be required. 97

Paras

35. The scheme of the new legislation relating to discharge without composition should be as detailed in paragraph 98. 98

36. The trustee should notify the Accountant of Court of the date of conclusion of the bankrupt's examination for insertion in the Register of Bankruptcies, and in every case prepare and send to the Accountant for inclusion in the Register, a report on the bankrupt's conduct. 99

37. A provision should be included in the new Bankruptcy Act to enable a bankrupt who has done all that is required of him to apply to the Sheriff for his discharge in any case where either no trustee has been elected, or where, owing to the failure of the trustee to comply with the procedure laid down in the Bankruptcy (Scotland) Act 1913, the statutory machinery whereby the bankrupt can obtain his discharge has broken down, or where, for some other reason for which the bankrupt is not responsible, he is precluded from obtaining his discharge in the normal way and can only do so by presenting a petition to the Court of Session ex nobile officio. 100

38. Where the trustee in bankruptcy himself embarks upon a new contract he should incur personal liability for performance but should have a right of recourse against the bankrupt's estate. 102

Paras

39. The proposal to relieve a trustee in bankruptcy from the personal liability which presently exists in respect of a contract entered into by the bankrupt and continued by the trustee should not be implemented since the contracting party should not be obliged to risk the continuation of the contract by the trustee without some form of undertaking. 103

40. In the absence of public demand, a statutory provision such as that existing in England empowering a trustee in sequestration or a liquidator of an incorporated company to disclaim onerous property of the bankrupt or company should not be introduced into the law of Scotland. 105

Appendix A

Members of the Working Party on Insolvency, Bankruptcy and Liquidation

The Hon Lord Kilbrandon, L.L.D., Scottish Law Commission, (Chairman)

Professor J M Halliday, C.B.E., Scottish Law Commission, (Vice-Chairman).

Mr R A Bennett, Q.C., the Faculty of Advocates.

Mr W A Cook, C.B.E., Solicitor, Glasgow, the Law Society of Scotland.

Mr R D Gould, Sheriff-clerk, Edinburgh.

Mr R McWhirter, W.S., Bank of Scotland, Edinburgh, the Committee of Scottish Bank General Managers.

Mr C R Munro, Chartered Accountant, Edinburgh, the Scottish Chamber of Commerce.

Mr D G Slidders, Chartered Accountant, Dundee, the Institute of Chartered Accountants of Scotland.

Mr G Wallace, O.St.J., J.P., S.S.C., Chairman and Managing Director, Wallace Cameron & Co Ltd, Glasgow, the Confederation of British Industry.

Secretary: Mr J B S Lewis, Scottish Law Commission.

Appendix B

Organisations and Individuals from whom we received memoranda or letters or whose comments or suggestions were passed to us for consideration.

1. A C Bennett & Son.
2. Accountant of Court, Factory Department.
3. Board of Trade.
4. Chartered Institute of Secretaries.
5. Cleveland Petroleum Co Ltd.
6. Companies Registration Office.
7. Conferation of British Industry.
8. Crown Office.
9. Department of Employment and Productivity.
10. Department of Health and Social Security.
11. Faculty of Advocates.
12. Faculty of Law, University of Glasgow.
13. George Rae & Co Ltd.
14. Institute of Chartered Accountants of Scotland.
15. Lt Col A E H Campbell.
16. Law Society of Scotland.
17. Registrar of Companies.
18. Scottish Association of Manufacturers Agents.
19. Society of Solicitors of Hamilton.
20. Solicitor for Scotland, Inland Revenue.
21. The Committee of Scottish Bank General Managers.

Appendix C - Styles of Accounts

..... Registered Bankruptcy Number

INTERIM ACCOUNT OF TRUSTEE

Account of the Intromissions of .....Name
.....Address

Trustee in the Bankruptcy of .....Name
.....Address

For the period from (Date of Bankruptcy or end of previous account.)

to (End of 6 months period or end of bankruptcy transactions.)

INCOME	£. p.
(i) Cash balances at commencement	
(ii) Trading Income	
(iii) Realisations of estate	
(iv) Interest, rents etc. arising to trustee	
(v) Other income	
TOTAL	

EXPENDITURE	£. p.
(i) Trading outlays	
(ii) Sundry outlays	
(iii) Payments to secured creditors (p. per £1)	
(iv) Payments to Preferential creditors (p. per £1)	
(v) Payments to ordinary creditors (p. per £1)	
(vi) Trustee's Remuneration (fixed by)	
(vii) Other expenditure	
TOTAL	

STATE OF FUNDS	£. p.	
Total income		
Total expenditure		
Balance held by trustee		
represented by:-	£. p.	

Notes

(a) The trustee's account is to be laid before a meeting of commissioners (which failing, of creditors) within 1 month after the end of the period to which it relates and copy of the account is to be lodged with the Accountant of Court within 1 month of that meeting.
(b) Where appropriate use supporting schedules to be affixed hereto.
(c) Include in income (i), cash, bank balances and cash deposits.
(d) The trustee's report should indicate, inter alia, the estate not yet ingathered, the total claims received and the trustee's estimate of the period until conclusion of his intromissions.

FOR LIQUIDATIONS. The account should be similar with alterations:-

(1) Space for company registered number.

(2) "Liquidator" for "Trustee".

(3) "Liquidation" for "Bankruptcy".

(4) "Committee of creditors" for "commissioners".

(5) Lines in expenditure for payments to classes of shareholders.

(6) "Registrar" for "Accountant of Court".

REPORT BY TRUSTEE

(Signed).....Trustee

COMMISSIONERS' (OR CREDITORS') DOCQUET

The foregoing account was produced to a meeting of commissioners / creditors

held at .....

on .....

and the account was approved in terms of section ? (of new Bankruptcy Act.)

(Signed).....Chairman of Commissioners' (or Creditors') meeting.

FINAL ACCOUNT OF TRUSTEE

Account of the Intromissions of .....Name
.....Address
Trustee in the Bankruptcy of .....Name
.....Address

For the period from (Date of Bankruptcy.)
to (End of trustee's intromissions.)

Bankrupt's state of affairs: £. p.

Total of Estate per bankrupt's state of affairs
less -

	£. p.
Secured creditors " " " " "	
Preferential creditors " " " " "	
Ordinary creditors " " " " "	

Showing an estimated dividend (Subject to costs etc) of p. per £1

TRUSTEE'S TRANSACTIONS

	£. p.
Realisation of Assets	
Trading income less trading outlays	
Sundry income	
TOTAL	
Less Expenses of realisation:-	£. p.
Trustee's outlays	
Solicitor's fees	
Trustee's remuneration (fixed by)	
Less Payments to secured creditors	
Less Paid to preferential creditors at p. per £1 on claims admitted of £	
Net funds available for ordinary creditors	
Less Paid to ordinary creditors at p. per £1 on claims admitted of £	
Surplus (if any)	
Distributed:-	£. p.
Paid to deferred creditors	
Interest to creditors at % p.a.	
Balance paid to erstwhile bankrupt	

Notes

(a) Copy of the trustee's account is to be lodged with the Accountant of Court within 1 month of the final meeting of creditors.
(b) Where appropriate use supporting schedules to be affixed hereto.
(c) The trustee's report should give the principal reasons for divergence of dividend paid to ordinary creditors from that predicted by bankrupt.

FOR LIQUIDATIONS. The account should be similar with alterations:-

(1) Space for company registered number.

(2) "Liquidator" for "Trustee".

(3) "Liquidation" for "Bankruptcy".

(4) "Committee of creditors" for "commissioners".

(5) Lines in expenditure for payments to classes of shareholders in lieu of last 3 lines under "distributed".

(6) "Registrar" for "Accountant of Court".

REPORT BY TRUSTEE
as to realisation
of estate.

(Signed) .....Trustee

COMMISSIONERS' (OR CREDITORS') DOCQUET

The foregoing account was produced to a meeting of commissioners / creditors held at .....

on.....

and the account was approved in terms of section ? (of new Bankruptcy Act.)

(Signed) .....Chairman
of Commissioners'
(or Creditors')
meeting

Appendix D

NOTE ON DISCLAIMER OF ONEROUS PROPERTY BY TRUSTEE OR LIQUIDATOR PREPARED BY PROFESSOR J M HALLIDAY

1. This paper deals with the right of a trustee in sequestration or a liquidator of a company to disclaim onerous property of the bankrupt or of the company. The question is whether such a right, which exists in England, could with advantage be introduced in Scotland.

A. BANKRUPTCY

2. English Law. The right of a trustee in bankruptcy to disclaim onerous property of the bankrupt is regulated principally by the Bankruptcy Act 1914 s. 54, and the Companies Act 1947 ss. 99 and 115(5) (the provisions of s. 99 are repealed by s. 459 and Sch. 17 part II of the Companies Act 1948 but substantially re-enacted by ss. 324 and 356 of the 1948 Act except as applied to bankruptcy by s. 115(5) of the 1947 Act). A perusal of these sections shows that the right of disclaimer is not without complications. The following brief summary is an over-simplification but will serve to indicate the main provisions.

(a) Any part of the property of the bankrupt which consists of land burdened with onerous covenants, shares or stock in companies, unprofitable contracts or any other unsaleable, or not readily saleable, property involving onerous obligations may be disclaimed by the trustee by writing at any time within 12 months of his appointment or within such extended period as may be allowed by the court. If the property has only come to the knowledge of the trustee more than one month after his appointment, he may disclaim within 12 months after he has become aware of it.

(b) The effect of the disclaimer is to determine as from its date the rights, interests and liabilities of the bankrupt in respect of the property disclaimed, and to discharge the trustee of personal liability in respect of it as from the date on which it vested in him, but, save in so far as necessary to release the bankrupt and his trustee from liability, it does not affect the

rights of third parties.

(c) A trustee may not disclaim a lease except with leave of the court, and the court may require notice to persons interested and may impose terms as a condition of granting leave, and may make orders regarding fixtures, tenant's improvements, etc.

(d) If any person interested in the property applies in writing to the trustee requiring him to decide whether to disclaim or not, the trustee must within 28 days give notice whether he wishes to disclaim or not, and cannot disclaim thereafter. This provision applies also to contracts.

(e) The court may, on the application of any person entitled to the benefit or subject to the burden of a contract made with the bankrupt, make an order rescinding the contract on appropriate terms as to payment of damages for which the person concerned may prove in the bankruptcy.

(f) The court may, on application by any person claiming any interest in the disclaimed property, or under any liability not discharged by the Act in respect of the disclaimed property, make an order vesting the property in any person entitled to it. If the disclaimed property is a leashold the court will not make such an order in favour of any person deriving right from the bankrupt (e.g., as under-lessee or mortgagee) except upon terms making that person subject to the same liabilities and obligations as the bankrupt under the lease.

(g) Any person injured by the operation of a disclaimer shall be deemed a creditor of the bankrupt to the extent of the injury, and may prove for same in the bankruptcy.

(h) Where by operation of law, land vests in the Crown which is subject to a rentcharge, on a disclaimer by a trustee in bankruptcy, that imposes no personal liability on the Crown or its successors in title for the rentcharge.

3. Scots Law. Although no corresponding provisions as to disclaimer appear in the Scottish Bankruptcy statutes, the common

law operates to much the same effect. It is settled that a trustee in sequestration is not bound to take up and invest himself with contracts of the bankrupt which are of an onerous character (Goudy p. 282). If he does so repudiate, however, the person injured thereby will be entitled to claim damages for breach and rank on the bankrupt estate.

In relation to particular types of contract:-

(a) Land. Where land is held by the bankrupt on feu the trustee may abandon it. The position then is that he is not the vassal in a question with the superior. The bankrupt is the entered vassal and the superior, since the bankrupt will have failed to pay the reddendo, may exercise the rights available to him against the land, e.g., he may irritate the feu and take back the land. If the superior does not do so the bankrupt remains the vassal but the superior cannot pursue him on the personal obligation. In effect, if the superior does not irritate, there is a position of stalemate since the bankrupt can never subsequently use the land for any development with the threat of irritancy remaining. (see Mitchell's Trs. v Pearson 1834 12 S. 322).

(b) Leases. If the lease contains a provision which excludes assignees legal and voluntary of the tenant, the right of the trustee to take up the lease depends upon the lessor being agreeable. If there is no such provision, or if there is such a provision and the lessor is willing to accept the trustee, the trustee may take up the lease. It is open to the trustee, however, to renounce the lease if it is onerous, in which event the lessor may claim damages, which will be the difference between the rent payable under the lease and that which he can obtain from another tenant. (Goudy pp. 283, 284).

(c) Executory Contracts. The rule is that the trustee can repudiate any executory contract which he considers onerous, leaving the other party to claim damages. If the contract is personal in character the trustee cannot take it up, but if it is of a pecuniary or patrimonial character he can almost always assume

the beneficial enjoyment of it for the creditors. (Goudy pp. 284, 285). It is settled that the trustee must intimate his intention to take up or renounce the contract within a reasonable time and the courts will determine what is "reasonable" in the individual circumstances of each case.

4. Advantages and Disadvantages of Statutory Provisions and Common Law.

These may be summarised thus:-

(a) Time within which Disclaimer must be made. The provisions of the statutory law in England enable the trustee and the other party to the contract to determine with greater precision the time within which a decision as to disclaimer must be made. The statutory period is 12 months (although the court may extend it), but the other party may require a decision within 28 days by applying to the trustee requiring him to make his election. Alternatively the other party may apply to the court for an order rescinding the contract. In Scotland at common law there is no specified period but the trustee, if he delays unduly, may find that the court considers the delay unreasonable and may not permit him to take up the contract. The advantages and disadvantages of these two approaches are largely a matter for guidance by the members of the Working Party who have practical experience of sequestration, and their views would be valuable.

(b) Land. The position under statute in England is that any person claiming an interest in the disclaimed property may apply to the court for an order vesting the property in him. Where the property is leasehold, the court may not make an order in favour of any person claiming under the bankrupt, e.g., an under-lessee or mortgagee, except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt under the lease.

In Scotland the position at common law may be considered in various possible situations.

(i) Feu - no heritable securities and no leases.

In such a case the superior normally may irritate and recover ownership of the dominium utile. This remedy will usually be available and useful except:- (a) Where the irritancy ob non soluten canonem is not expressed or is expressed as available upon 2 years arrears and the feuduty is not in arrears for 2 years at the time of the sequestration and no conventional irritancy in respect of any other breach of feuing conditions has occurred. This problem can usually be overcome either by waiting until the 2 years' arrears build up or by making some arrangement with the trustee whereby, on being indemnified against any claims and costs, the trustee will convey the land to the superior. (b) Where the dominium utile is not worth the feuduty and the site is a liability. (I have in practice had a case where land was burdened with a large feuduty but was covered with slag heaps so that, on compulsory acquisition, the superiority and the dominium utile both had a negative value.) In such a case the land would be sterilised, at least until changes in circumstances or in market conditions made the land of some value, when the superior could irritate with advantage. It is difficult to see how a right in the court to make a vesting order would be of assistance: neither the superior nor anybody else would ask for one.

(ii) Feu burdened by heritable securities.

The heritable security will give the heritable creditor right to sell or foreclose. If the land has any value, the creditor can realise it. There is no need of any procedure for obtaining a vesting order. If there is no security worth realising the heritable creditor has no liability to the superior. He would simply permit the superior to irritate, which would have the effect of cutting down the security.

(iii) Feu subject to leases (bankrupt lessor).

If the rental income is more valuable than the feuduty and the expense of implementing the other conditions of the feu as to

maintenance of the property, there will be some value in the property and the trustee will take it over and realise it for the benefit of the creditors. If that is not the position, the tenants are at risk of losing their rights through irritancy by the superior, but if their tenancy rights are worth protecting, even at cost of paying the greater sum necessary to fulfil the feuing conditions, it will usually be possible to acquire the property from the trustee on payment of a nominal price and the expenses of the transaction. If the tenants are unwilling to incur the expenses of ownership, they may take no action but will lose their tenancy rights on irritancy. This is much the same position as in England, where lessees can only take over the property on condition of implementing the liabilities and obligations of the bankrupt.

(iv) Feu subject to heritable securities and leases. The rights of the tenants are valid against the heritable creditor. The heritable creditor may sell or foreclose, subject to the tenants' rights. If the property has no value in excess of the feuduty the superior may ultimately irritate but the tenants may protect their rights by fulfilling the feuing conditions.

(v) Lease - (bankrupt lessee). The lease will be terminable through non-payment of rent and the landlord can re-let without the need of any court procedure.

5. Conclusions. The arguments in favour of introducing the right of disclaimer are:-

(i) It makes the bankruptcy statute a more comprehensive code of the law.

(ii) It brings the law of Scotland more nearly into harmony with that of England.

(iii) It provides clear periods within which the right of disclaimer can be exercised.

On the other hand:-

(1) The existing common law has much the same effect as the statute law in England and there have been no complaints, so far

as I am aware, of defects in it.

(2) Although the statutory provisions as to time of disclaimer are more precise, they are also more rigid.

(3) Unless there are valid criticisms of the operation of the common law, is the Scottish Law Commission justified in recommending that it be superseded by statute merely in order to make the statutory code more complete?

B. LIQUIDATION

6. English Law. The rights of a liquidator to disclaim onerous contracts of the insolvent company are virtually identical to those of a trustee in bankruptcy - s. 323 of the Companies Act 1948 repeats almost exactly the provisions of s. 54 of the Bankruptcy Act 1914. S. 323 does not apply to a company which is wound up in Scotland.

7. Scots Law. The position of a liquidator in Scotland as to renouncing onerous contracts is similar to that of a trustee in bankruptcy - he may disaffirm the contract and the other party may claim and rank for damages (Asphaltic Limestone Co Ltd v Corporation of Glasgow 1907 S.C. 463).

8. Conclusions. The situation is broadly similar to bankruptcy and the arguments for and against inclusion of disclaimer provisions in relation to companies wound up in Scotland are the same as in the case of bankruptcy - see paragraph 5 supra.

APPENDIX E

VIDIMUS OR TIME-TABLE OF VOLUNTARY DECLARATION OF INSOLVENCY PROCEDURE

Registration of Declaration of Insolvency	Within seven days of the execution of the declaration (which contains the statement of affairs) the interim trustee registers the declaration in the Register of Bankruptcies and Register of Inhibitions and Adjudications.
First Meeting of Creditors	Interim Trustee summons First Meeting within twenty-eight days of registration of declaration of insolvency on seven days' notice in Edinburgh Gazette and in newspaper circulating in the district. Postal notice to creditors.
Trustee's and Commissioners' appointment	Trustee and up to five Commissioners appointed. Abbreviate of appointment of Trustee to be registered by the trustee in Register of Bankruptcies and in Register of Inhibitions and Adjudications within seven days of Meeting. At the same time intimation of names and addresses of Commissioners to be made to Accountant of Court.
Publication of appointment of Trustee	In Edinburgh Gazette within seven days of the Registration of Abbreviate of Appointment.
Bankrupt's (and third parties') examination before Trustee	Within four months of date of registration of declaration of insolvency bankrupt (and others) to attend on Trustee for examination without warrant of Court. Advertisement of diet in Edinburgh Gazette and newspaper circulating in the district, and circular notice to creditors.
Examination before Court	If necessary, formal examination upon oath before Sheriff. Diet not sooner than fourteen days nor later than twenty-eight days from date of application.
Date for lodging claims	Within six months from date of registration of declaration of insolvency.
Second meeting of creditors	Within two months following expiry of twelve months from date of registration of declaration.
Subsequent meetings of creditors	At six-monthly intervals or at such longer or shorter periods as might be fixed by Commissioners.
Distribution of Dividends	On dates decided by Commissioners.
Removal of Bankrupt's name from Register of Bankruptcies etc.	After three months from date of registration of declaration of insolvency following upon application by Bankrupt, with consent of Trustee, to Accountant of Court.
Registration of Notice of Removal	When name removed, Notice of Removal registered in Register of Inhibitions and Adjudications.

Renewal of Inhibition	Memorandum for registration of Inhibitions and Adjudications to be presented by trustee at intervals of five years from date of first registration.

APPENDIX F

CLAIM IN BANKRUPTCY

1. Bankrupt's name, designation and address.

I/We hereby certify that on 197 , the date of the Bankruptcy of[1].

2. Creditor's full name, designation and address.

there was and still is owing to[2].

3. Amount of claim in words not figures.

the sum of[3].

4. If any security is held for the debt add "except" and give particulars including your valuation of each security. If there are other obligants give their names and addresses. Each security must be professionally valued and the valuation should be lodged with the claim.

in accordance with the annexed or attached detailed statement which I/We have signed as relative hereto.

I/We further certify that no part of said sum has been paid or compensated and that no security is held for the same, and there are no obligants bound for the Debt other than the said Bankrupt.[4]

And I/We claim to vote and rank in the said bankruptcy in terms of this certificate conscientiously believing the same to be true.

5. If creditor is a partnership sign the Firm's Trading Title and add "By" A.B. Partner in said firm. If creditor is a limited company then the certificate must be signed by a director, secretary or duly authorised officer, the claim must be under the Common Seal or under the hand of some official duly authorised in that behalf and the fact that the officer is so authorised must be so stated.

Dated at ..... this .....
day of 197 .

5.
.....
.....

MANDATE

Name and address of mandatory .....
.....

.....197..

SIR,

You are hereby authorised to attend, vote, and act for ..... at all Meetings to be held under the bankruptcy of ..... designed in the above Claim, with the same powers

as belong to

5. .....

.....

Note: This style is based on the form recommended by the Institute of Chartered Accountants.