AN OUTLINE OF SOME RECOMMENDATIONS FOR THE AMENDMENT OF THE BANKRUPTCY ACT

By THE HONOURABLE SIR THOMAS CLYNE*

The Committee appointed to review the bankruptcy law of the Commonwealth has made many proposals for its amendment. The Report containing these proposals has been presented to the Attorney-General of the Commonwealth.[1] In this article some of the more important of these proposals will be examined.

In 1924 the Parliament of the Commonwealth passed a Bankruptcy Act and in 1927 an amending Act. An Act referred to as the Bankruptcy Act 1924-1927 came into force on 1 August 1928. Since this date the Parliament has passed many amending Bankruptcy Acts and the Bankruptcy Act may now be cited as the Bankruptcy Act 1924-1960.

The amending Acts have been enacted to provide for situations unforeseen, and thus unprovided for, to supplement existing provisions of the legislation and to remove anomalies. In some of these amending Acts provision has been made to validate acts and things which in the opinion of the High Court were invalid. A brief account of the origins of the Commonwealth Bankruptcy Act may not be out of place in this article.

This Act is in a large measure founded upon the Bankruptcy Act, 1914 (U.K.).[2] An amending Act passed in 1926[3] may be disregarded. The English Act of 1914 is the latest of a series of statutes dealing with a very old problem—the failure of a debtor to pay his creditors. In 1542 a statute was enacted which dealt with this problem. It was called ' An Act against such Persons as do make Bankrupt '.[4]

Since 1542 numerous bankruptcy statutes have been enacted from time to time in England with the object of creating a satisfactory law concerning bankrupts. For a long time these bankruptcy statutes were

---

* Judge of the Federal Court of Bankruptcy.

[1] *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Review the Bankruptcy Law of the Commonwealth* (1962), Serial No. 8440/62; hereinafter cited as ' *Report* '. In the Third Schedule to the *Report* is a draft Bill that will give effect to the recommendations of the Committee. The Committee has recommended the enactment of the Bill by the Parliament as soon as practicable: *Report*, para. 8. In succeeding footnotes, references are given to clauses of the Bill which correspond with the recommendations in the *Report*.

[2] 4 & 5 Geo. 5, c. 59.

[3] 16 & 17 Geo. 5, c. 7.

[4] 34 & 35 Hen. 8, c. 4.

penal in character; they dealt with the bankrupt as an offender; they did not discriminate between the unfortunate and the dishonest bankrupt and they made no provision for the discharge of the bankrupt from his debts.

It has been jestingly said that the Bankruptcy Court deals with wrecks as do the Admiralty Court and the Divorce Court. Bankruptcy law, however, may well be regarded as an important part of the commercial law of the community to which it applies and of material concern to the business and trading members of that community.

It is usually said that bankruptcy law is a creation of statute, but this statement requires some qualification. In the course of its development in England various doctrines apart from statute have been formulated. Some of these doctrines in the course of time have been made part of the statute law of bankruptcy. By an Act of Queen Elizabeth passed in 1570,[5] jurisdiction in matters of bankruptcy was vested in the Lord Chancellor or Lord Keeper with power to appoint Commissioners to carry out various duties under the Act.

The Chancellor in the exercise of his jurisdiction was guided by principles similar to those which regulated his jurisdiction in Chancery; namely, equitable principles.[6] The Chancellor, it seems, exercised this jurisdiction when the statutes were silent as to the mode of compelling obedience to the orders necessary for carrying the provisions of the statutes into effect. But it has also been said that the Chancellor exercised this jurisdiction more by practice than authority.

The fundamental principles of the bankruptcy legislation now in force in England and in Australia can be briefly summarized. An insolvent debtor is required to surrender his property to his creditors in order that it may be distributed equitably amongst them and when this is done he is entitled to seek a judicial release from his debts. As incident to these fundamental principles it becomes necessary to provide machinery by which an investigation of the debtor's affairs can be made, and by which the debtor can be compelled to disclose his property and to deliver it up for the benefit of his creditors.

A further and an essential part of this legislation is the punishment of dishonest and fraudulent bankrupts.

In England during the nineteenth century bankruptcy was the subject of many legislative experiments and in the course of these experiments the legislature was concerned with the difficult question of the nature of bankruptcy administration. Should the administration be a creditors' administration or an official administration?

---

[5] 13 Eliz., c. 7.

[6] *Ex parte Bradley* (1812) 1 Rose 202.

By the Bankruptcy Act, 1883[7] the legislature apparently considered that an administration under official control was a more effective administration than one substantially under the control of creditors. By this Act bankruptcy administration was placed under the supervision of the Board of Trade, but the courts retained control of all judicial proceedings.

In the Commonwealth Act, based as it is on the English Act of 1914, official control is predominant. The English Act of 1914 is in substance a reproduction of the Act of 1883.

The Committee supports the principle of official administration. In its opinion it is preferable to an administration under the control of creditors. What is called an official administration is to some extent an administration carried on under the supervision and control of the Court.

By section 12 (7) of the Bankruptcy Act 1924-1960 an official receiver is controlled by the Court and section 12A (1) provides that the Registrars and Deputy Registrars shall be controlled by the Court. Under section 12A (6) an order or direction made or given, or an act done by a Registrar or Deputy Registrar, is subject to review by the Court. The Registrar under a Bankruptcy Rule may seek the opinion, direction or order of the Court in any matter about which he is doubtful.[8]

Under Part VIII of the Act persons eligible to be trustees are appointed by the Court and are subject to its control. An illustration of this control appears in section 148 of the Act. This section provides that if the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the Court, and the Court may confirm reverse or modify the act or decision complained of, and make such order in the matter as it thinks just.

Apart from specific instances of control the acts of Registrar and official receivers can be the subject of judicial direction.

The Committee could see no valid reason why the basic pattern of the present Act should be altered.

The more important of the proposals made by the Committee are, as already stated, the subject of this article. Some recommend radical alterations to the Act: others are designed to reduce the work and expense of administration.

The position of the Crown under the Bankruptcy Act

Sub-section (3) of section 5 of the Bankruptcy Act 1924-1960 provides:

> (3.) Except as otherwise expressly provided in this Act, the provisions of this Act relating to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or

[7] 46 & 47 Vict., c. 52.

[8] Bankruptcy Rules, rule 8.

> scheme of arrangement, and the effect of an order of discharge, shall bind the Crown as representing the Commonwealth or any State.

This sub-section has abolished the Crown's prerogative rights in the distribution of a bankrupt's estate. It is a reproduction of section 151 of the English Act of 1914 which in turn was a reproduction of section 150 of the English Act of 1883. The construction of this provision has not been free from difficulty.[9]

The bankruptcy law, as already stated, is a commercial law and with the great and increasing commercial and business undertakings of the Commonwealth it is considered that the Crown ought not to have any special privileges over other creditors in a bankruptcy. Hence it has has been recommended that a Bankruptcy Act should bind the Crown as representing the Commonwealth or any State.[10]

It may be mentioned that the Canadian Bankruptcy Act 1919 contained a provision similar in terms to that of section 5 (3) but a new Canadian Bankruptcy Act passed in 1949 contains a provision that the Act should bind the Crown in right of Canada or a province.

A corporate Official Receiver

The Bankruptcy Act provides that various parts of the Commonwealth may be declared to be Districts for the purpose of the Act, and further provides that there shall be in each District, amongst other officers, official receivers.[11]

By section 60 (1) of the Bankruptcy Act upon sequestration the property of the bankrupt vests in the official receiver named in the order—an official receiver for the District in which the order was made.

The Committee has recommended for reasons of convenience of administration that the official receivers should together constitute a body corporate to be known as 'The Official Receiver in Bankruptcy' for the purpose of having vested in it and of holding the property of bankrupts. It is considered that the formation of such a body will facilitate dealings with property and avoid difficulties which can occur when proceedings in bankruptcy are transferred from one court to another court or when a transfer of administration is made from one District to another District.[12]

For the general purposes of the administration of the estates of bankrupts it is proposed that the individual official receivers should retain their identity.[13]

---

[9] *Federal Commissioner of Taxation v. Jaques* (1956) 95 C.L.R. 223.
[10] *Report*, paras. 27-29; clause 7.
[11] S. 12.
[12] *Report*, para. 33 ; clause 18.
[13] *Ibid.*

The jurisdiction of the Court and of courts exercising federal jurisdiction in bankruptcy

Part III of the existing Act is headed ' The Constitution, Procedure and Powers of Courts '. An important provision in this Part is section 25 (1):

> 25.—(1.) Subject to this Act, the Court shall, in any proceeding in bankruptcy, have full power to decide all questions of priorities, and all other questions whether of law or of fact—
>
> (a) which arise in any case of bankruptcy coming within the cognisance of the Court; and
>
> (b) which the Court deems it expedient or necessary to decide for the purpose of doing complete justice or making a complete realization and distribution of property in the case.

The courts which now have jurisdiction in bankruptcy are the Federal Court of Bankruptcy created by the Bankruptcy Act 1930 and State courts and courts of Territories invested with federal jurisdiction in bankruptcy. The nature and extent of this jurisdiction must be ascertained from the language of the Act itself. In England jurisdiction in bankruptcy is exercised by Judges of the High Court and of County Courts.

If the Court has the power to decide all questions of law or fact in any case of bankruptcy within its cognizance, it should be implied that the Court has also the power to grant such remedies as are necessary and appropriate to give effect to this power to decide all such questions. The Committee considered that the remedies which the Court may grant should not be left to implication. It is proposed therefore that the Court should have express power to make such orders as it considers necessary for giving effect to the Act; this power would include that of granting equitable remedies. Also it is proposed that the Court should have the power to make declaratory orders.[14]

Creditors' petitions and proceedings incident thereto

The Committee considers that the provisions of the Act setting out the conditions under which a creditor can present a petition for a sequestration order should be amended.

Bankruptcy in law and bankruptcy in fact are two different matters. Where a creditor sets about to make his debtor a bankrupt in law he must be in a position to satisfy certain statutory conditions.

1. *Definition of ' debtor '*

The person whom it is sought to make bankrupt must be a debtor within the meaning and for the purposes of the Bankruptcy Act. Under section 4 of the Bankruptcy Act the word ' debtor ' is defined:

[14] *Ibid.* paras. 39-41; clause 30 (1).

" Debtor " includes any person, whether a British subject or not, who at the time when any act of bankruptcy was done or suffered by him—

(*a*) was personally present in Australia; or

(*b*) ordinarily resided or had a place of residence in Australia; or

(*c*) was carrying on business in Australia, personally or by means of an agent or manager; or

(*d*) was a member of a firm or partnership which carried on business in Australia.

However, section 55 (1) (d) provides:

55.—(1.) A creditor shall not be entitled to present a petition against a debtor unless—

... (*d*) the debtor is domiciled in Australia, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in Australia, or has carried on business in Australia, personally or by means of an agent or manager, or is or within the said period has been a member of a firm or partnership which has carried on business in Australia by means of a partner or partners, or an agent or manager ...

The distinguishing marks of a debtor are based on residence in Australia and the carrying on of business in Australia.

For the purposes of a creditor's petition section 55 (1) (d) must be strictly complied with. It is thus difficult to see the necessity for the definition of debtor in section 4. In the opinion of the Committee domicile as a distinguishing mark of a debtor is unsatisfactory. A debtor for the purposes of the Bankruptcy Act should be the subject of one description only.

It is proposed that a debtor for the purposes of the Bankruptcy Act should be a person who having committed an act of bankruptcy—

(a) was personally present or ordinarily resident in Australia;

(b) had a dwelling-house or place of business in Australia;

(c) was carrying on business in Australia either personally or by means of an agent or manager; or

(d) was a member of a firm or partnership carrying on business in Australia by means of a partner or partners or of an agent or manager.[15]

2. *Act of bankruptcy*

A debtor who can be made bankrupt must be a debtor who has committed what is known as an act of bankruptcy being one of a number of acts of bankruptcy prescribed and defined by the Bankruptcy Act. It is not sufficient that he is in fact insolvent. Section 52 of the

[15] *Ibid.* paras. 78-79; clause 43 (1).

Bankruptcy Act sets out a list of these acts of bankruptcy some of which have a long history.

The Committee considers that some of these acts of bankruptcy require amendment and that others should not be retained.

Mention is made of some of the acts of bankruptcy. One can be described briefly as the failure of a debtor to comply with the requirements of a bankruptcy notice. It is set out in paragraph (j) of section 52.

A creditor who seeks the issue of a bankruptcy notice for service upon his debtor must be a creditor who has obtained a final judgment or final order against the debtor, and this final judgment or final order must be one upon which the creditor can issue immediate execution. If the debtor fails within a time specified in the notice to comply with the requirements of the notice, he commits an act of bankruptcy. The use of bankruptcy notices by creditors has been the subject of some critical comment. In the opinion of the Committee, a bankruptcy notice as a step in founding an act of bankruptcy serves a useful purpose.

When a debtor's financial situation is in a tottering condition his non-compliance with a bankruptcy notice gives to a creditor a prompt and ready method of founding an act of bankruptcy on which to base a petition.

A debtor who is insolvent ought not to be allowed time or opportunity to deal with or fritter away property which should in justice go to his creditors.

The Committee considers that section 52 (j) should be retained, and also considers that the final judgment or final order on which a bankruptcy notice can be issued should have an extended meaning. As the law now stands a judgment obtained in pursuance of an order to enforce an award made in an arbitration is not a final judgment within the meaning of section 52 (j).[16]

A judgment based upon a certificate granted under section 13A of the Deserted Wives and Children Act 1901-1939 (N.S.W.) and under that Act enforceable as a final judgment in an action was held by the High Court not to be a final judgment for the purposes of section 52 (j).[17]

The following proposals are made for the amendment of section 52 (j):
(a) Where leave is given to enforce an award being an award under which money is payable by a debtor to another person, the award shall be deemed to be a final order obtained by that person against the debtor and the arbitration proceedings shall be deemed to be the proceeding in which that final order was obtained.
(b) A judgment or order enforceable as, or in the same manner as, a final judgment obtained in an action shall be deemed to be a final

[16] *Re Bankruptcy Notice* [1907] 1 K.B. 478.
[17] *Opie v. Opie* (1951) 84 C.L.R. 362.

judgment and the proceedings in which it was obtained shall be deemed to be the action in which it was obtained.[18]

These proposals must necessarily limit the operation of that part of section 52 (j) which entitles a debtor to satisfy the court that he has a counterclaim set-off or cross demand equal to or exceeding the amount of the judgment debt or sum payable under the order being a counterclaim set-off or cross demand that he could not set up in the action or proceeding in which the judgment or order was obtained. This part of section 52 (j) will still have an extensive operation.

Another important act of bankruptcy appears in paragraph (c) of section 52. This act of bankruptcy is committed if in Australia or elsewhere the debtor makes any conveyance or transfer of his property or creates any charge thereon which would, under this or any other Act, be void as a preference or a fraudulent preference if he became bankrupt.

The words 'fraudulent preference' are superfluous. In the opinion of the Committee this paragraph should be recast in the following manner :

> A debtor commits an act of bankruptcy . . . if in Australia or elsewhere—
>
> (i) he makes a conveyance, transfer, settlement or other disposition of his property or of any part of his property;
>
> (ii) he creates a charge on his property or on any part of his property;
>
> (iii) he makes a payment; or
>
> (iv) he incurs an obligation,
>
> that would, if he became a bankrupt, be void as against the trustee.

This amendment constitutes as acts of bankruptcy the transactions which, with one exception, constitute preferences under section 95 of the Act.[19]

One act of bankruptcy is obsolete and should be abandoned. It appears in section 52 (f). It is the adjudication or declaration of bankruptcy of a debtor by any court in the Queen's Dominions out of the Commonwealth. It had its origin in the Bankruptcy Act, 1869 (U.K.)[20] and by a section of the Bankruptcy Act, 1883 it became superfluous.[21]

Some acts of bankruptcy described in section 52 depend upon the provisions dealing with arrangements between debtors and creditors made under Parts XI and XII of the Act. If the proposal of the Committee for new provisions relating to these arrangements is adopted, other acts of bankruptcy arising out of such provisions have been suggested.[22]

---

[18] *Report*, paras. 54-58; clause 40 (3) (a), (b).

[19] *Ibid.* para. 47; clause 40 (l) (b).

[20] 32 & 33 Vict., c. 71, s. 74.

[21] 46 & 47 Vict., c. 52, s. 118. *Report*, para. 50; clause 29 (2).

[22] *Report*, paras. 59-60; clause 40 (l) (i)–(m).

3. *Amount of indebtedness*

A third condition essential to a creditor's petition is that the debtor must be indebted to the creditor in an amount of at least fifty pounds.

Section 55 (1) (a) of the Bankruptcy Act provides that a creditor shall not be entitled to present a petition against a debtor unless the debt owing by the debtor to him, or, if two or more creditors join in the petition, the aggregate of the debts owing to the several petitioning creditors, amounts to fifty pounds.

It is proposed that an amount of two hundred and fifty pounds should be substituted for the amount of fifty pounds.[23] The change in the value of money was considered an important reason for this proposed amendment. There are other pertinent matters. It seems reasonable that the machinery of the Bankruptcy Act ought not to be set in motion by a creditor if a debtor owes this creditor a sum of fifty pounds. It is a matter of common knowledge that a creditor in the hope of obtaining some financial benefit out of a debtor's estate takes proceedings to make the debtor a bankrupt. It cannot be denied that many creditors and debt-collecting agents have come to regard the Bankruptcy Court as a debt-collecting institution. When a petition is presented by a creditor for a sequestration order the creditor does so for the benefit of all the creditors. Of this he is usually unaware.

If a debtor is in financial difficulties there ought to be little difficulty in two or more creditors joining together to make their debtor bankrupt.

In the Canadian Bankruptcy Act 1919 the requisite debt of a petitioning creditor was five hundred dollars but in the later Act of 1949 this amount was increased to one thousand dollars.

Debtors' petitions

It is proposed that a radical alteration should be made to the law dealing with debtors' petitions. At present under section 54 (1) of the Bankruptcy Act the Court may on a bankruptcy petition presented by a debtor make a sequestration order and under section 57 (1) a debtor's petition must allege that the debtor is unable to pay his debts and the presentation thereof is to be deemed an act of bankruptcy without the previous filing of any declaration of inability to pay his debts, and the Court may thereupon make, or refuse for good and sufficient cause to make, a sequestration order.

Under section 52 (i) a debtor commits an act of bankruptcy if he presents a bankruptcy petition against himself. As the law now stands the making of a sequestration order on the petition of a debtor is a judicial act. The Committee considers that the making of a sequestration order on the petition of a debtor should be an administrative act.[24]

---

[23] *Ibid.* paras. 74-77; clause 44.

[24] *Ibid.* para. 89; clause 55.

Prior to September 1954 sequestration orders were made by a Registrar.

In *The Queen v. Davison*[25] the authority of a Registrar to make a sequestration order came to be considered by the High Court. By section 4 of the Bankruptcy Act 1924-1950, 'the Court' was defined as meaning 'any Court having jurisdiction in bankruptcy or a Judge thereof' and as including 'a Registrar when exercising the powers of the Court conferred upon him by or under this Act', and section 24 (1) (a) of the Act then provided that a Registrar could exercise the following function: 'To hear debtors' petitions and to make sequestration orders thereon, or to give leave to withdraw the petitions'. The High Court held that section 24 (1) (a), considered with the definition of 'the Court' in section 4 and with section 54 and section 57, amounted to an attempt to confer upon a Registrar the power of making a judicial order operating as an order of the Bankruptcy Court and was void as purporting to authorize a person not constituting a court under sections 71 and 72 of the Constitution to exercise part of the judicial power of the Commonwealth. Dixon C.J. and McTiernan J. said: 'There is nothing, however, inherent in the nature of voluntary sequestrations to make it impossible for the legislature to provide some other means than a judicial order for the purpose.'[26]

In the opinion of the Committee it is unnecessary and unreasonable that debtors' petitions should be dealt with by a court.

The following provision has been recommended: a debtor may present to the Registrar a petition against himself accompanied by a statement of his affairs verified by affidavit and if the petition and statement of affairs appear to the Registrar to be in a prescribed form, they should be accepted by the Registrar and thereupon by force of this provision the debtor becomes a bankrupt by virtue of the presentation of the petition.

When the debtor thus becomes a bankrupt the Registrar must forthwith give notice of the bankruptcy to the Official Receiver.[27]

Priority of debts

It has always been a fundamental doctrine of the bankruptcy laws that there should be an equal and rateable proportion observed in the distribution of the bankrupt's goods amongst his creditors having regard to the quantity of their several debts.[28]

But to this doctrine there are exceptions. In the distribution of a bankrupt's estate certain creditors are given a right to have their debts

[25] (1954) 90 C.L.R. 353.
[26] *Ibid.* 365.
[27] *Report*, paras. 89-90; clause 55.
[28] *Smith v. Mills* (1584) 2 Co. Rep. 25 (a); 76 E.R. 441.

paid before the ordinary unsecured creditors become entitled to share in the estate.

Section 89 of the Act provides that subject to the provisions of the Act all debts proved in the bankruptcy shall be paid *pari passu*. One such provision is section 84, which sets out the classes of creditors who are given a priority over the general body of creditors and the order and extent of their respective priorities. The Committee considers that some of the provisions relating to priorities should be amended to bring them into line with present-day conditions. A brief reference is made to some of these priorities.

At present section 84 gives to a clerk, servant, labourer or workman a priority for wages or salary not exceeding fifty pounds in respect of services rendered to a bankrupt within four months before the date of the sequestration order. This provision was no doubt material in a less complicated industrial society than that now existing. In the opinion of the Committee, the priority mentioned is antiquated and unreasonable and this priority should be a priority in a sum not exceeding three hundred pounds due to any employee of the bankrupt whether remunerated by salary, wages, commission or otherwise in respect of services rendered to or for the bankrupt before the date of the bankruptcy.[29]

Another right of priority is that of a person who has a claim for workers' compensation. At present such a claim cannot exceed a sum of two hundred pounds. This amount is considered unreasonable and it is recommended that the amount of this claim to priority should be increased to an amount not exceeding one thousand pounds.[30]

Another creditor who has under the Act a priority of claim in the distribution of the assets of a bankrupt is the Commissioner of Taxation. Under section 84 (1) (h) of the Act the Commissioner is entitled to a priority for income tax assessed under any Act or State Act prior to the sequestration order not exceeding in the whole one year's assessment. Where there are assessments unpaid for more years than one, the priority in favour of income tax extends to an amount equal to but not exceeding the amount of the largest of such assessments.

This priority for tax has been seriously affected by section 221 (1) (b) of the Income Tax and Social Services Contribution Assessment Act 1936-1963, which gives an overall priority for income tax to the Commissioner of Taxation. Section 221 (1) (b) provides:

> (*b*) notwithstanding anything contained in any other Act or State Act—
>
> (i) a person who is a trustee within the meaning of the *Bankruptcy Act* 1924-1933 shall apply the estate of the bankrupt in payment of tax due under this Act (whether assessed

[29] *Report*, paras. 125-127; clause 109 (1) (f).

[30] *Ibid.* para. 129; clause 109 (1) (g).

> before or after the date on which he became a bankrupt) in priority to all other unsecured debts other than debts of the classes specified in paragraphs (*a*), (*d*) or (*e*) of subsection (1.) of section eighty-four of that Act . . .

Paragraph (a) refers to costs of administration, paragraph (d) to funeral and testamentary expenses and paragraph (e) to wages or salary.

Objection has been taken to this provision on the ground that it is unjust to a bankrupt's other creditors. It happens not infrequently that a creditor incurs the expense of obtaining a sequestration order against a debtor and then discovers that the Commissioner has a claim of which the creditor and other creditors cannot possibly be aware. When this claim is satisfied in whole or in part the ordinary creditors quite often get little or nothing. Many a petitioning creditor may console himself with the melancholy reflection that the law has its pitfalls.

The Committee considers that the rights of all creditors of a bankrupt should be prescribed and defined by the Bankruptcy Act. The overriding priority for tax ill consorts with the Committee's view that the Bankruptcy Act should bind the Crown in right of the Commonwealth.[31]

The property of a bankrupt divisible among creditors

Section 91 of the Act defines what property of a bankrupt is available to creditors and what property is not so available. It is recommended that this section should be amended.

By section 91 (b) the property of a bankrupt divisible amongst his creditors does not include policies of life assurance or endowment in respect of his own life, except to the extent of a charge on the policies in respect of the amount of the premiums paid on the policies during the two years next preceding the date of the order of sequestration. This provision appears to be both odd and artificial.

For a long period legislation in various forms was enacted in the States of the Commonwealth designed to afford some protection to policies effected by a person on his own life. The policy of this legislation is now expressed in section 92 of the Life Insurance Act 1945-1961 (Cth). This gives a generous protection to the property and interest of any person in a policy effected upon his own life, but the protection so given is subject to the Bankruptcy Act.

It is proposed that policies of life assurance or endowment assurance in respect of the life of a bankrupt and also of his spouse that have been in force for at least two years before the date of the bankruptcy and the proceeds of such policies received after the date of the bankruptcy shall not be the property of the bankrupt divisible amongst his creditors. The object of giving protection only to policies in force for at least two years

[31] *Ibid.* paras. 133-141; clause 109 (1) (i).

is to prevent or dissuade insolvent debtors from taking out policies for large sums at the expense of their creditors.[32]

An amendment to section 91 (d) is also suggested. By section 91 (d) property not divisible amongst creditors includes the ordinary hand tools, hand implements and hand instruments of the bankrupt not exceeding in the whole fifty pounds in value. This provision is outmoded and too rigid and should be replaced by a provision which will exclude from the property of a bankrupt available to creditors such of the ordinary tools of trade, plant and equipment, professional instruments and reference books of the bankrupt as the creditors by resolution determine or as the court, on the application of the bankrupt, determines.[33]

On the other hand by section 91 (iii) the property available to creditors now includes all goods, being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt with the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof.

A provision such as this became part of the law of bankruptcy by a statute passed in the reign of James I and has since been reproduced in varying forms in succeeding statutes. It was no doubt a material and reasonable provision of the law in former days.

Where nowadays the purchase of chattels under the hire-purchase system is so widespread and notorious, it is difficult to see what application the doctrine of reputed ownership can now have. It is considered that section 91 (iii) ought to be omitted from any new Bankruptcy Act.[34]

The effect of bankruptcy on antecedent transactions

The law relating to this matter needs revision. The provisions of this branch of the law appear in Division 4 of Part VI of the Act. In dealing with these transactions, it is necessary to make some reference to a doctrine known as the doctrine of relation back—a doctrine which first appeared in a statutory form over four hundred years ago. Section 90 of the Act is a statutory expression of this doctrine. The effect of the doctrine generally is that a date prior to bankruptcy is fixed as the date of the commencement of the bankruptcy. By section 90 the bankruptcy of the bankrupt is to be deemed to have relation back to, and to commence at, the time of the act of bankruptcy on which a sequestration order is made proved to have been committed by the bankrupt within six months next preceding the date of the presentation of the bankruptcy petition.

This doctrine is not without justification. If a debtor on the verge of bankruptcy plays fast and loose with his property at the expense of

[32] *Ibid.* paras. 155-157; clause 116 (2) (d).
[33] *Ibid.* paras. 162-163; clause 116 (2) (b), (c).
[34] *Ibid.* para. 153.

his creditors, it enables a trustee to take proceedings to have dealings of the bankrupt with his property set aside. Occasionally such dealings are manifestly dishonest. Substantial inroads upon this doctrine of relation back are made by the provisions of the Act relating to certain antecedent transactions. These antecedent transactions are executions or attachments levied or made by creditors, voluntary settlements made by debtors and preferences given to creditors by debtors.

Section 92 of the Act restricts the common law rights of a creditor under an execution or attachment. It is expressed in a form which has been the subject of much judicial consideration. It was the subject of an elaborate examination by the High Court in *McQuarrie v. Jaques.*[35]

The effect of section 92 briefly stated is that an execution creditor cannot retain the benefit of an execution or attachment unless he has completed the execution or attachment before sequestration and before notice of the presentation of any petition by or against the debtor or before notice of the commission of any available act of bankruptcy by the debtor. An execution against goods is completed by sale and an attachment of a debt is completed by receipt of the debt, and an execution against land is completed by sale.

Where a debtor's property is the subject of an execution or attachment it may reasonably be assumed that he is in an insolvent condition and it is not unusual to find that a debtor's property is the subject of a number of executions.

The Committee is of the opinion that in the interests of the general body of creditors the provisions of section 92 should be amended. Accordingly it is proposed that where—

(a) a creditor has issued execution against property of a debtor or attached a debt due to the debtor—
  (i) within six months before the presentation of a petition against the debtor; or
  (ii) after the presentation of a petition against the debtor; and
(b) the debtor subsequently becomes a bankrupt on, or by virtue of the presentation of, the petition,

the creditor shall pay to the trustee in the bankruptcy an amount equal to the amount, if any, received by the creditor as the result of the execution or attachment, less the taxed costs of the execution or attachment. Where such an amount has been paid by a creditor to the trustee he should be entitled to prove in the bankruptcy for this amount.[36]

The avoidance of voluntary settlements and marriage settlements is the subject of section 94 of the Bankruptcy Act. Amendments to this section are proposed, but they are of minor importance and in this article can be disregarded.

---

[35] (1954) 92 C.L.R. 262.

[36] *Report*, paras. 167-169; clause 118.

The next antecedent transaction to be considered is that of a preference given by a debtor to a creditor.

It is a long established doctrine that a debtor cannot give to one creditor a preference or an advantage over his other creditors.

Section 95 (1) provides that:

> 95.—(1.) Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered, by any person unable to pay his debts as they become due from his own money, in favour of any creditor or of any person in trust for any creditor, having the effect of giving that creditor, or any surety or guarantor for the debt due to that creditor, a preference, a priority or an advantage over the other creditors, shall, if the debtor becomes bankrupt on a bankruptcy petition presented within six months thereafter be void as against the trustee in bankruptcy.

This section is to trustees and creditors one of extreme importance and concern.

A recommendation was made to the Committee that section 95 should be replaced by a section similar to section 44 of the English Act of 1914. Under the English section the test of a preference is the intention of the debtor to prefer. A payment is deemed to be fraudulent and void against the trustee in bankruptcy if the debtor gives the payment to a creditor with a view to giving that creditor a preference over other creditors.

It was urged especially on behalf of banks that when money is advanced to a person to help him in a time of financial stress any repayment to the creditor ought not to be regarded as a preference to that creditor unless the payment was made with the view of giving that creditor a preference over other creditors.

The intent of a debtor to prefer is often difficult of proof as it involves the question: What was the dominant motive in the debtor's mind? In the opinion of the Committee the essence of a preference is that one creditor receives an advantage over other creditors, and it is not prepared to accept and adopt as a test of preference the intention or motive of a debtor to prefer.[37]

When a preferred creditor is required to return to a trustee the property the subject of a preference he is entitled to prove for the value of the property which he is obliged to restore to the estate.

In the opinion of the Committee some amendments should be made to section 95. Under this section a judicial proceeding taken or suffered may create a preference. A preference of this kind is seldom seen and is archaic, and the Committee considers it should not be reproduced in any new Bankruptcy Act.[38]

---

[37] *Ibid.* paras. 174-176; clause 122.

[38] *Ibid.* para. 181; clause 122.

One important question under section 95 should be referred to: What effect has section 95 (1) upon a payment made by a debtor to a creditor in the course of a running account between the debtor and the creditor? This can be a question of much concern to bankers and their customers. Some light is thrown on this question by a decision of the High Court.

In *Richardson v. The Commercial Banking Co. of Sydney Ltd*[39] the High Court had to consider a question arising out of a claim by an official receiver that certain deposits made by a debtor into an office account and a trust account which he had with a bank amounted to preferences under section 95. The High Court held that these deposits did not constitute preferences within the meaning of section 95.

The Court said there were two things that it was important to have clearly in mind.[40] One was the kind of ' effect ' which section 95 treats as decisive. The other was that where the payment formed an integral or inseparable part of an entire transaction, its effect as a preference involves a consideration of the whole transaction. The Court said:

> A running account of any debtor who has reached insolvency must present difficulties under s. 95 . . . But without stating any principle with an application beyond the facts of this case, it is enough to decide that the payments into the office account possessed in point of fact a business purpose common to both parties which so connected them with the subsequent debits to the account as to make it impossible to pause at any payment into the account and treat it as having produced an immediate effect to be considered independently of what followed and so to be adjudged a preference.[41]

Under section 95 as under section 44 of the English Act, the preference struck at is a preference not only to the creditor but also to any surety or guarantor for the debt due to such creditor. The words ' or any surety or guarantor for the debt due to such creditor ' were an amendment made to the Bankruptcy Act, 1883 by the Bankruptcy and Deeds of Arrangement Act, 1913 (U.K.).[42]

In *Re Conley*,[43] Farwell J. said that the amendment was made to remedy the result of two decisions under the Act of 1883. The two decisions were *Re Mills*: *Ex parte The Official Receiver*,[44] which decided that a payment to a creditor with a view to prefer a surety was not an undue preference since there was no intention to prefer the creditor, and *Re Warren*: *Ex parte The Trustee*,[45] which decided that it was not possible to establish an undue preference against the surety since he was not a creditor.

---

[39] (1952) 85 C.L.R. 110.
[40] *Ibid.* 129.
[41] *Ibid.* 133.
[42] 3 & 4 Geo. 5, c. 34.
[43] [1937] 4 All E.R. 438, 443.
[44] (1888) 58 L.T. 871.
[45] [1900] 2 Q.B. 138.

In *In re G. Stanley & Co. Ltd*[46] Eve J. held that the real object of amending section 44 of the English Act of 1914 was to enable the trustee to recover a payment from the person actually preferred.

This opinion of the learned judge did not receive the approval of Farwell J. when *Re Conley*[47] came before him, or the approval of Luxmore J. when *Re Conley* was taken to the Court of Appeal.[48] Clauson J., in *Re Lyons: Ex parte Barclays Bank Ltd v. Trustee*,[49] also did not approve the opinion of Eve J.

If the purpose of the amendment made by the Act of 1913 was such as Eve J. thought, it seems that this purpose has not been achieved.

The Committee considers that the words in section 95 ' or any surety or guarantor for the debt due to that creditor ' serve no useful purpose and should be omittted if this section is amended.[50]

A creditor who takes a surety or guarantor for a debt can always provide, if he thinks it necessary, that the surety or guarantor shall remain liable if payment by the bankrupt to the creditor is set aside as a preference.

Another amendment suggested is that where a preference is given after the presentation of a petition on which the debtor becomes bankrupt and before the debtor becomes a bankrupt it should be void as against the trustee in the bankruptcy.[51]

The discharge of bankrupts

As already observed one of the basic principles of a modern bankruptcy law is that when a debtor has given up his property for the benefit of his creditors he should then be liberated from his debts.

It is necessary to mention that a bankrupt who has not received a discharge suffers many disabilities. Two may be mentioned. The after-acquired property of a bankrupt can be taken by the trustee of his estate except so much thereof as is necessary for the support of himself and his family. If the bankrupt obtains credit to the extent of twenty pounds or upwards from any person without informing him that he is an undischarged bankrupt he is guilty of an offence under the Act.[52]

An interesting example of the result of this disability may be mentioned. An undischarged bankrupt agreed to purchase property, the purchase price being payable by instalments: he did not disclose to the vendor

[46] [1925] Ch. 148.
[47] [1937] 4 All E.R. 438.
[48] [1938] 2 All E.R. 127, 139.
[49] [1934] All E.R. Rep. 124; (1934) 152 L.T. 201; 51 T.L.R. 24.
[50] *Report*, para. 180.
[51] *Ibid.* para. 182.
[52] Bankruptcy Act 1924-1960, s. 211 (a).

that he was an undischarged bankrupt. It was held that he had unlawfully obtained credit and that the contract was unenforceable.[53]

It should also be mentioned that many obligations are imposed upon an undischarged bankrupt and trustees have a duty to see that these obligations are observed.

Section 119 of the Act deals with discharge from bankruptcy. Under this section the bankrupt who desires a discharge must make an application to the Court. It may be mentioned that a judicial discharge became part of the law of bankruptcy in 1869. Under section 119 (1) the order sought is an order of discharge releasing the bankrupt from his debts. Certain of his debts are not released by the order.

Under section 119 the Court is empowered to grant or refuse an absolute discharge, to suspend for a specified period the operation of an order of discharge or grant an order of discharge subject to specified conditions.

When a bankrupt makes an application to the Court for a discharge the Court has a wide discretion and must consider the interests and conduct of the bankrupt, the interests of his creditors and the interests of the public.

Numerous bankrupts are not aware of their right to a discharge and as a consequence never apply for a discharge; others who know of their right to a discharge have little interest in exercising this right.

At the present time there is in Australia an army of bankrupts. The question has emerged whether some form of automatic discharge should be provided for bankrupts. It appears to be a reasonable answer to this question that a bankrupt should after a specified period be entitled to an automatic discharge subject to certain safeguards.

Many debtors who become bankrupt are the victims of misfortune. Some debtors become bankrupt because they regard their obligations to their creditors with reckless indifference, and to them a sequestration order is a ready and easy way of shedding their financial obligations. A minority of debtors become bankrupt as a method of defrauding their creditors.

It is recommended that a person who becomes bankrupt shall be discharged from bankruptcy upon the expiration of five years from the date of the bankruptcy, but this automatic discharge shall not be permitted if the Registrar, the trustee or a creditor lodges an objection to the discharge in a manner to be prescribed.[54]

It is also recommended that an automatic discharge be provided for those who are now bankrupt.[55]

---

[53] *De Choisy v. Hynes* [1937] 4 All E.R. 54.

[54] *Report*, para. 233; clause 149.

[55] *Ibid.*

If, under the proposed amendments relating to discharge, a bankrupt is obliged to make an application to the Court for a discharge, the Court should have a much wider discretion than it has at present. Under section 119, on proof of certain adverse facts the Court is bound to refuse or suspend a discharge for a specified period or until a dividend of not less than ten shillings in the pound is paid to creditors or to require the bankrupt as a condition of his discharge to consent to a judgment being entered against him by the trustee for some balance of the amount of the debts provable in the bankruptcy.

It is proposed that upon proof of certain prescribed adverse facts the Court should be empowered to grant an order of discharge and suspend its operation either unconditionally or subject to conditions.[56]

Often a bankrupt ought to be discharged upon payment to his creditors of some dividend less than ten shillings in the pound, but at present the Court has no jurisdiction to suspend a discharge until a dividend of not less than ten shillings in the pound has been paid to the creditors.

Arrangements outside bankruptcy

Many debtors desire to make arrangements with their creditors in order to escape what is sometimes described as the stigma of bankruptcy.

In England such arrangements have a long history during which they have received the attention of Parliament. The law does not prohibit a person who is insolvent from making arrangements with his creditors but it became necessary to provide statutory protection of the interests of creditors who made private arrangements with their debtors.

The Bankruptcy Act, 1869 contained some provision for effecting the liquidation by arrangement of the affairs of insolvent debtors, but these provisions were not satisfactory.

After various experiments the Deeds of Arrangement Act, 1887[57] was passed and this Act is, to a large extent, reproduced in the Deeds of Arrangement Act 1914.[58] The Deeds of Arrangement Act, 1887 was designed to give publicity to arrangements between debtors and creditors by providing for their registration and by requiring the approval of the majority of the creditors. It should be mentioned that under this legislation if a creditor of the debtor does not assent to an arrangement made between the debtor and his creditors, he is not bound by it.

Under the Commonwealth Bankruptcy Act these arrangements are in two classes which appear respectively in Parts XI and XII of the Act. Part XI deals with proposals made by a debtor which can be considered by all his creditors and, if they are approved by meetings of creditors,

[56] *Ibid.* para. 235 ; clause 150 (3)—(6).
[57] 50 & 51 Vict., c. 57.
[58] 4 & 5 Geo. 5, c. 47.

they become binding upon all the creditors. These are proposals for compositions and for schemes of arrangement with creditors. The creditors may also require a debtor to execute a deed of assignment for the benefit of his creditors. Provision is made under this Part for the filing of material documents.

Part XII also deals with arrangements with creditors. These arrangements must be contained in instruments which must be registered. Amongst these instruments are assignments of property, compositions and other instruments containing arrangements whereby creditors obtain some control over the property or business of a debtor.

Under Part XII it is left to the debtor to make such an arrangement with his creditors. He usually does so on the advice of a trustee. He may enter into an arrangement of one or other of the kinds prescribed by Part XII, and the instrument containing this arrangement must be registered and at a subsequent date must receive the approval of creditors before it becomes an effective arrangement.

What is obviously a weakness in the law relating to arrangements under Part XII is that a creditor may not approve of the arrangement, and this creditor has the right to petition the Court for a sequestration of the debtor's estate, notwithstanding that the arrangement has the approval of the great majority of the creditors. It has been considered that there ought to be one code dealing with all arrangements between debtors and creditors.[59]

The essential features of this proposed code are that it provides for the immediate taking of control of a debtor's property by a trustee. It gives to the creditors a right to consider a debtor's affairs with power to determine what is an appropriate method of dealing with his affairs. It gives to the creditors the right to request the debtor to make a composition; to enter into a scheme of arrangement for the benefit of his creditors; to make an assignment of his property for the benefit of creditors or to present a petition for the sequestration of his estate. An important feature of the proposed code is that an arrangement approved by the majority of creditors shall be binding upon all the creditors.[60]

Powers and duties of trustees

Section 105 of the Bankruptcy Act provides that a trustee may do various things set out in this section in his administration of a bankrupt's estate, and by section 107 a trustee by permission of the creditors by a resolution passed at any general meeting, or of the committee of inspection or by leave of the Court may in the course of his administration do the various things set out in that section.

---

[59] *Report*, para. 270.

[60] *Ibid.* paras. 291-342; draft Bill, Part X.

It is considered that the powers of a trustee to deal with a bankrupt's property should be substantially increased. It is proposed amongst other things that a trustee should have the power, which he does not have at present, to sell property of a bankrupt by private contract without the permission of the creditors or a committee of inspection or the leave of the Court. It is considered that this power should only be exercised by the trustee if the value of the property which the trustee proposes to sell does not exceed five thousand pounds.[61]

At present a trustee may with the permission of the creditors or a committee of inspection or the leave of the Court carry on the business of a bankrupt so far as may be necessary for its beneficial winding-up. It is considered that for this purpose the permission or leave mentioned ought not to be required.[62]

It is also considered that a trustee's power to make compromises ought to be enlarged. Under section 105 a trustee may compromise any debt not exceeding one hundred pounds due to the bankrupt. Authority to make various other compromises of debts or claims requires permission or leave.

The Committee proposes that a trustee should have the power to make compromises where the debt or claim does not exceed five thousand pounds. In its opinion, however, where a debt or claim exceeds five thousand pounds, authority to compromise should be by permission or leave.[63]

Other proposals are made with the object of making less burdensome the duties of trustees in connection with trustees' accounts and audits, the taxation of costs and the payment of dividends of negligible amount.

Small bankruptcies

Part IX, which consists of section 154, provides that where a sequestration order is made against a debtor, the Court may make an order that a debtor's estate be summarily administered, if the Court is satisfied that the assets of the debtor are not likely to exceed in value three hundred pounds. In a summary administration the provisions of the Act in relation to the bankruptcy are subject to such modifications as are prescribed with the object of simplifying procedure and saving expense.

It is proposed that where it appears to the Court that a bankrupt's liabilities do not exceed one thousand pounds the Court may order that the bankrupt's estate be administered as a small bankruptcy and where the Court so orders, subject to any other order made, it will be unnecessary to call a meeting of creditors unless requested by a creditor, or to

[61] *Ibid.* para. 213; clause 134 (1) (a), (2).
[62] *Ibid.* para. 212; clause 134 (1) (b).
[63] *Ibid.* paras. 214-215; clauses 134 (1) (e), (f), (g); 135 (1) (e), (f), (g).

hold a public examination of the bankrupt unless a creditor requires it or the trustee considers that such an examination ought to be held.[64]

It is also recommended that such provisions of the Act as rules prescribe shall not apply in the summary administration of the estate.[65]

Offences against the Bankruptcy Act

Part XIV of the Act deals with offences against the Act. The Committee considers that this Part should in many respects be amended. Most of the amendments suggested are matters of detail and are not dealt with in this article.

One important amendment proposed it is necessary to mention. Section 217 provides that if the Court, in any application for an order of discharge either voluntary or compulsory, has reason to believe that the bankrupt has been guilty of an offence against the Act punishable by imprisonment, it may charge him with the offence and try him summarily.

By this provision the Court is placed in an inconvenient situation and in the opinion of the Committee it should be abandoned. It is proposed by the Committee that where the Registrar has reason to believe that a bankrupt has been guilty of an offence against the Act punishable by imprisonment he may report the matter to the Attorney-General, and the Attorney-General may then direct the Registrar to charge the bankrupt with the offence before the Court.[66]

Miscellaneous proposals

Various proposals made by the Committee are set out in its Report under the heading ' Miscellaneous Proposals '. One only of these proposals need be mentioned.

The Committee considered that the mere fact of the bankruptcy of a debtor ought not to be a ground for the determination or modification of certain contracts or agreements made between the debtor and another party. The exercise of the power to terminate or modify such agreements or contracts can deprive the trustee of an opportunity to wind up the business of a bankrupt with advantage to the creditors. The Committee has therefore made the following recommendation:

> A provision in a contract or agreement for the sale of property, in a lease of property, in a hire-purchase agreement or in a licence to the effect that—
>
> (a) the contract, agreement, lease, hire-purchase agreement or licence is to terminate or may be terminated by the vendor, lessor, owner or licensor;
>
> (b) the operation of the contract, agreement, lease, hire-purchase agreement or licence is to be modified; or

[64] *Ibid.* paras. 258, 260-261; clauses 185, 186 (a), (b).
[65] *Ibid.* para. 262; clause 186 (c), (d).
[66] *Ibid.* para. 375; clause 273.

(c) property to which the contract, agreement, lease, hire-purchase agreement or licence relates may be repossessed by or on behalf of the vendor, lessor, owner or licensor,

should be void if the purchaser, lessee, hirer or licensee becomes a bankrupt or commits an act of bankruptcy or executes a deed of assignment or a deed of arrangement.[67]

This article gives a brief account of the origins of the Bankruptcy Act 1924-1960 (Cth) and an outline of some important provisions of the Act which, in the opinion of the Committee, ought to be amended, and sets out briefly its proposals for the amendment of these provisions.

If the amendments proposed are adopted they will bring about some radical and, in the opinion of the Committee, necessary changes in the present law. By these amendments (and others not dealt with in this article) many unnecessary and restrictive proceedings in bankruptcy will be removed; the administration of the estates of bankrupts will be less arduous; the administration of the estates of debtors under private arrangements will be made more effective, and the costs of bankruptcy administration will be reduced.

[67] *Ibid.* paras. 383-385; clause 301.