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**AN BILLE FÉIMHEACHTA 1982**  
**BANKRUPTCY BILL, 1982**

*Mar a ritheadh ag dhá Theach an Oireachtais*  
*As passed by both Houses of the Oireachtas*

**EXPLANATORY MEMORANDUM**

*General*

1. The Bill proposes to consolidate and modernise the entire statute law relating to bankruptcy. While the Bill is based, in the main, on recommendations of the Bankruptcy Law Committee in its 1972 Report (Prl. 2714), detailed examination of the recommendations resulted in extensive revisions in the draft Bill appended to the Report.

2. Explanatory sidenotes to the text of the Bill indicate provisions that are new to the statute law and the existing statutory provisions that are being amended or consolidated. A legend to the sidenotes will be found at the beginning of the Bill.

*Main amendments proposed*

3. (1) A more efficient and speedy method is being provided for realising the estates of bankrupts and arranging debtors (*Parts III and IV*);

(2) the Official Assignee, subject to the overall control of the High Court, is being given primary responsibility in bankruptcy administration with specific powers and functions similar to those of a liquidator in the winding up of a company by the court (*section 61*);

(3) the minimum amount of a petitioning creditor's debt is being increased from £40 to £1,500, and the period during which an act of bankruptcy is available to ground a petition to adjudicate a person bankrupt is being reduced from six to three months (*section 11*);

(4) bankruptcy law is being aligned more closely with that governing the winding up of companies, particularly in regard to disclaimer of onerous property, fraudulent preferences, priority of expenses and preferential payments;

(5) the bankruptcy jurisdiction of the Cork Circuit Court is being abolished;

(6) provision is being made for the winding up in bankruptcy of the estates of persons dying insolvent (*Part VI*);

(7) "relation back" of the Official Assignee's title to a bankrupt's property to a date earlier than adjudication is being abolished (*section 44 (2)*);

(8) the doctrine of reputed ownership ("order and disposition") is not being re-enacted, i.e. the provision making available for distri-

bution to the creditors any property of which the bankrupt, with the true owner's consent, was reputed owner and on the basis of which the bankrupt had obtained credit.

*Note:* In this memorandum references to paragraphs, unless otherwise stated, are to paragraphs in the Bankruptcy Law Committee's Report. References to the 1857, 1872 and 1889 Acts are to the Irish Bankrupt and Insolvent Act 1857, the Bankruptcy (Ireland) Amendment Act 1872 and the Preferential Payments in Bankruptcy (Ireland) Act 1889 respectively.

## PART I: PRELIMINARY AND GENERAL

4. *Sections 1 and 2* are the short title and commencement provisions. The Act must be brought into operation not later than 1st January, 1989.

5. *Section 3* is the interpretation section. "Bankruptcy Inspector" is the new title given to the present Court Messenger. The debtor's summons, which under the present law is the most common method of instituting bankruptcy proceedings, is being renamed "bankruptcy summons" (*para. 2.10.6.*). "Property" is being defined so that it will be clear that the entire property of the debtor, including property situate outside the State, vests in the Official Assignee on adjudication (*para. 9.1.3.*).

6. *Section 4* is a transitional provision and is intended to solve any practical problems that may arise in relation to partially administered bankruptcies or arrangements. It applies the Act to these bankruptcies and arrangements insofar as its provisions are capable of application and subject to whatever modifications may be appropriate. However, the amendments made in the Bill in relation to preferential payments will not apply (see *section 81(6)* and (7)).

7. *Section 5* is the usual expenses provision and *section 6* deals with repeats.

## PART II: PROCEDURE IN BANKRUPTCY

8. *Section 7* lists the acts of bankruptcy any one of which a debtor must have committed before a petition can be presented to the Court to adjudicate him bankrupt. Two new acts of bankruptcy are being provided, i.e. where the debtor gives a fraudulent preference and where his goods are seized or there is a return of no goods (*paras. 2.10.10. and 2.10.5.*). Certain acts of bankruptcy that at present apply only in relation to traders, e.g. a debtor leaving his dwelling house, are being extended to non-traders (*paras. 2.9.3. and 2.14.1.*). The acts of bankruptcy created by the Auctioneers and House Agents Act 1967 and the Central Bank Act 1971 will not be affected (*paras. 2.9.9. and 2.10.9.*). *Subsection (1)* makes it clear that only an individual can commit an act of bankruptcy: partnerships as such and incorporated bodies cannot do so and cannot therefore be adjudicated.

9. *Section 8* repeats the conditions at present required before a debtor's summons (now "bankruptcy summons") may be issued. It makes statutory the existing requirement that the debt must be a liquidated sum and introduces a requirement that a notice in the prescribed form requiring payment of the debt must have been served on the debtor. Under existing law a debtor's summons may be issued for a debt of £20 although a debt of not less than £40 is required to found a creditor's petition for adjudication in bankruptcy. This anomaly is being removed by providing that the minimum amount of a debt for which a bankruptcy summons will be issued is the same as that required to enable a creditor to petition, i.e. £1,500. *Subsection (6)* provides that, if the debt is subsequently disputed by the debtor and the Court is satisfied that an issue arises for trial, the Court must

dismiss the bankruptcy summons: at present in such a case it can stay the proceedings (*para. 2.10.6.*).

10. *Section 9* re-enacts in modern form the provisions of the 1872 Act which authorise the arrest of absconding debtors.

11. *Section 10*, providing for the commencement of bankruptcy proceedings by petition verified by an affidavit, re-enacts the existing law. Existing provisions which allow a petition by one creditor to be availed of by another creditor if the former does not proceed are not being re-enacted (*para. 2.6.3.*).

12. *Section 11(1)* lays down the requirements that must be fulfilled to entitle a creditor to present a petition for adjudication against a debtor. The existing requirements are being modified by increasing the minimum debt to ground a petition from £40 to £1,500, by reducing from six to three months the period for which an act of bankruptcy is available for the purpose of obtaining adjudication and by requiring that the debtor must be domiciled or have resided or carried on business in the State within a year before the presentation of the petition (*paras. 2.7.1-3.*). *Subsection (2)* reproduces the present provisions regarding the position of a petitioning creditor who is a secured creditor and *subsection (3)* provides that a debtor may, as at present, petition to adjudicate himself.

13. *Section 12* modifies the existing law and enables the Court to order the costs of the petitioning creditor to be paid at or after the sitting referred to in *section 17*. At present the costs are payable on the appointment of a creditors' assignee. *Section 13* re-enacts the existing provision and provides that collusion between the bankrupt and any creditor in relation to a petition or act of bankruptcy will not invalidate the petition or adjudication.

14. *Section 14* provides that the Court will adjudicate a debtor on a creditor's petition if satisfied that the requirements of *section 11(1)* have been complied with. It also provides for service on the debtor of a copy of the order of adjudication.

15. *Section 15* deals with adjudication on the debtor's own petition. It re-enacts the existing law, contained in Order 76, rule 37, of the Rules of the Superior Courts 1962, with the modification that the assets of the petitioning debtor must be worth at least £1,500 (£300 at present). The Committee recommended (*para. 2.15.3.*) that the minimum value of the assets should be reduced to £100.

16. *Section 16* retains the procedure which allows a bankrupt to show cause against the validity of his adjudication but modifies it considerably. *Subsection (1)* extends the maximum time for showing cause to fourteen days. *Subsection (2)* provides, as at present, that, if within the time allowed the bankrupt shows that any of the requirements of *section 11(1)* (see paragraph 12) have not been complied with, the Court must annul the adjudication. The subsection further provides that in any other case the bankrupt's application may either be dismissed or adjourned on conditions specified by the Court. Specific provision is made for the Court, when adjourning the application, to have regard to the interests of the bankrupt, his creditors and any persons who might advance further credit to him, e.g. where the bankrupt is permitted to continue trading. (*Section 17(4)* allows the Court, on such an adjournment, to stay publication of the adjudication under certain conditions.) *Subsection (3)* provides that the show cause procedure will not be a bar to the immediate seizure of the goods of the bankrupt on adjudication.

17. *Section 17* provides for publication of notice of the adjudication in *Iris Oifigiúil* and in at least one daily newspaper in circulation in

the area where the bankrupt resides and for appointing a sitting of the Court (referred to as a "statutory sitting") at which the bankrupt must make full disclosure of his property and the creditors may prove their debts and choose and appoint a creditors' assignee (*subsections (2) and (3)*). The existing second sitting is being abolished (*para. 2.14.5.*). The statutory sitting must be held within three weeks of publication of the notice. *Subsection (4)* empowers the Court, on adjourning an application to show cause under *section 16*, to stay publication of the notice on security being given by the bankrupt or on such other conditions as the Court thinks fit.

18. *Section 18* accords generally with existing law and practice regarding the choice and appointment of a creditors' assignee. The role of the creditors' assignee has diminished over the years. Under the Bill it will be reduced still further. Since the property of the bankrupt will vest automatically on adjudication in the Official Assignee alone (*section 44*), the functions now exercised jointly by him and the creditors' assignee in relation to the property will no longer be shared (*paras. 2.14.2., 9.4.2. and 51.2.4.*).

19. *Section 19* sets out the duties of a bankrupt and is generally in accordance with the existing law and practice relating to delivering up his property, books of account, etc. to the Official Assignee and assisting him in administering the estate. The bankrupt's statement of affairs is statutorily provided for as recommended by the Committee and a much simpler form of statement than the present one is proposed to be prescribed (*para. 2.14.7.*). A duty to disclose after-acquired property (*paragraph (e)*) is expressly provided for as a corollary to *section 127*, which makes it an offence not to disclose such property. The Committee were in favour of providing that a bankrupt would be guilty, in addition, of contempt of court if he failed to perform the duties imposed by the section (Report, p. 428).

20. *Section 20* requires the bankrupt to notify *inter alia* any change of name or address to the Official Assignee (*para. 5.1.1.*). It is an offence for a bankrupt not to comply with this section.

21. *Section 21* deals with the Court's powers to summon and examine the bankrupt and other persons involved in one way or another in dealing with the bankrupt or his property or capable of giving information about his affairs. *Subsection (4)* gives effect to the Committee's recommendation that statutory effect should be given to the rule that a bankrupt cannot refuse to answer a question which might incriminate him and that this principle, which was enunciated in *Ex p. Schofield*, 6 Ch.D. 230, should be extended to all witnesses (*paras. 7.6.2., 7.10.1., and p. 432*). This section corresponds to section 245 of the Companies Act 1963.

22. *Section 22* provides for the payment or delivery of money or property to the Official Assignee by a person who on examination admits that he is indebted to the bankrupt or has property belonging to him. It re-enacts section 311 of the 1857 Act but is wider in scope.

23. *Sections 23 to 29* deal with arrest, committal and warrants. *Section 23* substantially re-enacts existing law regarding the Court's power to have a bankrupt or any of the persons referred to in *section 21* arrested and brought before it for examination. *Section 24* provides for the committal to prison of a bankrupt or any person who refuses to answer questions or otherwise disobeys any order of the Court and *section 25* for bringing before the Court the imprisoned persons and for their release if they comply with the Court's requirements. These sections are designed to clarify existing provisions as recommended by the Committee (*para. 7.11.1.*). *Section 26* is new. It provides for the release by the Court of a debtor who is imprisoned under section

6 of the Enforcement of Court Orders Act 1940 and subsequently becomes bankrupt (*para. 2.14.6.*). A debtor may be imprisoned under section 6 of that Act if he fails to obey a court order directing him to pay a debt either in one payment or by instalments. *Section 27* re-enacts in modern form the existing law which empowers the Court Messenger (now to be the Bankruptcy Inspector) and his assistants acting under warrant of the Court to seize property of the bankrupt and for that purpose to break open any house or place where the bankrupt or any of his property is reputed to be (*para. 8.6.1.*). *Section 28* re-enacts existing law in accordance with the recommendation of the Committee that a special application to the Court should be made for a search warrant where there is reason to believe that any property of the bankrupt is concealed in a place not belonging to him (*para. 8.6.1.*). *Section 29*, which indemnifies persons acting under warrant, also re-enacts existing law.

#### *Partnership cases*

24. *Section 30* represents existing law subject to the modification that only the Official Assignee and the bankrupt's partner may be authorised to sue to recover a debt due to the partners. At present the creditors' assignee must also be joined with them in taking the action.

25. *Section 31* deals with the presentation of a petition against one or more partners (*paras. 39.5.1/2. and 39.10.2.*). It re-enacts existing law.

26. *Section 32* is new. It provides that where a member of a partnership is adjudicated the Official Assignee may require the other partner(s) to produce accounts and information relating to the partnership and the bankrupt's interest therein. That information will enable the Official Assignee to decide whether an application should be made under *section 138* for an order winding up the partnership by reason of delay (*paras. 39.10.7/8.*).

27. *Section 33* is also new. It is designed to assist the Official Assignee in assessing the value of a partner's share in the partnership property where he alone is adjudicated. It requires the bankrupt partner to deliver to the Official Assignee a separate statement of affairs in respect of the partnership in addition to his own (*para. 39.10.3.*).

28. *Section 34* deals with the distribution of joint and separate properties where members of a partnership are adjudicated. It makes statutory the provisions of Order 76, rules 88-90, of the Rules of the Superior Courts 1962 (*para. 39.10.4.*).

29. *Section 35*, which is new, implements a recommendation of the Committee that, where a bankrupt is a party to a contract jointly with another person, that person may sue or be sued in respect of the contract without joining the bankrupt (*para. 39.10.9.*).

30. *Section 36*, which is also new, deals with proceedings under the Bill by or against a partnership. It gives effect to the Committee's recommendation that any partners carrying on business under a partnership name may sue or be sued in the name of the firm; the Court may order the disclosure of the partners' names (*para. 39.10.10.*). It repeats the existing law that a firm cannot be adjudicated but that the individual partners can.

31. *Section 37* replaces with amendments section 345(8) of the Companies Act 1963, which applies the Bankruptcy Acts to limited partnerships as if they were ordinary partnerships and provides that on the adjudication of all the partners of a limited partnership the

assets of the partnership should vest in the Official Assignee. In accordance with the Committee's recommendations the section provides that the assets of a limited partnership shall vest in the Official Assignee where all the *general* partners are adjudicated (*para.* 39.11.2.).

#### *Composition after bankruptcy*

32. *Sections 38 to 41* continue, subject to changes recommended by the Committee, the existing system of composition after bankruptcy which enables a bankrupt to negotiate a settlement with his creditors under the aegis of the Court (*paras.* 3.1.1. and 3.6.1.).

33. *Section 38* makes statutory the existing practice whereby the bankrupt or his solicitor applies to the Court for a stay on realisation of the estate to enable him to make an offer of composition to his creditors (*para.* 3.3.2.).

34. *Section 39* re-enacts existing law under which the bankrupt calls a meeting of his creditors before the Court. If at the meeting three-fifths in number and value of the creditors accept the offer of composition and the Court approves of it, the offer is binding on all creditors. In accordance with the Committee's views several changes are being made. Only one composition meeting is to be held (the second meeting is being abolished). In deciding on an offer, any creditor whose debt is less than £100 will not be entitled to vote at the meeting, i.e. he will not be reckoned in number, or his debt in value, to arrive at the required majority (at present a creditor whose debt is less than £20 is not reckoned in number but the debt is computed in value). The Court is to have full control over the composition, i.e. it must approve of it before it is binding (there is no such requirement at present but the Court can refuse to annul the adjudication if the offer is not reasonable and proper). If for any reason the bankrupt has not already done so, he must file the statement of affairs required by *section 19(c)* at or before the meeting (at present he must file it ten days before the first of the two meetings) (*paras.* 3.6.1-5.).

35. *Section 40* also gives statutory effect to existing practice regarding payment of a composition, subject to the following recommended changes, namely, (i) that an instalment may not be secured by a bill, note or other security signed by or enforceable against the bankrupt alone and (ii) that the Court should have discretion to refuse to approve of an offer if the final instalment is not payable within two years (*para.* 3.6.4.).

36. *Section 41* provides that in the absence of fraud the Court must discharge the adjudication order on the application of the bankrupt or his personal representative and on the report of the Official Assignee after lodgment with him of the cash or specified securities (*paras.* 3.3.4., 3.6.6. and 38.6.1.).

#### *Bankrupt dying after adjudication*

37. *Section 42*, which provides that if a bankrupt dies the Court may proceed in the bankruptcy as if he were living, is a re-enactment of the existing law.

#### *Subsequent bankruptcy*

38. *Section 43* is new. It implements the Committee's recommendation that creditors in second or subsequent bankruptcies (i.e. where an undischarged bankrupt is again adjudicated) should have priority in those bankruptcies. The present practice is that the Official Assignee claims the assets of the second bankruptcy for the benefit of the creditors of the first bankruptcy (*para.* 57.2.2.).

### PART III: ADMINISTRATION OF PROPERTY

39. This Part deals with the effect of adjudication on the bankrupt's property (*sections 44 to 56*), fraudulent and voluntary conveyances (*sections 57 to 59*), management of the estate, including the powers and functions of the Official Assignee (*sections 60 to 79*) and distribution of the estate (*sections 80 to 86*).

#### *Effect of adjudication on bankrupt's property*

40. *Section 44* changes and modernises the law regarding the vesting of the bankrupt's property on adjudication in accordance with the Committee's recommendation that there should be absolute vesting in the Official Assignee alone. At present the property vests in both the Official Assignee and the creditors' assignee and they can elect not to take leasehold property of the bankrupt or not to abide by an agreement he has made to buy any estate in land. The power to elect is being abolished (*paras. 9.2.1. and 9.4.2/3.*).

41. *Subsection (1) of section 44* vests in the Official Assignee immediately on adjudication all the property of the bankrupt, subject to the exceptions specified in the Bill. *Subsection (2)*, in providing that the title of the Official Assignee shall not commence at an earlier date than the date of adjudication, effectively abolishes the non-statutory doctrine of "relation back" (*para. 59.8.1.*). Under this doctrine, where adjudication is on a creditor's petition, the Official Assignee's title dates from the time of the act of bankruptcy on which the adjudication is based or, if the debtor is proved to have committed more acts of bankruptcy than one, from the time of the first of the acts of bankruptcy proved to have been committed within six months of the petition. There is no relation back beyond the time of the contracting of the debt of the petitioning creditor. Where the bankrupt is adjudicated on his own petition or an arranging debtor is adjudicated, the Official Assignee's title dates from the adjudication. *Subsection (3)* elaborates on the vesting provision in *subsection (1)* by stipulating that the property which vests in the Official Assignee includes (a) all powers vested in the bankrupt which the latter might legally exercise immediately before the date of adjudication and (b) all property the subject matter of conveyances or transfers which *sections 57 to 59* (dealing with fraudulent preferences, etc.) render void as against the Official Assignee. (*Section 47* provides for the vesting in the Official Assignee also of post office and other savings.) *Subsection (4)* mentions specifically certain classes of property which will not vest in the Official Assignee, namely, trust property, sums to the credit of certain client accounts which vest in the Official Assignee under *section 7(1)(a)* of the Auctioneers and House Agents Act 1967 and certain amounts deposited under *section 7* of the Central Bank Act 1971, which vest in him under *section 30(i)* of that Act. These exceptions are not exhaustive. Other provisions of the Bill allow for part of the bankrupt's property to be retained by him (*sections 45, 65 and 71*). In addition, property may be deemed not to be part of the estate of the bankrupt by virtue of certain other enactments, e.g. Social Welfare (Consolidation) Act 1981, *sections 120(3) and 250(3)*. *Subsection (5)* provides that all after-acquired property claimed by the Official Assignee will vest in him but not damages recovered or recoverable by the bankrupt for personal injury or loss suffered by him.

42. *Section 45* continues the existing provisions entitling the bankrupt to retain certain articles (household furniture, etc.). The maximum value of the articles is being increased from £20 to £2,500 or such further sum as the Court may allow (*para. 12.4.2. and p. 436*).

43. *Section 46* re-enacts existing law in modern form. It provides that, where according to law any conveyance of land is required to

be registered and such land becomes vested in the Official Assignee under this Part of the Bill, a certificate under the seal of the Court shall be issued to him as evidence of the vesting and further that registration of the certificate by him will have the same effect as registration of a conveyance of the land would have had (*subsection (1)*). The title of a purchaser of any such land for valuable consideration in good faith and without notice of the adjudication who has registered his conveyance before registration of the certificate is not to be affected by the adjudication unless the certificate is registered by the Official Assignee within two months after the adjudication.

44. *Section 47*, which is new, gives effect to the Committee's recommendation that money in the Post Office Savings Bank or securities, e.g. saving certificates, issued through An Post by the Minister for Finance under his statutory borrowing powers and to which a bankrupt is entitled should vest in the Official Assignee (*para. 18.4.1.*). The section also provides that money of the bankrupt lodged with a trustee savings bank will also vest in the Official Assignee (Report, p. 438).

45. *Section 48* is also new. There is no specific statutory provision to cover the situation where the bankrupt's property includes the copyright in any work and he is liable to pay royalties to the author in respect of it. The section provides that the author of the work should receive royalties in full where the Official Assignee sells any copies of the work or authorises it to be performed (*para. 20.3.1.*).

46. *Section 49* (new) enacts that a covenant for forfeiture of a lease on the bankruptcy of the lessee or a clause in a hire-purchase agreement providing for the termination of the agreement on the bankruptcy of the hirer shall be void as against the Official Assignee. The Committee regarded such covenants and clauses as contrary to the principle of equitable distribution amongst creditors (*paras. 13.2.1. and 13.3.1.*).

47. *Section 50*, which deals with execution orders made against the debtor's property before adjudication, re-enacts section 54 of the 1872 Act with amendments. That section requires the sheriff or county registrar, where he has seized goods of a trader for a sum exceeding £20, to retain the proceeds of sale for 14 days. If notified within that period of the trader's bankruptcy, he must hold the proceeds, after deducting expenses, on trust for the assignees. The amendments, which are in accordance with the Committee's recommendations, include an increase in the 14-day period to 21 days and the extension of the section to cover all debtors (and not merely traders) and money paid to avoid seizure or sale (and not merely the proceeds of sale) (*paras. 14.3.4-9.*).

48. *Section 51* re-enacts existing bankruptcy and company law regarding the priority of a judgment mortgage registered under the 1850 Act except that the date of adjudication is substituted for the date of petition (*para. 14.4.1.*).

49. *Section 52* repeats the existing law, which empowers the Court to put a purchaser into possession of land sold by or under its direction and extends it to land sold under the power of sale conferred on the Official Assignee by *section 61(3)(a)*.

50. *Section 53* empowers a mortgagee of the property of a bankrupt or arranging debtor, with the leave of the Court, to bid and purchase at its sale. It re-enacts the present law.

51. *Section 54* protects from claims by a bankrupt any persons from whom the Official Assignee has recovered or received the bankrupt's

property or who have paid to the Official Assignee debts owed to the bankrupt, notwithstanding that the bankruptcy is subsequently annulled or discharged. It is substantially a re-enactment of the existing law (*para.* 21.3.1.).

52. *Section 55* reproduces in modern form the existing provision whereby the title to any property sold in bankruptcy is not invalidated by reason only of a defect in any proceedings under the Bill.

53. *Section 56* continues the existing power of the Official Assignee to disclaim onerous property. The Committee recommended that the dual system of election (see paragraph 40) and disclaimer should be discontinued and a single system of disclaimer substituted (*para.* 9.4.3/4.). The provisions have been brought into line as far as possible with section 290 of the Companies Act 1963, which empowers a liquidator to disclaim onerous property when a company is being wound up.

#### *Fraudulent and voluntary conveyances*

54. *Section 57(1)* provides for the avoidance of fraudulent preferences. It corresponds with minor amendments to section 53 of the 1872 Act, as replaced by paragraph 1 of the Eleventh Schedule to the Companies Act 1963, but it will no longer apply to arrangements because of their essentially voluntary character (*para.* 22.7.7.). *Subsection (2)* reproduces, with appropriate amendments, section 287 of the 1963 Act, which applies to bankruptcy by virtue of paragraph 2 of the Eleventh Schedule to that Act. (Section 287 enables a bank, on being compelled to refund to a liquidator moneys paid into an account within six months before the winding up with a view to giving a guarantor or surety a fraudulent preference, to recover these moneys from the guarantor or surety.)

55. *Section 58*, which is new, is consequential on the abolition of the doctrine of relation back (see paragraph 41). Since in the Committee's view abolition could lead to fraud they recommended avoidance of certain transactions within three months before adjudication (*para.* 22.7.5.). *Subsection (1)* implements this recommendation in substance and provides that sales at a substantial undervalue or any other transaction which would have the effect of substantially reducing the sum available for distribution to the creditors will be void as against the Official Assignee: the transactions must have been entered into after an act of bankruptcy has been committed and within three months before adjudication. The transactions mentioned in *sections 57(1)* and *59* are excluded and there is a saver for *bona fide* purchasers.

56. *Section 59* provides for the avoidance of certain voluntary settlements of property made before adjudication. Unlike existing law, the section applies to all debtors, whether traders or not, and also to settlements made by wives as well as husbands (*para.* 23.10.1.). *Subsection (1)* re-enacts the existing law except that persons claiming under a voluntary settlement made within five (formerly ten) years before the settlor's bankruptcy must prove not only that the settlor was able to pay his debts at the date of the settlement without the aid of the property comprised in it but also that the settlor's interest in the property had passed to the trustee of the settlement on its execution (*paras.* 23.6.1. and 23.10.1.). *Subsection (2)* deals with covenants or contracts in consideration of marriage for the future payment of money or future settlement of property for the benefit of the settlor's spouse or children. A covenant or contract of this kind will also be void as against the Official Assignee if the settlor is adjudicated bankrupt before the covenant or contract is executed. This is the present law, with the addition of a proviso that the beneficiaries may prove their claims in the bankruptcy, although these claims will be postponed to those of other creditors for valuable

consideration (*para.* 23.9.1.). *Subsection (3)* is new. It avoids, as against the Official Assignee, certain payments of money or transfers of property made in pursuance of the covenants or contracts mentioned in *subsection (2)*. *Subsection (3)* does not apply to payments of premiums on policies of life assurance.

#### *Management provisions*

57. *Sections 60 to 79* are concerned with the management of the bankrupt's estate and implement the recommendations of the Committee regarding the future status of the Official Assignee and his office, powers and functions. The recommendations envisage that the Examiner will no longer have a function in relation to the administration of bankrupts' estates.

58. *Section 60* deals with the office of the Official Assignee. The statutory basis of the office, i.e. paragraph 3 of the Eighth Schedule to the Courts (Supplemental Provisions) Act 1961, remains unchanged. *Subsection (1)* replaces in modern form section 12 of the Court Officers Act 1926, which is being repealed. *Subsections (2)* and *(3)* implement the Committee's recommendation that the Court Messenger should be renamed Bankruptcy Inspector. Paragraph 22 of the Eighth Schedule to the 1961 Act, referred to in *subsection (2)*, deals generally with employment of staff in the offices attached to the High Court, the Supreme Court and the President of the High Court.

59. *Section 61* sets out the duties and functions of the Official Assignee. It implements the Committee's view (Report, chapter 51) that the Official Assignee should have complete freedom in administering bankruptcies (*subsection (7)*), subject to the overriding control of the Court and the right of a creditor or other person to apply to the Court in relation to the exercise or proposed exercise of the Official Assignee's powers. *Subsection (2)* gives the Official Assignee a general power to get in and realise the property in every bankruptcy and vesting arrangement and to distribute it. *Subsection (3)* lists the particular powers conferred on the Official Assignee, which are akin to those of the liquidator on the winding up of a company by the court (see section 231 of the Companies Act 1963). *Subsection (4)* provides that no disposition or sale of a family home can take place without the prior sanction of the Court, and *subsection (5)* lays down guidelines to assist the Court in exercising its power to postpone the sale of a family home. *Subsection (6)* provides that the Official Assignee may seek the directions of the Court in any case of doubt or difficulty. *Subsection (8)* indicates when the powers and functions conferred on him by the section may be exercised and performed.

60. *Section 62* sets out the various duties of the Bankruptcy Inspector (*para.* 52.3.1.).

61. *Section 63* re-enacts the present law by providing that the Official Assignee shall not be liable by reason of any of the matters on which the adjudication was grounded being insufficient to support the adjudication or in respect of his receipt of any property provided he has dealt with it in accordance with the directions of the Court or the provisions of the Bill or rules of court.

62. *Section 64* re-enacts the existing law which empowers the Official Assignee, with the Court's sanction, to deal with property to which a bankrupt is beneficially entitled as tenant in tail in the same way as the bankrupt might have dealt with it if he had not been adjudicated (*para.* 26.1.1.).

63. *Section 65* reproduces the existing law regarding the power of the Court, on the application of the Official Assignee, to appropriate

the whole or part of a bankrupt's income from a particular source and extends it to cover the earnings of self-employed persons. The existing requirement in certain cases of departmental or other sanction for payment to the Official Assignee of portion of a salary or income is being dispensed with. In applying the section the Court will have regard to the family responsibilities and personal situation of the bankrupt (*para. 27.5.1.* and p. 445).

64. *Section 66* requires the delivery to the Official Assignee, on request, of all money or securities for money which a person is not entitled to retain as against the bankrupt or the Official Assignee. Under the existing provision (section 324 of the 1857 Act) this requirement is confined to solicitors and other agents of the bankrupt.

65. *Section 67* (new) gives the Official Assignee the same power to transfer stocks or shares belonging to a bankrupt, or an arranging debtor in a vesting arrangement, as either of them would have had but for the bankruptcy or arrangement (*para. 28.2.1.*). At present a transfer of stocks or shares into the name of the assignees requires an order of the Court.

66. *Section 68* is a new provision which gives the Official Assignee a right to inspect any of a bankrupt's goods which have been pawned or pledged so that he may have a reasonable opportunity of exercising the right of redemption (*para. 33.1.1.*).

67. *Section 69(1)* provides that the Official Assignee alone is to be the assignee of each bankrupt's estate but he will act, as at present, with the creditors' assignee (if any). The property of the bankrupt and the income and proceeds thereof will be possessed by the Official Assignee (*subsection (2)*). *Subsection (3)* provides that all money and securities received by him will be lodged in the Central Bank, while money standing to the credit of bank accounts in bankruptcy or arrangement matters at the commencement of the Act will be dealt with by rules of court (*subsection (4)*). *Subsection (5)* proposes that he should require the leave of the Court for the investment of bankruptcy funds and is based on existing law.

68. *Section 70* is new. It follows the Committee's recommendation that a claimant to property in the possession of a bankrupt should file with the Official Assignee a claim verified by affidavit. If an affidavit is not filed within a month after service of a notice to any person to prove his claim to the property, the Official Assignee may sell or dispose of it free of the claimant's interest. The section is designed to expedite dealing with genuine claims and to prevent false claims (*para. 34.1.1.*). The sale or disposition of the property will require the sanction of the Court.

69. *Section 71* replaces various provisions in existing law relating to the payment of allowances to a bankrupt. The Committee recommended the repeal of these provisions and the substitution of a simple provision empowering the Court to make such allowances as it thinks proper in the special circumstances of the case (*para. 29.2.1.*).

70. *Section 72* re-enacts in substance the existing power of the Court to order the redirection to the Official Assignee of letters addressed to the bankrupt. It extends the present provisions to include telegrams and postal packets (*para. 35.3.1.*).

71. *Section 73*, by providing that the Court may appoint a receiver or manager of the property of a bankrupt or arranging debtor and direct him to take immediate possession of it, re-enacts in principle existing law (*para. 17.3.1.*).

72. *Section 74* re-enacts the present law in accordance with which a creditor of a partnership may prove in the bankruptcy of one or more of the partners for the purpose of voting in the choice and appointment of a creditors' assignee but may not receive any dividend out of the separate estate of the bankrupt until all the separate creditors have been paid in full (*para. 39.8.1.*).

73. *Section 75(1)* sets out the debts that are provable in a bankruptcy or arrangement. It gives effect to the Committee's recommendation to replace the various proof of debts sections in the present law by an omnibus provision (*para. 43.14.1.*). Interest reserved or agreed for on a debt which is overdue at the date of adjudication may be proved up to that date (*subsection (2)*). *Subsection (3)* empowers the Court, where all the necessary parties agree, to make an order in the bankruptcy proceedings for the assessment of unliquidated damages notwithstanding that it is not the court before which the claim for damages falls to be determined. Under *subsection (4)* the Court may estimate the value of a debt which is subject to a contingency or which for any other reason is of uncertain value. These subsections re-enact in principle the existing law.

74. *Section 76* alters the law concerning proof of debts in bankruptcies or arrangements. At present the documents relating to debts are examined by the Official Assignee and his staff and are then submitted to the Assistant Examiner at sittings for proof and admission of debts. Debts may also be proved at other sittings of the Court, e.g., the first public sitting for the choice and appointment of a creditors' assignee. Under this section and the *First Schedule* creditors will normally prove their debts by sending the required documentation to the Official Assignee by post and by attendance at his office if necessary. Debts may also be proved at sittings of the Court (see paragraph 145). The admission or rejection of debts will ordinarily be a matter for the Official Assignee in the first instance and only disputed claims will be referred by him to the Court (see *paragraph 23(c)* of *First Schedule*).

75. *Section 77* substitutes a reference to the Official Assignee for the reference to a trustee in bankruptcy in section 12(2) of the Factors Act 1889. That section regulates the rights of an owner of goods in the case of the bankruptcy of a mercantile agent to whom they have been entrusted (*paras. 43.7.8. and 43.14.13.*).

76. *Section 78* re-enacts the existing law whereby a creditor may prove for the costs of a judgment obtained before the debtor is adjudicated or granted an order for protection (*para. 43.14.31.*).

77. *Section 79* re-enacts existing law which empowers the Court to disallow a debt already proved or admitted but authorises the bankrupt or arranging debtor as well as the Official Assignee or a creditor to apply to have the debt disallowed (*para. 43.14.27.*).

#### *Distribution of estate*

78. *Sections 80 to 86* deal with priority of expenses, preferential payments, distribution of estate, accounts and audit, the Unclaimed Dividend Account, discharge and annulment, and surpluses in bankruptcies.

79. *Section 80* provides that the expenses, fees and costs of a bankruptcy are payable in priority to the liabilities of the bankrupt in such order as may be prescribed by rules of court. It is based on section 244 of the Companies Act 1963. At present these priorities are not provided for by statute or rule of court (*para. 32.1.1.*).

80. *Section 81* re-enacts with amendments the existing statutory provision governing preferential payments in bankruptcy, i.e. section 4 of the 1889 Act, as amended. The section also proposes to align the preferential debts payable in bankruptcy with those payable on the winding up of companies and is, in fact, modelled on section 285 of the Companies Act 1963, as amended by the Companies (Amendment) Act 1982.

81. In *subsection 1 (b)* and *(c)* of *section 81* the maximum amount of the preference for wages or salaries is being increased to £2,500 from £50 (for clerks or servants) and £25 (for labourers or workmen). *Subsection 1(d)–(f)* is derived from company legislation. *Subsection 1 (g)* is an omnibus provision covering all preferential payments created by various enactments, e.g., the Social Welfare (Consolidation) Act 1981, the Redundancy Payments Acts, etc., under which certain specified payments or contributions were included amongst the debts to which priority was given by section 4 of the 1889 Act. *Subsection 2*, which provides that preferential debts rank equally between themselves, re-enacts the existing law, as do *subsections 3*, *(4)* and *(6)* to *(10)*. *Subsection 5* has been taken from section 285 (11) of the 1963 Act, as amended by the Companies (Amendment) Act 1982. *Subsection 6* follows section 4 (5) of the 1889 Act and the analogous provisions of section 285 (12) of the 1963 Act. The reference in *subsection 10* to section 3 of the Partnership Act 1890 is a saver for the existing law governing the postponement of a claim of a silent partner (*para. 43.14.22*). Section 14 of the Trustee Savings Banks Act 1863, also referred to in *subsection 10*, provides that the assets of a bankrupt officer of a trustee savings bank shall be charged with all moneys received by him by virtue of his office and remaining due by him to the bank. The provision in the Friendly Societies Act 1896, whereby an arranging debtor or a bankrupt who is a treasurer of a friendly society must pay the full amount of his debt to the society before paying his other creditors a composition or dividend, is being preserved by this section. The preference for apprenticeship fees under section 250 of the 1857 Act is not being re-enacted. The Committee regarded it as an anachronism (*para. 55.9.1*).

82. *Section 82* provides a new, simplified procedure for the distribution of a bankrupt's estate in place of the existing system (known as "audit and dividend") under which the Examiner vouches the bankrupt's account in the Official Assignee's books and prepares a report for the sitting of the Court at which an order for distribution is made (*para. 36.2.1*). The section envisages that, as soon as the Official Assignee has sufficient funds to warrant a distribution, he will place on the Court file a list of creditors admitted, a copy of the relevant account of the bankrupt's estate, particulars of expenses, fees, costs, preferential payments and dividend payable, as well as his report to the Court on the realisation of the estate (*subsection 1*). At a sitting to be held not less than 21 days after notice of the filing and of the sitting the Official Assignee will present to the Court the documents and the report (*subsection 2*), and the Court may then make an order for distribution of the estate (*subsection 3*). *Subsection 4* provides for public inspection of the Court file. Where a residue remains or further assets become available subsequent distributions may be made (*subsection 5*). *Subsection 6* deals with the situation where there are insufficient funds available to pay the creditors.

83. Under *section 83* rules of court will prescribe the accounts to be kept by the Official Assignee and make provision for their audit.

84. *Section 84* proposes to replace the existing Unclaimed Dividend Account, which is operated by the Bankruptcy Judge and the Exam-

iner, and the similar account operated by the Cork Local Bankruptcy Court, by a new account which is to be opened by the Official Assignee (*para.* 37.4.3. et seq.) in the Central Bank and to which he will transfer all unclaimed dividends and moneys (*subsections* (1) and (2)) He will be entitled to pay out of it all dividends lawfully claimed as well as the sums referred to in *section 61* (3) (*k*) (an order of the Court is now required to pay unclaimed dividends (*para.* 37.4.3.)). *Subsection* (3)(*b*), which derives from Order 76, rule 168, of the Rules of the Superior Courts 1962, allows temporary withdrawals from the Account to cover payments for which no funds are immediately available in the particular estate against which they are chargeable. *Subsection* (4) empowers the Official Assignee to invest, with the leave of the Court, moneys standing to the credit of the Account. *Subsection* (5) re-enacts existing law with the amendment recommended by the Committee that payment by way of indemnification may be made out of the corpus of the fund as well as out of interest (*para.* 37.4.4.). *Subsection* (6) is a new provision which implements the Committee's view that the Account should not be available for any purposes other than those specified in the section (*para.* 37.4.5.).

85. *Section 85* deals with discharge and annulment of bankruptcies. Since the existing statutory procedures (composition after bankruptcy and certificate of conformity) and the practice of annulments with the consent of creditors have not been availed of to the extent intended, the Committee were of the opinion that a new system of discharge and annulment was called for (*para.* 38.5.1/2.). *Subsections* (1) and (2) provide for the discharge of all bankruptcies subsisting at the commencement of the Act where the adjudication took place before 1 January 1960: the date recommended by the Committee, which reported in 1972, was 1 January 1950 (*para.* 38.5.4.). For other bankruptcies *subsection* (3) provides that a bankrupt will be entitled to a discharge when provision has been made for the payment of the expenses, etc. in the bankruptcy as well as the preferential debts and he has either paid one pound in the pound with such interest as the Court may allow or has obtained the consent of all the creditors. In the case of a composition after bankruptcy, he will be entitled to a discharge when, pursuant to *section 41*, he has lodged with the Official Assignee cash or securities sufficient to meet the composition (*paras.* 38.2.3. and 38.6.1.). *Subsection* (4) makes further provision for the discharge of a bankruptcy, i.e. where the bankrupt's estate has in the opinion of the Court been fully realised and certain specified conditions have been complied with, e.g. where either 50 pence or more in the pound has been paid or the bankruptcy has subsisted for twelve years; in the latter case the Court must be satisfied that all after-acquired property has been disclosed and that it is reasonable and proper to grant a discharge. *Subsection* (5) entitles a bankrupt to an annulment of the adjudication where he has shown cause under *section 16* or in any other case where, in the opinion of the Court, he ought not to have been adjudicated bankrupt. The latter provision gives statutory effect to *Re M'G. 11 I.L.T.R. 93*, which deals with setting aside or annulling an adjudication on equitable grounds (Report, p. 450). Under *subsection* (6), an order of discharge or annulment will provide for the property to be re-vested in the bankrupt and the order will be deemed to be a conveyance, assignment or transfer which may be registered, where appropriate (*para.* 38.6.5.). *Subsection* (7) is in line with the Committee's decision to abolish the certificate of conformity (*para.* 38.6.4). It provides that any person entitled to a discharge or annulment may apply to the Court for a certificate to that effect under the seal of the Court.

86. *Section 86* deals with the payment or delivery to the bankrupt of any surplus in bankruptcy after payment of debts with interest at the rate currently payable on judgment debts. *Subsection* (2) (new)

deems the Court order for the payment or delivery of the surplus to be a conveyance or transfer which may be registered.

#### PART IV: ARRANGEMENTS UNDER CONTROL OF COURT

87. This Part (*sections 87 to 109*) gives effect to the Committee's recommendation that the system of private arrangements under the control of the Court should be continued. These arrangements allow a trader to continue trading, to maintain his place in the commercial world and to be helped by his friends. Moreover, he is assisted by the Court and its officers and the minority creditors are protected by the Court's power to refuse to sanction a proposal (*para. 42.6.3.*).

88. *Section 87* provides that, as at present, a debtor seeking to effect an arrangement with his creditors under the control of the Court may present a petition to the Court requesting that his person and property be protected from any action or other process until further order. *Subsection (3)*, which is new, provides that the Court may refuse to grant protection to a debtor who is a member of a partnership unless all the partners join in the petition (*para. 42.16.3 and p. 221*). *Subsection (6)* replaces the existing law regarding the release of a petitioner imprisoned for failure to pay a debt (*para. 42.7.1.*).

89. *Section 88* makes statutory a provision, now incorporated in the protection order, prohibiting an arranging debtor, without the sanction of the Court, from disposing of his property save in the ordinary course of trade (*para. 42.9.1.*).

90. *Section 89* is new. It implements the Committee's recommendation that an order for protection may be granted to a debtor notwithstanding that an execution order is in the hands of a sheriff or county registrar (*para. 42.7.1.*). The order for protection will protect the debtor against execution unless the sheriff or county registrar has made a seizure or gone into possession and the execution creditor will be bound by the arrangement.

91. *Section 90* is also new. It sets out the procedure to be followed after the granting of an order for protection, i.e. the delivery forthwith by the arranging debtor to the Official Assignee of a memorandum containing details of his assets and liabilities; a preliminary meeting of creditors; and a subsequent private sitting before the Court to consider the arranging debtor's proposal. Since the debtor's proposal will have evolved from the preliminary meeting of creditors, only one sitting before the Court (instead of two under existing law) is being provided for (*para. 42.11.1.*). The memorandum to be submitted to the Official Assignee replaces the documents at present required to be lodged pursuant to the Deeds of Arrangement Act 1887, as applied to arrangements under the control of the Court by the Deeds of Arrangement Amendment Act 1890 (*paras. 42.4.21. and 42.8.1.*). The 1890 Act is being repealed by the *Second Schedule*.

92. *Section 91* sets out the statements to be filed by the arranging debtor. The Committee considered that the time allowed for preparation of the statement of affairs was insufficient and the section requires it to be lodged at least two days before the private sitting instead of ten days before the first sitting as at present (*para. 42.10.4.*).

93. *Section 92*, which deals with the procedure at the private sitting for voting on and accepting the arranging debtor's proposal, re-enacts existing law with minor amendments. The minimum value of a debt entitling a creditor to vote at the sitting has been increased from £10 to £100: the Committee recommended £20 (*para. 42.11.1.*).

94. *Section 93(1)* contains provisions regarding vesting of the arranging debtor's property in the Official Assignee. The arranging debtor's proposal may provide for vesting in the Official Assignee either as security for the offer (i.e. for realisation in default of the payment of the composition) or for the purpose of having the property realised and distributed by the Official Assignee. In either case the approval of the Court and the consent of the Official Assignee is necessary. The requirement of consent by the Official Assignee to the vesting in him is new and was recommended by the Committee in order to give the Official Assignee the opportunity of investigating beforehand whether such an arrangement would be in the interest of the creditors (*paras. 42.13.3/4*). Where property is vested for realisation and distribution, i.e. under a vesting arrangement, the Official Assignee will have the same powers of realisation and distribution as in bankruptcy (*para. 42.13.5.*) and *section 46*, relating to the issue and registration of a certificate of vesting, will apply (*subsections (2) and (3)*).

95. *Section 94* sets out the procedure for distribution in the case of a vesting arrangement (*para. 42.20.1.*). It is similar to that in bankruptcy (see *section 82* and *para. 36.2.1.*) but there is no advertisement of the filing in the Central Office of particulars of the proposed distribution.

96. *Section 95* re-enacts existing law, subject to modifications recommended by the Committee (*para. 42.17.2.*). It provides for a special private sitting to be held, on the application of the arranging debtor, where a proposal has been accepted and approved and the Court considers it necessary (*subsection (1)*): the object is to provide a means for carrying through an arrangement that would otherwise fail. At the special sitting the majority in number and value of the creditors who have proved debts of not less than £100 may confirm, alter or annul the original proposal (*subsection (2)*) but, if one-third in number and value of these creditors do not attend the sitting, the decision at the sitting will not be valid unless approved by the Court (*subsection (3)*).

97. *Section 96* is new. It provides, in accordance with the Committee's recommendation, that an arranging debtor's proposal will be considered to be carried into effect when it is approved by the Court (in the case of a vesting arrangement) and in any other case at such time as may be prescribed (*paras. 42.19.1 and 42.21.1.*).

98. *Section 97* (new) requires an arranging debtor in the case of a non-vesting arrangement to lodge the cash and securities with the Official Assignee for distribution. The object is to ensure that all compositions are paid through the Official Assignee.

99. *Section 98* (new) provides for granting a certificate to an arranging debtor which will operate as a discharge to him from the claims of creditors who received notice of the arrangement. The present certificate operates like a certificate of conformity in bankruptcy (that certificate is being abolished: see paragraph 85 and *para. 38.6.4.*). Except in the case of a vesting arrangement, the present certificate may not be applied for until the agreed composition has been paid to creditors. The proposed certificate may be issued to an arranging debtor at any time after his proposal has been carried into effect because, as the period in which proofs of debt may be lodged is being restricted (*First Schedule, paragraph 3*), the amount required by a debtor to pay the agreed composition will be ascertainable at an early stage (*para. 42.19.1.*).

100. *Section 99* is also new. It prohibits publication, without the sanction of the Court, of the affairs of an arranging debtor or of the proceedings in an arrangement other than publication in a *bona fide* trade journal of the particulars set out in the documents filed in the Central Office under *section 90*. Contravention of the prohibition will be an offence (Report, p.457).

101. *Section 100* empowers the Court, on sufficient cause being shown, to direct that the property of an arranging debtor should be possessed by the Official Assignee. This provision re-enacts existing law, which was regarded by the Committee as necessary in the interest of creditors and as providing a further safeguard against disposal of the debtor's property between the date of the order for protection and acceptance of the proposal (*para. 42.22.1.*).

102. *Section 101* (new) provides that the Court may, at any time after the private sitting referred to in *section 90*, discharge the order of protection on the application of the arranging debtor with the concurrence of every creditor who had notice of the private sitting and whose debt is not less than £100 (*para. 42.4.19.*).

103. *Section 102*, which provides for the return of surplus assets to an arranging debtor who has obtained a certificate under *section 98*, re-enacts the existing law (*para. 42.13.6.*).

104. *Section 103* is new. It gives effect to the Committee's view that, if a debtor obtains goods on credit within fourteen days before obtaining an order for protection, knowing that he will be unable to pay for them, the Court should have power to direct him either to return the goods or to pay for them in full (*para. 42.23.3.*).

105. *Section 104* provides for a private sitting for enquiry, i.e. for examining witnesses (including the arranging debtor). At present such a sitting may be applied for only by a creditor but, as recommended by the Committee, the Official Assignee or any other person having an interest is being authorised to apply (*para. 42.18.1.*). The section is not being restricted to vesting arrangements as suggested by the Committee (p. 458).

106. *Section 105* sets out the circumstances in which the Court may adjudicate a petitioning debtor bankrupt, e.g. where his proposal is not approved, where he does not attend the private sitting, etc. At present the Court can only adjudicate the debtor in some of these cases. In the remainder—those referred to in *paragraphs (a), (g) and (h)*—it can only dismiss the petition. The Committee considered that adjudication should apply in all cases, since those now only warranting dismissal are as serious as those deserving of adjudication (*para. 42.15.1.*). *Paragraphs (b), (d), (e) and (f)* re-enact existing law but *paragraphs (c) and (i)* are two additional grounds for adjudication, i.e. where a debtor's proposal is annulled and where he is party to a corrupt agreement with his creditors to secure acceptance of the proposal (*para. 42.15.4.*). The section does not re-enact the existing law whereby a debtor may be adjudicated if within three months of the presentation of the petition he assigned any part of his property otherwise than in due course or voluntarily did any act whereby his goods have been taken in execution. Such an assignment or execution would be an act of bankruptcy on which the debtor can be adjudicated under *section 14* (*para. 42.15.3.*). *Subsection (2)* provides that on adjudication the Court will proceed as in bankruptcy and that any proposal which may have been accepted or approved will be void.

107. *Section 106* makes statutory the decision in *Loré's case* (1889) 23 L.R. Ir. 365, i.e. that where two or more members of a partnership

obtain protection and make proposals for the payment of their joint and several liabilities the Court will adjudicate all the members bankrupt if any of the proposals are not accepted (*paras. 42.16.2/3.*).

108. *Section 107* applies to arrangements the bankruptcy provisions in regard to summoning witnesses and enforcing their attendance.

109. *Section 108* is new. It provides for keeping a register in the Central Office of the memoranda delivered pursuant to *section 90* (*para. 42.8.1.*).

110. *Section 109* provides that the Deeds of Arrangement Act 1887 will not apply to arrangements under the control of the Court (*para. 42.8.1.*).

#### PART V: WINDING UP BY TRUSTEE

This Part deals with the winding up of a bankrupt's estate by a trustee and committee of inspection as an alternative to its being administered by the Official Assignee. The procedure is being retained because of the increase in the size and complexity of recent bankruptcies. It is in substitution for the "Trustee Clauses" in the 1872 Act.

111. *Section 110* provides for the appointment of a trustee and committee of inspection by the creditors at the first statutory sitting following a resolution by them that the bankruptcy be wound up in that way, and for the making of an order by the Court to that effect.

112. *Section 111* provides that on the making of an order under *section 110* the Official Assignee will be divested of the property of the bankrupt and that it will vest in the trustee.

113. *Section 112* lists the powers of the trustee. He will be subject to the control of the Court and have regard to any directions given to him by the committee of inspection or by resolution of the creditors at the statutory or any subsequent sitting. In general, the trustee will have the same powers and functions as are conferred on the Official Assignee by the Act.

114. *Section 113* provides for the discharge of the bankruptcy and the release of the trustee by the Court when the estate has been fully wound up and a final dividend paid.

115. *Section 114* enacts that where a bankruptcy is wound up by a trustee and committee of inspection the Court will have power to make such orders and give such directions in relation to the bankrupt, his creditors, etc. as it would have had if a trustee and committee had not been appointed.

#### PART VI: ESTATES OF PERSONS DYING INSOLVENT

116. This Part (*sections 115 to 122*) implements the Committee's recommendation (*para. 40.10.1.*) that the estates of persons who die insolvent should be wound up in bankruptcy. The Committee considered that this procedure would be more efficient and less expensive than the present system under which such estates are administered outside of bankruptcy by the Examiner under the direction of the Court (*para. 40.9.1.*).

117. *Section 115 (1)* provides that a petition for the administration in bankruptcy of the estate of a deceased person may be presented to

the Court by either a creditor whose debt would have supported a bankruptcy petition against the deceased had he been alive or by the personal representative (*para. 40.10.1.*). Where a creditor presents the petition, notice must be served on the personal representative (*subsection (2)*). *Subsection (3)* provides that, if there is no personal representative, the Court may direct service on such person and in such manner as it thinks fit or it may dispense with service (*para. 40.11.1.*). A petition may not be presented when proceedings have already begun in the Circuit Court for the administration of the deceased's estate but that court may, when satisfied that the estate is insolvent, transfer the proceedings to the High Court which may make an order for administration under this Part (*subsection (4)*).

118. *Section 116* deals with the effect of the service on a personal representative of notice of a creditor's petition. Thereafter, no payment or transfer of property by the personal representative will operate as a discharge to him as between himself and the Official Assignee.

119. *Section 117* empowers the Court to make an order for the administration of a deceased's estate under this Part unless it appears probable that the estate will be sufficient to pay his debts (*subsection (1)*). Where a creditor petitions, he must prove his debt before an order is made (*subsection (2)*). *Subsection (3)* empowers the Court to make an order even though there is no known personal representative of the deceased (*para. 40.11.1.*).

120. *Section 118* provides for vesting the insolvent deceased's property in the Official Assignee for realisation and distribution and for the application of *section 46* which relates to the issue and registration of a certificate of vesting.

121. *Section 119* provides that in the administration under this Part of a deceased's estate the proper funeral and testamentary expenses incurred shall be paid in full in priority to all other payments.

122. *Section 120* deals with the application of the bankruptcy provisions of the Bill to an administration order under this Part.

123. *Section 121* provides for paying or delivering to the personal representative any surplus arising on the administration of a deceased's estate. Interest at the rate currently payable on judgment debts will be allowed.

124. *Section 122* restricts the personal representative's right of retainer, i.e. the right to retain out of the estate a debt due to him, in the case of an administration under this Part (there is a similar restriction at present in the winding up of an insolvent estate by the Court) but it permits him to prove any debt due to him that is otherwise provable (*para. 40.11.1.(2)*).

## PART VII: OFFENCES

125. This Part, which deals with bankruptcy offences, is mainly a re-enactment of existing law with the addition of new offences recommended by the Committee, viz. non-disclosure of after-acquired property (*section 127*) and obtaining credit or trading under another name (*section 129*). The offences will be punishable, on summary conviction, by a maximum fine of £500 or a term of imprisonment not exceeding twelve months or both and, on conviction on indictment, by either a maximum fine of £1,000 or five years imprisonment or both (*section 132*).

126. *Section 123* is based on section 11 of the Debtors Act (Ireland) 1872, which contains comprehensive provisions for the punishment of fraudulent debtors (*paras.* 50.15.1 and 50.17.1). *Subsections (1)* and *(2)* deal with various offences committed by bankrupts or arranging debtors (fraudulently concealing property, etc.). *Subsection (3)* makes it an offence for other persons (including persons who subsequently become bankrupts or arranging debtors) to do certain acts with intent to defraud their creditors and there will be a rebuttable presumption that the act constituting the offence was done with that intent if it occurred within twelve months before adjudication or the grant of an order for protection.

127. *Section 124*, relating to a debtor absconding with property, is based on section 12 of the Debtors Act. The minimum value of the property has been increased from £20 to £500.

128. *Section 125* replaces the existing provisions making void the claim of a creditor who accepts property from the bankrupt or the arranging debtor or from any other person as an inducement for forbearing to oppose or for accepting a proposal or an offer of composition. Instead of forfeiting treble the value of the property that he accepts, the creditor will be guilty of an offence. The person offering the inducement will also be guilty of an offence (*paras.* 3.6.7. and 42.14.1.).

129. *Section 126* (false claims by a creditor) re-enacts section 14 of the Debtor's Act (*para.* 50.17.1.) and *section 127*, which is new, makes non-disclosure of after-acquired property an offence (*para.* 50.18.6.).

130. *Section 128* (obstruction of Bankruptcy Inspector or his assistants) re-enacts the existing law (*para.* 50.18.7.) and extends its scope to any person acting in the execution of his duties under the Bill (*para.* 52.3.3.).

131. *Section 129* (new) makes it an offence for a bankrupt or arranging debtor to obtain credit of £500 or upwards (£10 or upwards in the Committee's Report) without disclosing the fact that he is a bankrupt or an arranging debtor or, without a similar disclosure, to engage in any trade or business under a different name to that under which he was adjudicated or granted protection (*para.* 50.12.4/5.).

132. *Section 130* (inserting advertisement without authority) re-enacts existing law (*para.* 50.18.8) and *section 131* (new) implements the Committee's recommendation that a bankrupt or an arranging debtor should not be exempt from criminal liability by reason of the fact that his bankruptcy has been discharged or annulled or that his proposal has been carried into effect (Report, p. 469).

133. *Section 132* deals with the punishment of offences. The maximum penalties being provided on summary conviction are a fine of £500 or imprisonment for twelve months or both fine and imprisonment; on conviction on indictment they are a fine of £1,000 or imprisonment for five years or both.

#### PART VIII: MISCELLANEOUS

134. *Section 133* is new and is designed to remove doubts regarding the effect of the Statute of Limitations on property vested in the Official Assignee by virtue of an adjudication. It provides that he will not be a trustee for the purposes of the Statute, i.e. the Statute will apply to him as if he were not a trustee within the meaning thereof.

135. *Section 134* re-enacts existing law by empowering the Court to direct that the whole or any part of any sitting or proceeding under the Act shall be in private.

136. *Section 135* restates the existing jurisdiction of the Court to review, rescind or vary any of its orders except orders of discharge and annulment (*paras.* 45.9.3., 45.12.5 and p. 465).

137. *Section 136* deals with the effect of adjudication on a creditor's remedies. It differs from the existing law in that it restricts the rights of a creditor in respect of a debt provable in bankruptcy to his rights under the bankruptcy and prohibits him from commencing any proceedings in respect of the debt without the leave of the Court (*para.* 45.12.6). *Subsection (2)* preserves the right of a secured creditor to realise his security outside of the bankruptcy.

138. *Section 137* re-enacts, with the modifications recommended by the Committee, the existing provisions which empower the Court to restrain proceedings against a bankrupt. It is modelled on section 217 of the Companies Act 1963 (*para.* 45.12.7 and p. 429).

139. *Section 138* is new. It empowers the Court to order the winding up of any partnership or estate of a deceased person in which a bankrupt has an interest. Its purpose is to obviate delays by enabling the extent of the bankrupt's interest to be promptly determined (*paras.* 39.10.7. and 39.10.8.).

140. *Section 139* implements the Committee's recommendation that no distress should be levied on the goods of a bankrupt or arranging debtor after the date of adjudication or order for protection (*para.* 55.8.2.).

141. *Sections 140* and *141* (admissibility of evidence of deceased witness or of notices in *Iris Ofigiúil* or newspapers) re-enacts in substance the existing law.

142. *Section 142* implements the Committee's recommendation that the existing law, under which the Court can act in aid of certain courts outside the jurisdiction in bankruptcy matters, should be re-enacted with provision for its extension to other jurisdictions (*para.* 53.13.1.).

143. *Section 143* (new) empowers the Minister for Justice to increase or reduce by order the monetary limits specified in certain sections of the Bill.

144. *Section 144* is the usual provision for laying orders made under *sections 142 (2)* and *143* before each House of the Oireachtas.

145. The *First Schedule* sets out a new and simplified procedure for proving debts in a bankruptcy or arrangement. The admission or rejection of debts will be a matter for the Official Assignee in the first instance and only disputed debts will be referred to the Court for adjudication. Debts may also be admitted at sittings of the Court.

*Paragraph 1*, which re-enacts in substance the existing law, provides that a creditor must prove his debt in order to share in any distribution.

*Paragraph 2* sets out the normal procedure for proving a debt, i.e. by delivering particulars through the post to the Official Assignee (*subparagraph (a)*) although the debt may also be proved at a sitting of the Court (*subparagraph (b)*).

Paragraph 3 implements the Committee's recommendation that claims from creditors should not be accepted after a fixed date. At present it is almost impossible to reach finality in ascertaining debts (para. 43.14.2.).

Paragraphs 4 to 8 are substantially in accordance with present law or practice.

Paragraph 9 changes the present practice whereby a creditor requires the Court's sanction in order to amend the proof of debt after lodging it with the Official Assignee. In future the Official Assignee's consent will be sufficient. An alteration by a secured creditor of the estimated value of his security will, by virtue of paragraph 24 (5), require an application to the Court unless the Official Assignee allows the alteration (para. 43.14.25.).

Paragraph 10 permits a creditor who has lodged a proof of debt to examine the proofs of other creditors.

Paragraph 11 provides that a husband and wife should be permitted to claim against one another as if they were not married. It removes doubts which, according to the Committee, were still being expressed on this point notwithstanding the provisions of the Married Women's Status Act 1957 (para. 60.7.1.).

Paragraph 12 is new. It reverses the decision in *Re Howard and Gibbs, Ex p. Shaw* (1882) 1 G1 and J. 127 in that it permits a sole trustee who is a bankrupt or an arranging debtor, without the leave of the Court, to prove in his own bankruptcy or arrangement for a debt due from him to the trust estate (para. 43.14.23.).

Paragraph 13 re-enacts the existing provision regarding proof in respect of distinct contracts (para. 43.14.21.).

Paragraph 14 permits a creditor, in cases where interest is not reserved or agreed for on a debt which is overdue at the date of adjudication, to prove for interest up to that date. It re-enacts existing law with the modification that the rate of interest has been increased to the rate currently payable on judgment debts.

Paragraph 15 re-enacts existing law regarding proof in respect of a debt due after the date of adjudication or order for protection where the liability exists at that date. The mode of calculation of such a debt has been simplified so that its value will be calculated as at the date of adjudication or order for protection (para. 43.14.9.).

Paragraph 16 is new insofar as it gives statutory effect to the decision in *Leek's case* (1902), 2 I.R. 399, that on disclaimer a lessor may prove for a proportionate part of the rent from the date on which the last payment was due to the date of adjudication or order for protection. It also extends the decision to any kind of periodical payment (para. 43.14.24.).

Paragraph 17 re-enacts in substance the existing law regarding set-off of mutual credits or debts as between a bankrupt and a person claiming as a creditor (para. 43.7.4.).

Paragraph 18 provides that the Schedule is without prejudice to sections 61 and 62 of the Civil Liability Act 1961. Section 61 provides for proof of claims for damages or contribution in respect of a wrong and section 62 for the application of moneys payable under certain policies of insurance where the insured becomes a bankrupt (para. 43.14.30.).

*Paragraphs 19* (costs of proving a debt) and *20* (examination by the Court of persons in relation to the proof of debts) re-enact the substance of existing provisions.

*Paragraph 21* is new and implements the Committee's recommendation that, in order to avoid fraud by creditors in proving debts, the claim of a creditor who makes any wilfully false statement or wilful misrepresentation should be disallowed (*para. 43.14.29.*). Making such a false statement or misrepresentation is an offence under *section 126*.

*Paragraph 22* is also new and empowers the Official Assignee, before deciding on a claim, to require a creditor to furnish additional information or to attend before him.

*Paragraph 23* provides for the preparation by the Official Assignee of a list setting out the claims admitted or disallowed by him and those which he considers should be referred to the Court. A copy of the list will be placed on the Court file and be open to public inspection. Any person aggrieved by the Official Assignee's decision may appeal to the Court (*para. 43.14.4.*).

*Paragraph 24* sets out the present practice of the Court regarding the requirements for proof by secured creditors (*para. 43.14.30.*).

141. The *Second Schedule* repeals the main bankruptcy enactments, i.e. the 1857, 1872 and 1889 Acts. The repeal of the Local Bankruptcy (Ireland) Act 1888 involves the abolition of the Cork Local Bankruptcy Court. The Deeds of Arrangement Amendment Act 1890 is being repealed because the Deeds of Arrangement Act 1887 will no longer apply to arrangements under the control of the Court (see paragraph 91). The repeal of sections 11 and 12, and 14 to 22, of the Debtors Act (Ireland) 1872 is consequential on the consolidation of the bankruptcy offences in *Part VII*. Section 12 of the Court Officers Act 1926 is repeated in substance in *section 60 (1)*. The repeal of section 3 of the Circuit Court (Registration of Judgments) Act 1937 and section 26 of the Courts Act 1981, which applied section 336 of the 1857 Act to judgments and decrees of the Circuit Court and District Court, are consequential on the repeal of section 336. Section 17 (1) of the Hire-Purchase Act 1946 and section 32 (3) of the Agricultural Credit Act 1947 are being repealed in consequence of the repeal of the provisions relating to the doctrine of reputed ownership (see paragraph 3 (8)).

The amendment to section 286 (1) of the Companies Act 1963 arises from the fact that the date of adjudication and not petition will be the critical date for various purposes under the Bill. Section 345 (8) of that Act is being re-enacted with amendments in *section 37*.

The repeal of section 28 (2) of the Central Bank Act 1971, which provides that the act of bankruptcy created by that section may be availed of for a period of six months, is consequential on the reduction of that period to three months (*section 11 (1)*).

*An Roinn Dlí agus Cirt,*  
Iúil, 1988.

