

BANKRUPTCY AND ITS SOCIAL EFFECTS

A dissertation submitted in partial fulfilment of  
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OPONDO R.M.A.

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Acknowledgement

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Opondo R M A  
Faculty of Law  
University of Nairobi

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- 2) Re Betts and Block (1887) 19 Q.B.D. 39
- 3) Re Solomons (1904) IK.B 106
- 4) Re Pearse (1912) 107 L.T. 859
- 5) Re Benjamin (1943) 1 ALL.E.R 468
- 6) Re Smith (1947) 1 ALL.E.R 769
- 7) Re Tabnisky (1947) Ch.565
- 8) Re Spackman ex parte Foley (1890) 24.Q.B.D. 728
- 9) Re Debtor (1927) 1 Ch.19
- 10) Re F.B. Warren (1938) Ch.725
- 11) Re Pagget (1927) 2 Ch.85 at P.87-88
- 12) Re Beers (1903) 1 K.B. 628
- 13) Re Wallis (1902) IK.B.
- 14) Re BPooley ex parte Rabbidge (1878) 8 Ch.D'
- 15) Bendall V McWhirter (1952) 2 Q.B.D. 466 at P. 484
- 16) National Provincial Bank Ltd V Ainsworth (1965) A.C. 117

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INTRODUCTION

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aces, historically the development of the Kenyan Bankruptcy law, both in England and how it was finally received into Kenya. The Bankruptcy Act, in Kenya, was passed in 1930 and it is the present law of Kenya. It is

17) Walji V official Receiver 11K.L.R. 24

18) Victoria Industries V Ramabhai Bros (1961) E A 11 Act 1914, as amended by the Bankruptcy (amendment) Act 1920.

Chapter one attempts a definition of what Bankruptcy is, and the various definitions laid down by different authors, for instance Friedman, just to mention but a few. The author does not fully agree with the various definitions propounded by the above mentioned authors and therefore lays

ABBREVIATIONS

down a critic of the definition. The historical background in England is also dealt with its significance as mentioned above.

- 1) All E R - All England Reports
- 2) Cap - Chapter
- 3) Ch - Chancery
- 4) Legco - Legislative Council
- 5) Q.B.D. - Queens Bench Division
- 6) K.B. - Kings Bench Division
- 7) L.T. - Law Times Report
- 8) A.C. - Appeal cases

10) E.A. - East African Law Reports

The author, in chapter two traces the historical background in Kenya, in order to be in a position to understand Bankruptcy legislation as it exists in Kenya. This is relevant in the sense that it enables one to be aware of the major social economic and political forces which influenced and moulded its development.

Kenyan society is not homogenous in the sense that we have gone through different periods of colonisation. The colonial Kenya was a socially and economically stratified society, in other words the colonial Kenya was an apartheid society.

I N T R O D U C T I O N

The dissertation traces, historically the development of the Kenyan Bankruptcy law, both in England and how it was finally received into Kenya. The Bankruptcy Act, in Kenya, was passed in 1930 and it is the present cap 53 laws of Kenya, it is basically the same in content as the English Bankruptcy Act 1914, as amended by the Bankruptcy (ammendment) Act 1920

Chapter one attempts a definition of what Bankruptcy is, and the various definitions laid down by different authors, for instance Fridman, and McNeil just to mention but a few. The author does not fully agree with the various definitions propounded by the above mentioned authors and therefore lays down a critic of the definition. The historical background in England is also dealt with the significance as mentioned elsewhere, being to trace the different stages of how Bankruptcy law has developed in England and finally how it was received in Kenya. Karl Marx was of the view that the mode of production in any society determines the kind of law it is going to have. In Kenya, we have a situation, where the British imposed her laws and this explains, the reasons why its the English type of Bankruptcy law that applies.

The author, in chapter two traces, the historical background in Kenya, in order to be in a position to understand Bankruptcy legislation as it exists in Kenya. This is relevant in the sense that it enables one to be aware of the major social economic and political forces which influenced and moulded its development.

Kenyan society is not homogenous in the sense that we have gone through different periods of colonisation. The colonial Kenya was a socially and economically stratified society, in other words the colonial Kenya was an apartheid society.

Chapter three examines the law as it exists today. The criteria used by the author is an assessment of the whole Act, and then chose twenty of the key provisions as the linchpins of her thesis, since the nature of our research and the time allowed for writing this paper could not allow an examination of all the defective provisions of the Act.

In the final chapter, conclusions on the fundamentals of the dissertation have been drawn. The author, has also furnished her suggestions for reforms. The author has come to the conclusion that the massive reception of the English common/Statutory law, were not germane to the prevailing socio-economic superstructure.

For future thinking, it is essential to note that, there was serious apprehension expressed regarding the wisdom of blanket acceptance of English law, without serious consideration of the needs of the country. It is finally submitted that the Bankruptcy laws, enacted in England suited the conditions of the said country and importing it, wholesale into Kenya had some effects, which will be considered on the Kenyan society.

## CHAPTER ONE

### DEFINITION OF HISTORICAL BACKGROUND OF BANKRUPTCY LAW

The main object of this chapter is a critical appraisal of the definition, as the author, does not fully agree with the various definitions laid down by different authors. The historical background in England is also dealt with, the significance being to trace the different stages of how Bankruptcy law, has developed in England and finally how it was received in Kenya.

One may ask on the onset why Bankruptcy law had to evolve at all? The answer to this question can be sought by picking up material from different textbooks that have been written by various authors on Bankruptcy law. For example, Fridman, Hick and Johnson in their book 'state that insolvency means inability to pay ones debts when they fall due. Secondly by looking at some of the factors, that necessitated commercial and economic development in England. This is so, because Bankruptcy grew out of lending and borrowing and its imperative that, we examine the economic situation in which it developed.

Generally, its now accepted in most communities that if one is in a hopeless financial position, as a result of which he is unable to discharge his financial obligations the law provides that his property be taken and used to pay each creditor in proportion to the amount owed to them.

Fridman, Hick and Johnson<sup>2</sup> state that among the basic principles of modern law may be listed the following:

The debtor must hand over his property and assets to his creditors. On doing so and paying a fair percentage of his liabilities, the debtor may obtain a full discharge from past debts. They further state that; "Bankruptcy is the compulsory administration of a persons' estates, intervivos by the court for the benefit of all his creditors generally.

out some of the broad functions of Bankruptcy law, which the author feels, deserves some attention. He says Bankruptcy law is used/.....



Bankruptcy is a legal process which is entirely the creation of statute; whereby a person who is unable to discharge his financial liabilities is declared insolvent, subject to certain disabilities and deprived of his property in order to ensure a more just and equitable distribution of such assets as he has among his various creditors."

(iii) "Enforcing certain standards of commercial morality."

To some extent, it can be said that Bankruptcy is the creation of statute, but the author disagrees where the word "insolvent" is used, which in its simplest terms means a person who is unable to discharge his financial obligations. Mere Bankruptcy does not necessarily render one a bankrupt. To a layman, this definition could be very misleading in the sense that its very vague because it does not state in clear terms when the right accrues for one to be declared a Bankrupt. The limit has been set out in specific Acts, in Kenya. For instance it is provided for in the Kenya Bankruptcy Act<sup>3</sup>, but the question that arises is how many people ever have access to the Bankruptcy Act, let alone knowing of its contents. The explanation for this is because the Act, has its origins in England, its not home-grown and therefore its reception has tended to alienate the law. The other reason, could be literacy. Not very many people are educated in order to be conversant with the Bankruptcy Act which in turn would lead to such an Act being useful to them.

The fact that one, is unable to pay even the smallest amount, does not necessarily give his creditors the right to take legal action against him, this term is quite misleading to a layman. The consequence of this is that it can cause a person to be shunned by society.

McNeil in his book<sup>4</sup> sets out some of the broad functions of Bankruptcy law, which the author feels, deserves some comment. He says Bankruptcy law is used to;

- (i) "To enable worthy debtors, to secure fresh starts in their lives free from the load of obligation which they have incurred."
- (ii) "To preserve the debtor's property and to enable creditors to share equitably in that property rather than snatching what he can; "and the devil take the hindmost"
- (iii) "Enforcing certain standards of commercial morality."<sup>5</sup>

The use of the word worthy debtors, raises eyebrows because the author is of the view that a debtor is one who is unable to discharge his debts whether "worthy" or "unworthy" the fact remains that he is still a debtor. Opportunity is given to the debtor to overcome his financial difficulties and to start a fresh. From what has been said it is then very obvious that Bankruptcy is generally intended to be beneficial to creditors, debtors and, the public at large. Its absurd as to why creditors are never mentioned. It might seem that, they are never at fault, which is not always the case. After discharge<sup>6</sup> the former Bankrupt is allowed to start a fresh without the incidences of the previous debts on him. However, there are certain types of debts that may not lapse on discharge<sup>7</sup>

The other issue worth mentioning concerns the issue of the preservation of the debtor's property. It can be argued that Bankruptcy enables debtors to get off their debts lightly after discharge but the idea of preserving the property does not in reality exist. Because once, a person has been declared insolvent, the reason is usually because he is unable to discharge his debts. His property is attached not preserved. Once the property is sold, the debtor cannot get back his property.

Karl Marx was of the view that the mode of production in any society determines the kind of law it is going to have. This analysis links to what professor McNeil lists as his third function when he talks of commercial morality, which is capitalism.

classes, by a minority of tycoons and profiteers.  
Windschell another celebrated bourgeois writer has said.  
HISTORICAL BACKGROUND OF BANKRUPTCY LAW IN ENGLAND

Bankruptcy law dated from as far back as the 16th Century medieval era and the vigour with which it flourishes especially during the industrial revolution, is a tribute to its vitality.

Once a society begins to engage in commerce then Bankruptcy law becomes a necessity. One can therefore argue, that the necessity of Bankruptcy law results whenever a nation is involved in any considerable degree of commerce. No people can be well governed without it, since it follows that, whenever there is an extensive commerce, extensive credits must be given. The development of Bankruptcy law under the various capitalist stages is discussed.

The law of Bankruptcy has been built on the 1542 framework. The common law of England in the 12th and 13th Centuries was not as severe against the debtors as the earlier law had been. During that time debtors were imprisoned if they failed to discharge their debts. Holdsworth discusses his phenomenon. He suggests that;

"Perhaps the reason is to be sought in the fact that, the common law influence of ideas drawn from the mature Roman law, had shaken off the very primitive ideas as to the strictly personal character of liability for debt, which led to achieve systems of law to the conclusion that seizure of the debtor's body is the only proper mode of his obligation to pay"<sup>9</sup>

During the trade era, rich merchants wanted to make as much profit as possible, and hence as creditors, they had to be protected from the foregoing the present author is of the view that the social destiny of humanity according to the bourgeoisie is the expansion of capitalism, the entrenchment of wavery and the increased impoverishment of the oppressed

classes, by a minority of tycoons and profiteers. Windscheid, another celebrated bourgeois writer has said; "The highest ends of humanity are attained only through free development of powers but this development would be impossible without law which prepares the way for all human advancement"<sup>10</sup>

After the industrial revolution things changed. Individuals lent money to industrial complexes, goods were sold on credit and because of mass production Bankruptcy law became humane, in the sense that unlike the 12th and 13th Centuries where debtors were imprisoned, if they failed discharge their debts at this particular time their goods were attached and later on sold. The factor that led to this change of mind on the part of capitalism, was that, it was realised that by attaching the debtors property, they stood no chances, of losing anything in contrast to imprisonment which meant, loss to them.

The law of Bankruptcy has been built on the 1542 framework. The English Bankruptcy law was passed in 1914 and subsequently amended in 1926. Holdsworth discusses the enactment of the English Act of 1542 to 1543, 1571, 1604 and 1623, the totality of these enactments, containing the Bankruptcy law of the British feudal era. The significance of this is that most of the principles, introduced by the 1542 Act, and the Acts enacted after that year, contained the main principles of Bankruptcy law, even today.

The law of Bankruptcy was consolidated in 1825 by a consolidation Act, that Holdsworth regards as the foundation of modern law of Bankruptcy. The 1825 Act defined: "The classes of persons who could be made bankrupt and the Acts which constituted Acts of Bankruptcy"

The law was once again consolidated in 1849. This Act was the first to enable an insolvent person to put the law in motion by filing a declaration of insolvency. The Act also enabled a creditor to force a debtor to commit an Act, of Bankruptcy by serving on him a debtors summon,

non compliance of which amounted to an Act of Bankruptcy.

A new Bankruptcy Act, was passed in 1883 considerably altering the procedure and system of administration, without any important changes of the principle. A consolidated Bankruptcy Act, was passed in 1914.

The present English law of Bankruptcy is governed by the 1914 Act, which was amended by the Bankruptcy (amendment) Act, 1926.

It was the purpose of this chapter to examine, the various interpretations of Bankruptcy law, through capitalist development. The origin of Bankruptcy through the growth of commerce is traced. After this period we saw, Bankruptcy law, as interpreted by the, emerging class of traders, investors and the bourgeoisie. During this period we saw how bourgeoisie interpreted what Bankruptcy law, was to suit their class interests.

The the second chapter we will trace the reception of Bankruptcy law in Kenya. The law is not homogenous, but rather it is received law. We shall, also consider whether this law is abstract, or it suits the local conditions.

CHAPTER TWO

HISTORICAL BACKGROUND IN KENYA

In order to be in a position to understand Bankruptcy legislation as it exists in Kenya, it is necessary to trace its historical pattern in order to be aware of the major social, economic and political forces which influenced and moulded its development. In Kenya we have a situation where British introduced capitalism therefore its the English types of laws, that apply and Bankruptcy law in not an exception.

Historians and lawyers may disagree as to when the history of the present, day Republic of Kenya begins. Ghai and McAuslan in their book, take the view that, the Kenya legal system begins in 1883. They state that:

"The development of admiralty Jurisdiction came first and it is significant that the early treaties and the earliest was in 1822 with the Sultan of Muscat - were concluded on the British side by Naval officers carrying out the general policy of the British Government to suppress the slave trade, whenever it continued - ."

But the author believes that <sup>Kenya</sup> Kenya, was born in 1886, when British and Germans divided between themselves, the present territories of Kenya and Tanzania (mainland). The Anglo-German agreement recognised dominions of the Sultan of Zanzibar which were made of, the ten mile coastal strip from Ruvuma, marking, the southern limits of the German territory, to a part of the Somalians coast and all the Island along the coast. It is under this agreement that the present day Kenya became:

"The British sphere of influence". The year 1895 marked the declaration of a protectorate of what is now Kenya. The year of the Berling conference 1885, may be taken as the starting date, for this historical survey, since it coincided with a change, in attitude of the European powers, towards the East African coast.

At this particular time, Britain was interested in suppressing slave trade. The Berlin conference of 1885 had, as one of its main objects the desire to:

"Obviate the misunderstanding and disputes which might in the future arise from new acts of occupation on the coasts of Africa...."<sup>2</sup>

The most fundamental feature of the statutory or general legal system of Kenya is that, they are largely based upon legal systems which have been borrowed in toto from Britain. It is therefore necessary to examine and explain the processes by which the colonial legal system was created in order that, the main lines of legal development which have produced the present laws can be laid bare. Generally there have been three major periods in the legal history of Kenya. These can loosely be called, the pre-colonial period, colonial period and lastly (that which is now current) the post colonial or independent period.

PRE-COLONIAL PERIOD

It is not disputed that before the arrival of the British or other European colonisers indigenous legal institutions were found in most of the communities. These were mainly customary in origin and type. Although they, had their own laws, most of these were unwritten. This characteristic undoubtedly had extremely important implications for the way in which the colonial rulers were to handle the pre-existing laws in their territories. In 1886, the Kenyan society was made up of Africans who led traditional lives and had simple economies, in the interior of Kenya, were Arabs and Swahilis and lastly Asians, who lived in the coastal area where they engaged in commerce. But due to the innumerable injustices and discriminatory practices to which the African peasantry was subjected, vis-a-vis other racial groups it was impossible for them to contribute effectively to any form of commerce.

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- (1) Historical development;
- (2) Geographical locations of societies;
- (3) Racial or ethnic differences;
- (4) Production and economic activities.

## 2) THE COLONIAL PERIOD

The English law was mainly introduced for the benefit of British subjects and others who fell under British protection. At this time, two main factors shaped the history of the colony, the first factor was that, mercantile capitalism had reached its zenith and could no longer be sustained on, its homeground and an outlet was required and it is at this stage that, the settler came out as a fully developed capitalist man, as E A Brett puts it "He the (Settler) did not expect to grow his own food, build his own house and make a portion of his own clothing."<sup>3</sup>

The colonial state was to promote the siphoning off the surplus to Britain, guarantee stability in Kenya so that, she could perform her new functions and implement policies which, the metropolitan bourgeoisie wanted carried out.

## 3) THE CONTEMPORARY OR INDEPENDENT PERIOD

At this particular period the sole aim of bankruptcy law in Kenya was the protection of the private property of the creditors.

The Bankruptcy law which we have today in Kenya, is the one we had during the colonial rule. Therefore the history of Bankruptcy law of England is also ours. Ours was not homegrown as has already been discussed, and after independence little or no efforts at all were made in order to modify the Bankruptcy legislation, that was received, from the British, and this explains why we have retained the English Bankruptcy law.

The Europeans by considering their law as being superior, failed to take into account that it was common knowledge that differences in philosophies of life exist and there are several factors that facilitate these differences. These could be caused by:

- (i) "Differences in theories of knowledge, which are determined by what a people can see or choose to see with their eyes;



Despite (ii) the Historical development; (iii) the Geographical locations of societies; (IV) the Racial or ethnic arrogance; (V) Modes of production and economic activities" <sup>4</sup>

Therefore the Kenya Bankruptcy laws received in Kenya, have to be viewed against the interests of the British, ruling class, whose interests Kenya served, and this was determined by the capitalist mode of production, and not the mode of production of the indigenous people. Under sec. 3(1) of the Judicature Act, other English laws can be applied as the: an almost verbatim re-enactment of the English Bankruptcy Act "Substance of common law, the doctrines of equity and statutes of general application in force in England on 12th August 1897 as long as the circumstances permit." <sup>5</sup> The Bankruptcy ordinance. The English law has, been generally received in Kenya, through three main sources of law, namely the common law, doctrines of Equity and statutes of general application, in force in England on 12th August 1897. or him to pay the creditor in such instalments, as the court thought fit.

The author is of the view that theoretically the Act had good ideas but practically it was not possible, this view is further confirmed by Ghai and McAuslan in their book, they state that: "The main thrust of development in colonial times was to displace African courts, and laws owing to their aspiration to the English legal system, and common law, but with variations to take account of local circumstances and the necessities of colonial rule." <sup>6</sup> of clause 2, in the definition of "relative by consanguinity and affinity".

It is submitted that Bankruptcy legislation, must have been received in Kenya, through statutes of general application as Bankruptcy was first legislated in England in the years, 1825, 1845 and 1883.

This was introduced and applied in Kenya through the orders in council. The first Bankruptcy legislation, to be enacted in Kenya was the Bankruptcy ordinance of 1925. Under that ordinance a fraudulent debtor was liable either for obtaining credit by fraud knowing that, he was insolvent or by making a fraudulent disposition of his property, and be guilty of contempt of court.

Despite the fact that, the 1925 Bankruptcy ordinance was regarded as a model ordinance for East Africa, it was discovered otherwise, as cases regarding fraudulent debtors, increased inspite of the penalties spelt out in the ordinance. This ordinance gave the supreme court jurisdiction to entertain Bankruptcy suits, the consequences of this was that, it proved both expensive and cumbersome, since people had to travel long distances to Nairobi to have their cases heard.

The present law is based on the 1930 ordinance, which was an almost verbatim re-enactment of the English Bankruptcy Act of 1914 (31), with a few amendments, effected in the years 1944, 1948 and 1957. The 1948 ammendment effected two ordinances, the ceivil procedure ordinance and the Bankruptcy ordinance. The former was ammended by the civil procedure (Ammendment) Bill of that year. The civil procedure (Ammendment) ordinance of 1948 empowered the court to inquire into, the means of such a debtor and, to order him to pay the creditor in such instalments, as the court though fit.

The Bankruptcy (Ammendment) Bill 1948 was aimed at achieving uniformity in the East Africa Bankruptcy laws.. The reasons for this need for uniformity was that, there were several people who carried on business, in the three East African territories. Thus the Bill was a result of inter-territorial consultation with the respective chambers of commerce. There were two main alterations, to the Bankruptcy ordinance. The first of these was the insertion of clause 2, in the definition of "relative by consanquinity and affinity".

The mover of the Bill contended that, the Bankruptcy ordinance 1930, gave a lot of leeway to dishonest traders, whom, he accused of:

"Riling up large amounts of money". The second motive affected by the Ammendment Ordinance of 1948, was the inclusion in clause 17 of the subclause. Under the new subclause if a debtor or witness on being examined before a judge refused to answer to the satisfaction of the court, any question, which he might have put, such a debtor should be guilty of contempt of court.

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Other minor amendments to the Bankruptcy law, were achieved through Bankruptcy rules 1957 (40) and 1961 (41). The foregoing historical analysis reveals a situation whereby English Bankruptcy law, was initially imported via India and after 1925 directly, through the incorporation of basically English statutes into the Kenyan jurisdiction. With independence, the mechanism and status quo did not change, in the sense that, Kenya was to retain the exploitative capitalist mode of production. Secondly this further meant that Kenya would have to continue to look to Britain with a long experience of operating in, the kind of production and for strengthening the colonial institutions, introduced mainly for the benefit of the Europeans. This is in a way enhancing the bourgeois morality, discussed by McNeil<sup>7</sup>, when he talks of commercial morality. The author is of the view that independence was seen, by the co-opted Kenyans, in racial terms. It was to bring a situation where a few indigenous people, would step into the shoes of the departing Europeans. Most of the dominant ideas, in most fields were the English ones obtained during the colonial rule. Since capitalism was established during the colonial rule and authoritarianism was needed to protect the colonial gains. As far as Bankruptcy laws, were concerned, the laws which were in force were, to continue. One can argue that for those who had, taken to the Europeans way of life, this was a fair deal for them, as this meant, they were going to be well protected. The author is fully convinced that, the period between 1963 to the present day is one in which Bankruptcy law meets the needs of English imported capitalism, which came with European colonization.

It is only after independence that, Africans started participating in commercial transactions because it is only after money economy was introduced, that they were able to acquire new forms of property such as cars bank deposits, and insurance policies, just to mention but a few. This is to, be contrasted with the subsistence, kind of economy, which was formally practised by the Africans. But as of now a local capitalist class is developing, originally based on merchant capital and gradually, moving into manufacturing.

Colin Leys<sup>8</sup> is of the view that all forms of indigenous capitalism are seen as merely an adjunct to metropolitan capital.

For Leys;

The mode of production of material life determines the general  
"The dominant class is still the foreign bourgeoisie." of life".

*theory?*  
*note*

The author shares the same view as Leys, in that when a comparison is made, between the relative number and size of African firms within different sectors of the economy, with the European and Asian firms, It is found that, African joint stock, companies were formed for the first time in Kenya after the second world war. These businesses emerged from the ranks of petty traders and salaried officials that had grown up, in the colony even before 1939. The colonial government however, had placed certain restrictions on the expansion of indigenous capitalism, through the corporate form. The credit of Native ordinance of 1926 had imposed a limit of K£10 on the amount of credit which could be advanced by non Africans.

It is submitted that there has been an attempt to illustrate the way in which this indigenous class is using the powers of the state to assist in its transition from a group of "small scale capitalists" into a national bourgeoisie. However, this type of indigenous capitalism is obviously not operating independently of the international capitalist system.

The author further agrees with the version of Karl Marx's philosophy, that states that the individual consciousness or world view is largely determined by the mode of production obtaining in a society, and that, the mode of production dictates, the greater content of law and other aspects of the superstructure. Marx states this proposition as follows;

*needs of the country.*

"In the social production which men carry on, they enter into definite relations that, are indispensable and independent of their will, these relations of production, correspond to a definite stage of their material powers of production." *footnote*

The sum total of these relations constitute the economic structure of the society - the real foundation on which rise legal and political structures, and to which correspond definite forms of social consciousness.

CHAPTER THREE

AN ASSESSMENT OF THE ROLES OF BANKRUPTCY LAW

The purpose of this chapter is to examine the law as it exists today. The criteria used by the author is an assessment of the whole Act, and then chose twenty of the key provisions as, the linchpins of her thesis. This chapter is divided into three parts, each part deals with one of the broad functions laid down by McNeil.

The sole aim of Bankruptcy law in Kenya can be gauged from its historical analysis of the rules already given. The position in Kenya is basically the same as that of the English except with minor amendments.

According to Marx's view,<sup>2</sup> Bankruptcy law confirms the sanctity of private property, upon which capitalist societies are founded. The concentration of capital leads to smaller capitalists being knocked out by the bigger ones. This is confirmed by Lenin's view on the centralisation of capital. Those knocked out end up as debtors. Tied up with the confirmation of the sanctity of property is the maximisation of profits, hence the law is out to get as much as possible from the debtors by holding them in terrorem.

The last object of Karl Marx is what he calls the false ideology of Bankruptcy law. The system can create its own victims who have essentially failed in the system. The effect of law as evinced by the public examination of the debtors. It is a capitalist ideology and society is not to blame for their Bankruptcy.

The first function set out by McNeil<sup>3</sup> is:

"To enable worthy debtors to secure fresh starts in their lives free from the load of obligation which they have incurred".

Application for order

At any time after being adjudged a Bankrupt may apply to the

court for an order of discharge<sup>4</sup>. A bankrupt who intends to apply for his discharge must produce to the Registrar a certificate from the official Receiver specifying the number of his creditors, of whom the official Receiver has notice whether they have proved or not. Upon an application by the bankrupt the court must appoint a day for hearing the application, but this may not be before the public examination of the bankrupt is concluded.<sup>5</sup>

See 7(2) of the Act<sup>6</sup> states that at the hearing the court shall require proof of the debt of the petitioning creditor of the service of petition and of the act of bankruptcy or if alleged in the petition of some of the alleged acts of bankruptcy and if satisfied with the proof may make a receiving order in pursuance of the petition.

If the court is not satisfied with the proof of the petitioning, creditors debts or of the act of bankruptcy or of the service of the petition or is satisfied by the debtor, that he is able to pay his debts or that for other sufficient cause no order ought to be made the court may dismiss the appeal.

When an application is heard then unless the case falls within any of the special categories such as limited partnerships the court may grant or refuse an absolute order of discharge:

In making a choice between these various alternatives the court has complete discretion. But its decision must be based upon the contents of the report of the official Receiver with respect to relevant matters i.e. relevant to the causes of the bankruptcy and the debtors behaviour during the proceedings, not matters which are extraneous. While any relevant fact to bankruptcy, not only those which as will be seen must be taken into account where the courts discretion is limited may be considered, it has been said in *Re Banker*<sup>7</sup>, by Lord Esher that:

"Only such conduct or affairs as may or can have had some effect upon the bankruptcy itself ought to be taken into consideration."

Conduct outside the bankruptcy as Lopes L.J. indicated in the same case is not to be considered in an application for bankrupts' discharge. For example the debtors refusal to effect an insurance policy which did not affect his bankruptcy or its consequences was held not to be a bar to his discharge, in Re Betts and Blocks<sup>8</sup>. Even offences under the debtors Act have been held not necessarily a bar to discharge: Since such conduct might or might not be relevant to the bankruptcy or the conduct of the relation to his bankruptcy.<sup>9</sup>

Delay in applying for discharge may also not be such conduct as would mean refusal unless there is an element of fraud about such delay.<sup>10</sup> Sec 29(1) (a) of the Act provides that:

"Where an order of adjudication is made the Bankrupt shall at the expiration of the period specified by the court apply for an order of discharge and the court shall appoint a day for hearing the application....."

On hearing the application the court may grant or refuse an absolute order of discharge or suspend the operation of the order or suspend the order for a specified time....."

The exercise of its discretion by the court however will not be interfered with and upset unless there were not reasonable grounds for the way the court decided. There must be good grounds for any reversal of the court's decision on the application for discharge by an appellate court as Lord Green pointed out in Re Smith.<sup>12</sup> For example, the decision may be varied or reversed if the court in granting or refusing an order of discharge was wrong on the facts.<sup>13</sup> Sec 32 (1) of the Act, provides that an order of discharge shall not release the bankrupt from any debt with which the bankrupt may be chargeable at the suit of the Government or of any person for, any offence against any law, relating to any branch of the general revenue of Kenya, or

at the suit of the bailiff or other Public Officer.

The unfettered discretion of the court which has been described, is limited in a number of special instances. Such limitation arises in the first instance, where the bankrupt has committed any misdemeanour uner the Act of 1914 (or any enactment repealed by it), or has committed any misdemeanour connected with his bankruptcy.<sup>14</sup>

Vaughan, Williams J.,<sup>15</sup> suggested that, for an offence to be connected with a bankruptcy it would have to be committed in such a way as to bring about insolvency or so as to amount to misconduct in the course of a bankruptcy, or so, as to defeat the bankruptcy law, increase the debtors liabilities or diminish his estate.

#### Sec 33(1) Power of court to annul adjudication

Where the court feels that a debtor ought not to be adjudged Bankrupt or where it is proved to the satisfaction of the court that the debts of the Bankrupt are paid full, the court may on the application of any person interested by order annul the adjudication.

The second function set out by McNeil<sup>16</sup> is:

"To preserve the debtors property and to enable the creditors to share equitably in that property rather than snatching what he can; and the devil take the hindmost."

Three important words have to be defined. Property is defined in Sec 2 of the Act<sup>17</sup>, to include;

Money, goods, <sup>Chale</sup> things in action, land and every description of property whether moveable or immoveable and whether situated in Kenya or elsewhere, and also obligations, easements and every description of estate, interest and profit, present or future vested or contingent arising out of or incident to property as above defined.



A creditor, is any person entitled to enforce payment of a debt at law or in equity, while a debtor is any person who owes money or anything to a credit as defined in Sec 3(2) of the Act.

Acts in Kenya or elsewhere a debtor makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors, generally it is immaterial whether the conveyance or assignment took place in Kenya.

In Re Spackman ex parte Foley<sup>18</sup>

It was shown that the debtor must convey the whole or substantial part of the property. Spackman was in financial difficulties and his property was scattered, at different places. He gave authority to someone to sell the principal part of his property. When Spackman's creditors learned about this, they demanded that certain proceeds be set aside for them and first that certain people should control the property, sell it and bank the proceeds in their own names, and later distribute the money among the creditors. The main issue was a conveyance or an assignment constituting an Act of Bankruptcy. It was held that the word "assignment" in the sub-section is related to cases where the debtor has, executed a deed in which he assigns all or substantial all his property to a trustee or trustees, to the benefit of his creditors generally. The transaction was not a conveyance of property and hence no Act of Bankruptcy was committed. Thus an Act of Bankruptcy needs more than a mere conveyance.

Creditors Petition Section 6

The creditor can only petition where the amount owed is more than or amounts to one thousand shillings. Secondly the debt must be in a liquidated sum payable immediately or at some certain date. The sum must be legally recoverable ascertainable, liquidated at the time of Bankruptcy and must be owed at the same date. This is illustrated by Re Debtor<sup>19</sup>.

The petitioning creditors were members of a rubber trade association of London.

Prices of rubber fell and the debtors cheques were dishonoured. He gave notice to suspend payment on the 17th pf April, 1926. Accroding to the rules of the association the amount owed was ascertained on 20th April, 1926. The petition on Bankruptcy was brought on 3rd June 1926. It was held that the petition was barred as it did not satisfy the provisions of this paragraph.

Here there is much more scope for the discretion of the court,<sup>20</sup> and the language of the Act and the rules make it clear that a receiving order may only be made on a creditors petition where the circumstances, completely justify such action. Various matters must be separately considered such as time of hearing. Under the Bankruptcy rules,<sup>21</sup> a creditor's petition may not be heard until the expiration of eight days from its service. Other matters like proof must also be considered. At the hearing the court must require proof of the petitioning creditor's debt, the service of the petition and the act of bankruptcy just to mention but a few.

#### Sec <sup>901</sup> Receiving order

The court decides whether or not it can make a receiving order in the case of a debto's petition. The effects of the order are very important. The official receiver, shall become a receiver of the debtor's property. The receiver acquires possession of the debtor's property and acquires no estaste or interest in the debtor's property, as the debtor can still pass a good title to other parties. The receiver has power to sell any part of the property which is not perishable before the trustee in Bankruptcy is appointed. The secured creditor, has an upper hand as he can have his security realised as is read with sec 6 (2)<sup>22</sup>.

If the court after hearing the petition decides to make a receiving order such order must be settled by the Registrar<sup>23</sup>. A receiving order made on a creditor's petition must state the nature and date of every act of Bankruptcy, upon which the order is made. Every receiving order must contain a notice requiring the debtor forthwith after service of the order upon him to attend on the official Receiver at the place mentioned therein.

A receiving order operates from the earliest moment of the day on, whcih it, is made, because it is a judicial act. Hence it takes precedence over a non-judicial act which occurs on the same day, even if earlier in time e.g. the payment of money into a bank<sup>24</sup>.

#### Sec 14 First meeting of the creditors

After the making of a receiving order against a debtor a general meeting of creditors (called the first meeting of creditors) must be held, to enable the creditors to consider the acceptance of any proposal for a composition or scheme of arrangement, or the expediency of having the debtor adjudged bankrupt and the general question of dealing with the debtor's property. The first meeting of creditors must be differentiated from any subsequent meeting which may be called by the trustee in bankruptcy or official receiver, at anytime to ascertain the wishes of the creditors or by the trustee or Official Receiver at, the instance of any creditor with the concurrence of a sufficient number of other creditors to amount to one sixth in value of them all, or on the directions of the court.

#### Sec 17 Public Examination of the Debtor

After the making of a receiving order "as soon as conveniently maybe after the expiration of the time for the submission of the debtor's statement of affairs," the court must hold a public sitting on a day appointed by the court for the examination of the debtor. He must attend such sitting at which he will be examined, as to his conduct, dealings and property<sup>25</sup>.

The essence of public examination is discussed in Re Pagget<sup>26</sup>. In the course of his public examination the debtor refused to answer a certain question on the ground that he might incriminate himself. The Registrar reported the matter to the judge, interviewed the debtor in his private room and, on his return into court stated that he was not satisfied that an answer to the question would result in further assets or secure rights for the creditors and secondly that he was satisfied that, there was serious personal reasons, why it would be to the debtor's detriment to answer the question in public.

The essence of public examination of a debtor, uncer sec 15 of the Bankruptcy Act, 1914, was stated at pages, 87-88 by Lord Hansworth M.R. as follows:

"... the object of the examination being not, merely for the purpose of collecting the debts on behalf of the creditors or of ascertaining simply what sum can be made available for the purpose of the protection of the public in cases in which the Bankruptcy proceedings, apply and that, there shall be a full searching examination as to what has been the conduct of the debtor in order that a full report may be made to the court by those who carry out the examination of the debtor.

To concentrate attention upon the mere debt collecting and distribution of assets, is to fail to appreciate, one very important side of Bankruptcy proceedings and law..... The purpose of the Act being to secure a full and complete examination and disclosure of the facts to the Bankruptcy in the interests of the public and not merely in the interests of those who, are creditors of the debtor."

*Footnote*

Sec 18 Composition or scheme of arrangement

Composition is an arrangement between two or more people, for the payment by one to the other or others a sum of money in satisfaction of an obligation to pay another sum, differing either in amount or mode of payment. Scheme of arrangement is a proposal for dealing with debts by an insolvent, debtor by applying his assets, or income in proportionate payment of them which proposal is agreed to by his, creditors or the requisite majority of them. Under sec 18 (3) of the Act, the proposal must be signed by the debtor personally and must give all the terms, he intends his creditors to consider.

The procedure under Sec 18 must be followed and approved by the court. The effect is that the debtor who has already been adjudged bankrupt will be discharged and his property will be re-vested in him or a person appointed by the court.

In Re Beers<sup>27</sup> It was held that the courts have to consider all the procedures and the question of public interest and demand commercial morality before it approves such composition.

The rationale behind the courts refusing the composition is to protect the public from Bankrupts.

#### Sec 22 Committee of inspection

This committee shall meet at such times as they shall from time to time appoint and failing such appointments at least once a month and the trustee or any member of the committee may also call, a meeting of the committee and when he thinks necessary.

#### Sec 27 Redirection of Debtor's Letters

Where a receiving order is made against a debtor the court on the application of the official Receiver, or trustee, may from time to time order that for such time not exceeding six months as the court thinks fit, post letters, telegrams, cablegrams, addressed to the debtor for redirection, shall be directed, sent, or delivered by the postmaster general or the officers acting under him, or by any other person incharge of the transmission and receipt of telegrams and cablegrams to the Official Receiver or the trustee or otherwise as the court directs and the same shall be done accordingly.

#### Sec 53 Realization of Property

The trustee shall as soon as maybe take possession of deeds, books and documents of a bankrupt and all other parts capable of manual delivery. He has been described as a "Statutory assignee" of the Bankrupts, in the transference from the Bankrupt to the trustee without any formality being necessary<sup>29</sup>. He must take possession of the Bankrupt's property, if possession is possible manually and, which will be protected in such possession as if he were a Receiver appointed by the High Court. Hence interference with the trustee's possession is contempt. The powers of the trustee to realise the Bankrupt's property will be considered in due course. Here it is only necessary to point put that by operation of the Bankruptcy Act, the trustee becomes as much the owner of the Bankrupt's property as the Bankrupt was before his adjudication.<sup>30</sup>

Thus the trustee becomes the legal owner of property owned legally by the Bankrupt.<sup>31</sup> If the property is subject to equities then as explained by Denning L.J. as in Bendall V McWhirter<sup>32</sup>, the trustee in Bankruptcy takes the property subject to such equities. He cannot be better off than the Bankrupt as far as the title is concerned. The property is taken in the "plight" in which it was at the material moment of time.

The second function set out by McNeil from what has been discussed indicate that these provisions are protective of the creditor.

The third function, set out by McNeil<sup>33</sup> is: "Enforcing certain standards of commercial morality",

Sec 3(1) (f) provides that a debtor commits an Act of Bankruptcy in each of the following cases, "If he files in the court a declaration of his inability to pay his debts or presents, a bankruptcy petition against himself". The debtor may do so, where he can validly allege that, he is unable to pay his debts.<sup>34</sup>

#### Sec 6 (1) creditors Petition

Whether a creditor may present a Bankruptcy petition depends in the first instance upon whether or not the debtor against whom the petition is brought has committed an Act of Bankruptcy. In addition, however, certain other conditions some of them statutory other derived from what has been called "Common law of Bankruptcy" must also be fulfilled.

#### Sec 61; Power to allow Bankrupt to manage property

The trustee with the permission of the committee of inspection, may appoint the Bankrupt himself to superintend the management of the property of the Bankrupt or of any part thereof or to carry on the trade (if any) of the Bankrupt for the benefit of his creditors and in any respect to aid administering the property, in such manner and on such terms as the trustee may direct.

Sec 81 (1) control over Trustee

This section provides that the trustee shall in the administration of the property of the Bankrupt and in the distribution thereof amongst his creditors, have regard to any directions that maybe given by resolution of the creditors at any general meeting, or by the committee of inspection and any direction, so given by the creditors at any general meeting shall in case of conflict be deemed to override any directions given by the committee of inspection.

The next chapter deals with a critique of the sections dealt with in this chapter and the possible solutions. In the view of the injustices likely to arise from the application of this doctrine the author recommends that the law relating to Bankruptcy be ammended. Further insuses directed towards reformation will be considered in the next chapter.

## RECOMMENDATIONS AND CONCLUSIONS

A variety of issues and problems have been discussed in the foregoing chapter of this dissertation. Only those aspects of the Bankruptcy process considered relevant to the context of thesis herein discussed have been examined and discussed. The dissertation set out in a three pronged inquiry. The first aspect of this dealt with the historical background both in England and Kenya. The second one discussed reception of the English law into Kenya and the last aspect dealt with the three broad functions set out by McNeil. An attempt has been made to show what the fundamental aims of Bankruptcy law in Kenya are in relation to the three functions stated by the above named author.

Our survey of the Bankruptcy Act reveals that the legislature, has pandered to the interests of the creditors for too long, to the detriment of the debtor's interest. The consequence of this is that it seems it is only the second function of McNeil that appears to be the fundamental aim of Bankruptcy law in Kenya. Protection of private property is a cardinal law of any branch of bourgeoisie law. Competitive capitalism in Britain led into the irrefutable phenomenon of concentration and centralisation of capitalism in fewer and fewer hands. This was caused by the quest for quick realisation of surplus value and its accumulation under increased production of material goods. Under monopoly capitalism there came to be mass production and distribution of goods. Those capitalists who could not put up with this capitalist competition were knocked out of the competition and the creditors had a tool in their hands to deal with them, the law of Bankruptcy.

Throughout the dissertation the fact of the out-modedness of the Bankruptcy Act has been constantly alluded to. It is with the view of both alleviating the plight of the debtor and of bringing the o moded provisions up-to-date that the author makes her suggestions for reforms.

The 1000/- for the petitioning creditors debt, has remained unaltered for over eight decades now. The amount suggested by the author, 8000/-.



The decline in monetary value has led to recent legislation in Australia by which the amount required to support a Bankruptcy petition has been raised from one thousand shillings to five hundred Australian dollars, the equivalent of five thousand six hundred and seventy Kenya shillings. Public examination is costly and the author is of the view that it should be abolished. It is proposed to examine developments in Australia which Bankruptcy Act of 1966 constituted a significance improvement over the existing situation which is similar to the one in Kenya today. In Australia, public examination was mandatory in every case. But the law today in Australia is that as concerns small Bankruptcies unless creditors and the trustee feel that it will assist in unearthing concealed assets this will not normally take place.

Illustrations, relating to the discharge provisions, which were made in the last chapter revealed the rigour with which these provisions are applied. The discharge from Bankruptcy was originally the one important aspect of the law of Bankruptcy that the committee which reported in 1957 was specifically requested to investigate. In consequence reform of the law relating to discharge occupies several pages of that report<sup>2</sup> and some reference to the suggestions therein, made would seem to be desirable and reasonable in the present context.

It is pointed out that the present law fails to achieve the primary objects of any law, relating to discharge namely to penalise and deter the dishonest Bankrupt and keep him under supervision to assist the honest and possibly unfortunante Bankrupt, and to distinguish the better type of Bankrupt from the bad. The reason for this is because under the present law, discharge must be sought by the Bankrupt himself, in consequence of which ones very few, bankrupts ever apply for discharge. Honest Bankrupts remain under such disability for years possibly until death, when the problems of administering an insolvent estate emerge. Dishonest bankrupts know how to manipulate the law relating to discharge so as to free themselves disability within a short time from adjudication.

The author's recommendation is, that a Bankrupt is entitled to automatic discharge on the expiry of two years from the date of his adjudication. The faster the Bankrupt is rehabilitated the better therefore for society at large and for himself. The reason that has prompted the author to suggest that the discharge be automatic and not through the court is that some Bankrupts are not likely to apply for their discharge for fear that they will be subjected to a grilling in the hands of their creditors.

The principle of automatic discharge was made available in Australia and New Zealand in 1967. Although these, changes were made over a decade ago, there has been no complaint, against the practice from the commercial community nor has it encouraged the incidence of insolvency as, was feared by those who initially opposed the introduction of the change.

A compromise solution where the interests of the debtor and the creditor do not conflict with those of the society at large should be adopted. Such a compromise would involve a situation where the debtor is not stripped of, everything he owns otherwise, he would be a burden to the society. He should not be exposed to unnecessary punishment nor should his chances of supporting himself and thus becoming a burden to the society at large be fettered.

Under Sec 34 of the Act, certain disabilities are laid down where a person who has been adjudged a Bankrupt may not:-

- a) Manage or assist or take in the management of any trade or business with any person who is a relative by consanguinity or affinity unless he has obtained permission from the court to do so.

These disabilities run through sections: 101, 138, 139, 140, 143 and 144.

It is recommended that there is no need to impose the disqualifications upon the Bankrupt's activities so much, so that he is as it were being

punished for his insolvency. His chances of acquiring a new start in life as shown elsewhere are infact lessened.

The, author also hastens to add that her constant reference to foreign legislations should not be construed to mean that slavish aping of what foreign legislatives are dong will be the solution to our legislative problems but rather that we should regard them merely as developments on which we can improve so as to obtain better results.

FOOT NOTES

- 1) McNeil Supra Ch. 1 pp 3
- 2) Report of the committee on Bankruptcy law and Deeds of Arrangement law Ammendment, 1957 Cmd. 221, paras, 53-78

*Footnote to the conclusion?*

FOOTNOTES: CHAPTER ONE (II)

- 1) Fridman, Hick and Johnson, Bankruptcy law and practice  
London Butterworths. 1970 P.1
- 2) Fridman, Hick and Johnson Supra Note at P.2
- 3) Kenya Bankruptcy Act Cap 53 laws of Kenya.
- 4) McNeil Bankruptcy law in East Africa Copyright in Kenya (1966)
- 5) McNeil Supra note at P.4
- 6) On discharge by the court the debtor is no longer a Bankrupt
- 7) For example under sec. 28(i) of the English Bankruptcy Act, 1914 an order of discharge, will not release the Bankrupt from, any debt or liability incurred by means of any fraud or fraudulent breach of trust.
- 8) Karl Marx: "Manifesto of the communist part"  
"In Marx and Engels selected works progress publishers, Moscovs (1969 Vol.1 P.108.
- 9) Holdsworth: A history of English law
- 10) Windschied: Die Autgabende Rechtswissen Schaft  
(Rectoral addresses lepsing)
- 8) Colin Leys : Under-development in Kenya. The political  
1844. Progress publishers Moscow.  
Economy of neo-colonialism. 1964-1971 London  
Heinemann.
- 9) Brett: Cited Supra at pp 3
- 10) Marx, Engels and Lenin, Un Historical materialism.  
Progress publishers Moscow (1972).

(II)

FOOTNOTES FOR CHAPTER TWO

- 1) Y P Ghai and J P W B McAuslan :  
Public law and political change in Kenya  
Oxford University press (1970)
- 2) General Act: Hertslet Volume II PP 468 - 87
- 3) E A Brett: Colonisation and under-development in E A.  
Politics of economic change.  
1919 - 1939 London - Heineman (1973) at pp 168
- 4) G K Kuria : Religion, the constitution family law and  
sucession.
- 5) Judicature Act: Cap 8 of the laws of Kenya
- 6) Y P Ghai and J P W B McAuslan: Supra note at pp 1
- 7) McNeil: Bankruptcy law in East Africa (1966) Copyright  
in Kenya.
- 8) Colin Leys : Under-development in Kenya. The political  
Economy of Neo-colonialism. 1964-1971 London  
Heinemann.
- 9) Brett: Cited Supra at pp 3
- 10) Marx, Engels and Lenin, Un Hinstorical materialsim.  
Progress publishers Moscow (1972).

CHAPTER THREE : FOOTNOTES

- 1) McNeil Supra Ch 1 P.3
- 2) Karl Marx, Engels Lenin; On historical materialism
- 3) McNeil Supra
- 4) Bankruptcy Act 1914 Sec 26(1) as amended by Bankruptcy (Amendment) Act. 1926, S.1
- 5) Bankruptcy Act 1914 S 76(1)
- 6) Kenya Bankruptcy Act Cap 53 laws of Kenya
- 7) Re Barker (1890) 25 Q.B.D. 285
- 8) Re Betts and Block (1887) 19 Q.B.D. 39
- 9) Re Solomons (1904) 1K.B. 106
- 10) Re Pearse (1912) 107 L.T. 859
- 11) See e.g. Re Benjamin (1943) 1 All.E.R 468 where the bankrupt's conduct was satisfactory and the absolute refusal of a discharge was held to be unreasonable.
- 12) Re Smith (1947) 1 AU.E.R. 769 at p. 771
- 13) Re Tabnisky (1947) Ch.565
- 14) Bankruptcy Act 1914 S.26(2) provision as amended by the criminal law Act 1967, schedule 3 part III
- 15) Fridman, Hicks and Johnson Ibid at pp. 925 -
- 16) McNeil Supra Ch. 1 pp. 3
- 17) Supra
- 18) Re Spackman ex parte Foley (1890) 24 Q.B.D. 728
- 19) Re Debtor (1927) 1Ch.19
- 20) Note, the discretion of the court where a petition is brought against more than one debtor to dismiss it, as against one, while allowing it against others. Bankruptcy Act. 1914 S 115.
- 21) Bankruptcy rules 1952. r 162 (2)
- 22) Sec 6(2) of Kenya Bankruptcy Act.
- 23) Bankruptcy Rules 1952 r.174
- 24) Re F.B. Warren (1938) Ch.725
- 25) Bankruptcy Act (1914) S.15(1)
- 26) Re Pagget (1927) 2 Ch.85 at p.87-88
- 27) Re Beers (1903) 1K.B. 628
- 28) Re Wallis (1902) 1K.B. 719
- 29) And his title, arises by operation of the Act, as soon as a receiving order, is made by virtue of the doctrine of relation back: Re Gansbourg (1920) 2 K.B. 426 at p.436 per Lord Sterndale M.R.

CHAPTER THREE : FOOTNOTES

- 30) And as such maybe the subject of an action for specific performance of a contract of sale of land, agreed, to be sold by the Bankrupt before Bankruptcy, Pearce V Bastaple's Trustee in Bankruptcy (1901) 2 Ch.122
- 31) Re Pooley ex parte Rabbidge (1878) 8 Ch.D
- 32) Bendall V McWhirter (1952) 2 Q.B.D. 466 at p. 484  
That case wa overruled so far as the desserted wife's position is concerned by the house of lords in National Provincial Bank Ltd V Ainsworth (1965) A.C. 1175 and the matrimonial home, provides that these shall not prevail inter alia a spouse's trustee in Bankruptcy.
- 33) McNeil Supra
- 34) Bankruptcy Act (1914) s.6(1)