SOUTH AFRICAN LAW COMMISSION

PROJECT 37

PREFERENCES ON INSOLVENCY

WORKING PAPER I

JULY 1982

G.P.-S.

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

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PREFACE

The working paper has been prepared by the research staff of the commission to serve as a basis for the deliberation of the commission. The points of view, conclusions and recommendations contained therein should not at this stage be regarded as those of the commission. The working paper is being published in full to provide persons and bodies wishing to comment thereon or to make suggestions for the development, improvement, modernisation or reform of this particular branch of the law, with sufficient background information to enable them to place substantiated submissions before the commission.

Any person or body wishing to make oral representations to the commission, must submit a brief résumé of his or its proposed representations together with a request to be heard by the commission, to the commission in writing.

It will be appreciated if written comments, representations or requests reach the commission not later than 15 July 1983. Please refer to the previous page for the address to which correspondence should be directed.

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HIERDIE STUK IS OOK IN AFRIKAANS BESKIKBAAR

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1 Introduction

1.1 Origin of the project

In May 1979 the Secretary for Justice in a memorandum to the Minister for Justice wrote as follows:

> "Masters of the Supreme Court have in the past warned against the creation of new preferent claims. It stands to reason that the creation of more preferent claims or the increase of the amounts claimable under existing preferent claims would further erode the free residue available for distribution among concurrent creditors. Although convincing reasons for the creation of new categories of preferent claims or the increase of maximum amounts under existing preferent claims might exist, it becomes more and more difficult to decide where the line must be drawn. It appears necessary that a thorough investigation into the law relating to preference in insolvency ought to be carried out with a view to reforming this branch of the law. It is suggested that the matter, including the requests for the inclusion of particular categories of preferent claims referred to above, be referred to the South African Law Commission for investigation."

The minister granted his approval for the commission to undertake such an investigation, and the project was included in the commission's programme.

1.2 A similar line of thought is apparent from the preface of a text book on the English law of insolvency:[1]

> "These and other extensions of the category of preferential debts are much resented by the ordinary unsecured creditors; there appears to be a strong demand for a reappraisal of the social justifications for the conferment of preferential status on any particular debt."

The object of the law of insolvency is to ensure that creditors of an insolvent should share in the assets of the insolvent estate on an equal footing, apart from specific common law and statutory exceptions. There are two classes of creditors who enjoy preference above the other creditors in general. The first class is known as secured creditors. They are creditors who hold certain assets or rights over them as security for the payment of their claims, eg pledgees, mortgagees and lien holders. Their claims are paid out of the proceeds of the particular assets comprising their security. Whatever remains after payment of the claims of secured creditors constitutes the free residue of the insolvent estate. Creditors falling into the second class enjoying preference are those who are entitled to payment of their claims out of the free residue of the insolvent estate

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1. Williams & Muir Hunter The law and practice in bankruptcy vii.

before the claims of the remaining creditors (concurrent creditors) are taken into account. These creditors are referred to as preferent creditors in this working paper.

1.4 It is inferred from the memorandum referred to above and the representations made to the Department of Justice for the extension of existing preferences and the creation of new preferences, that the investigation must at this stage be confined to preferences payable out of the free residue and that it is consequently not concerned with the position of secured creditors.

1.5 Several hypothecs existed under the common law which conferred a preference on some creditors above others.

> "Tacit hypothecs, which might be both special and general, are a legacy from the Roman law. In addition to the reception of numerous tacit hypothecs from the Roman law dozens of new tacit hypothecs were created by legislation in the Roman-Dutch law".[2]

> "The common law tacit hypothecs hampered the commercial intercourse of the time. Since these hypothecs came

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2. Van der Merwe Sakereg (Law of things) 441. Our translation.

into being by operation of law without registration, it was impossible for a grantor of credit to ascertain whether the assets of the prospective borrower were already subject to a tacit hypothec. This was probably the reason why most of the common law hypothecs were already abolished by pre-Union legislation in three of the provinces - the exception being the Orange Free State. This clearing-up process was followed by section 85 of the Insolvency Act, which provided that no tacit hypothec other than a landlord's legal hypothec or the hypothec of the hire-purchase seller, specially created by section 84 of the same act, conferred any preferent right against an insolvent estate."[3]

"(T)he trend of both modern judicial thought and modern legislation inclines to restrict or abolish and not to extend the rights of tacit hypothecs."[4]

1.6 The old Insolvency Act,[5] which abolished certain common law hypothecs, itself again introduced preferences in their present form.[6]

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3. Van der Merwe Sakereg 493. Cf Wille's principles of South African law 235.

4. Receiver of Revenue v M Barlinski & Co Ltd (In liquidation) 1920 CPD 410 at 417.

5. Insolvency Act 32 of 1916 s 86.

6. Funeral and death-bed expenses s 82; costs of administration s 83; costs of execution before sequestration s 84; salaries s 85.

Other preferences followed shortly afterwards[7] and preferences increased through the years until the present position was reached.

1.7 The preferences contained in sections 96 to 102 of the present Insolvency Act[8] differ from the common law hypothecs in that they confer no real rights over the property of a debtor, but on insolvency their effect on concurrent creditors is the same. As is the case with common law hypothecs there is no way in which a person who extends credit can determine how much will be due to preferent creditors. Creditors who know that they enjoy a preference are not so prompt in recovering amounts due to them and this strengthens the false impression of creditworthiness which may exist. Apart from the advantage that they are the first to receive payment, preferent creditors are liable to pay a contribution only in exceptional circumstances if the proceeds of the assets do not cover the administration costs.[9]

1.8 Statutory provision for certain categories of preferences have the tendency to create precedents for

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7. Income Tax (Consolidation) Act 41 of 1917 s 93; Miners' Phthises Act 40 of 1919 s 18.

8. Act 24 of 1936. Unless the contrary appears, references to sections are references to sections of this act.

9. S 106; Mars The law of insolvency in South Africa 394.

the addition of new preferences. Classes of creditors are continually coming forward with equally strong claims to preferences. On the one hand it is difficult to reject such claims on the merits but on the other hand it remains desirable to limit preferent claims in regard to insolvent estates in the interests of the general body of creditors. In the search for a solution to the problem it is necessary to go into the origins of the existing preferences and to reconsider whether there should be such preferences and what their order of priority should be in the light of new and potential claims to preferences. The starting point should be that a departure from the object of equal treatment of creditors of an insolvent estate is justified only if there are convincing reasons that can be advanced.

2 Short survey of the existing legal position

2.1 The expression "free residue" is defined in section 2 of the act as follows:

> "'free residue', in relation to an insolvent estate, means that portion of the estate which is not subject to any right of preference by reason of any special mortgage, legal hypothec, pledge or right of retention."

The legal hypothec referred to in the definition is

the landlord's tacit hypothec. [10] Apart from these four types of security section 84(1) of the act accords a creditor by virtue of a hire-purchase agreement a hypothec over the goods delivered to the debtor in terms of the contract, as security for the amount still owing. References in this section to a hire-purchase contract and the Hire-Purchase Act must now be construed as references to credit agreement transactions and the Credit Agreements Act 75 of 1980 respectively.[11] There are also other Acts which create preferences similar to a pledge or right of retention.[12] There are also statutory provisions in terms of which property does not vest in the trustee of the insolvent estate in certain cases.[13]

2.2 Sections 96 to 102 of the act provide for the order of priority of claims on the free residue. The order of priority is briefly as follows:

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10. S 85.

11. Interpretation Act 33 of 1957 s 12(1).

12. See eg Customs and Excise Act 91 of 1964 s 114 discussed in Rand Bank Bpk v Regering van die Republiek van Suid-Afrika 1974 4 SA 764 (T) and Secretary for Customs and Excise v Millman 1975 3 SA 544 (A); Land Bank Act 13 of 1944 s 33; Co-operatives Act 91 of 1981 s 173.

13. Cf eg the National Supplies Procurement Act 89 of 1970 s 5A discussed in par 11.3 below.

(a) Funeral expenses not exceeding R100.[14]

(b) Death-bed expenses not exceeding R100.[15]

(c) Costs of sequestration and costs of administration of estate.[16]

(d) Costs of execution before sequestration.[17]

(e) The following, which rank pari passu:

(i) Amounts due in terms of the Workmen's Compensation Act to the Workmen's Compensation Commissioner in respect of a workman.[18]

(ii) Amounts which in terms of the Income Tax Act were deducted or withheld by the insolvent in respect of another person's obligation to pay tax but were not paid to the Secretary for Inland Revenue.[19]

(iii) Amounts due, in terms of the Occupational Diseases in Mines and Works Act, to the Compensation Fund for Mines and Works.[20]

(iv) Amounts due in terms of the Customs and Excise Act.[21]

(v) Amounts provided by the state from the National Supplies Procurement Fund.[22]

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14. S 96(1).
15. S 96(2).
16. S 97.
17. S 98.
18. S 99(1)(a).
19. S 99(1)(b).
20. S 99(1)(c).
21. S 99(1)(cA).
22. S 99(1)(cB).

(vi) Sales tax.[23]

(vii) Appreciation contributions in terms of the Community Development Act.[24]

(viii) Amounts due by an employer to the Unemployment Insurance Fund.[25]

(ix) Contributions payable under any law to any pension, sick, medical, unemployment, holiday, provident or other insurance fund.[26]

(f) Salary or wages (including a commercial traveller's commission) for two months or fees due to an accountant, auditor or nurse not exceeding R400 for each employee, accountant, auditor or nurse. Salary in lieu of leave or bonus for not more than 21 days and not exceeding R200.[27]

(g) Income tax.[28]

(h) General bonds on movables.[29]

2.3 Application to companies and co-operative societies

Section 342(1) of the Companies Act,[30] provides as follows:

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23. S 99(1)(cC).
24. S 99(1)(d).
25. S 99(1)(e).
26. S 99(1)(f).
27. S 100.
28. S 101.
29. S 102.
30. Act 61 of 1973.

"In every winding-up of a company the assets shall be applied in payment of the costs, charges and expenses incurred in the winding-up and ... the claims of creditors as nearly as possible as they would be applied in payment of the costs of sequestration and the claims of creditors under the law relating to insolvency ..."

Section 219 of the Co-operatives Act[31] contains provisions similar to those in sections 97 and 99 to 101 of the Insolvency Act, relating to the insolvency of a co-operative.

2.4 Claims payable after concurrent claims

2.4.1 According to the common law an ex lege claimant for maintenance after sequestration is entitled to a dividend only after all other claims have been paid in full.[32]

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31. Act 91 of 1981.

32. In re Estate Visser 1948 3 SA 1129 (C) 1134; Ex parte Zietsman In re Estate Bastard 1952 2 SA 16 (C) 21A; Lloyd v Menzies 1956 2 SA 97 (D) 102A; Christie v Estate Christie 1956 3 SA 659 (N) 661H; Beinart 1958 Acta Juridica at 110.

2.4.2 A partner or his estate cannot claim in competition with the creditors of the partnership.[33]

3 Funeral and death-bed expenses

3. Section 96 of the act provides as follows:

"(1) Any free residue of an insolvent estate shall be applied in the first place in defraying the expenses of the funeral of the insolvent, if he died before the trustee's first plan of distribution was submitted to the Master in terms of section ninety-one, and the expenses of the funeral of the insolvent's wife or minor child, if those expenses were incurred within the period of three months immediately preceding the sequestration of the insolvent's estate, but the amount payable under this sub-section shall not exceed fifty pounds in all.

(2) Thereafter any balance of the free residue shall be applied in defraying the death-bed expenses of the insolvent if they were incurred before the trustee's first plan of

33. Mars The law of insolvency in South Africa 470.

distribution was submitted to the Master in terms of section ninety-one and the death-bed expenses of the debtor's wife or minor child, if those expenses were incurred within the period of three months immediately preceding the sequestration of the insolvent's estate, but the amount payable under this sub-section shall not exceed fifty pounds in all.

(3) In sub-section (2) 'death-bed expenses' means expenses incurred for medical attendance, nursing otherwise than by a nurse referred to in section one hundred, medicines and medical necessaries, and claims for those expenses shall rank pari passu and abate in equal proportion, if necessary.

(4) If the free residue of the estate is insufficient to defray the expenses mentioned in sub-sections (1) and (2), the deficiency shall be defrayed out of the proceeds of any other assets of the estate in proportion to their value."

3.2 Origin of the preference

3.2.1 The preference appeared in the common law long ago.[34]

3.2.2 Essentially the same preference was conferred by section 82 of the old Insolvency Act,[35] but the amount was limited to R50-00. This amount was increased to R100-00 in terms of section 29 of the Insolvency Amendment Act.[36]

3.3 Nature of the preference

This preferent creditor is in an exceptionally strong position for three reasons. Firstly he is the very first creditor to be paid out of the free residue even before the costs of sequestration have been paid. Secondly, if the free residue is insufficient, he is paid out of the proceeds of the other assets even though they may be subject to a special mortgage, pledge, right of retention or hypothec of a landlord or hire-purchase seller.[37] Thirdly his claim is the

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34. Grotius 2.48.14. Funeral expenses : Voet 11.7.9 and 20.4.36; Tiffin v Harsant (1876) 6 Buch 50; Wilson v Bruton (1902) 12 CTR 234. Death-bed expenses : Voet 11.17.15; McNally v Wiggett's Trustees (1905) 22 SC 686; In re Wolff Ex parte Daumas (1888) 6 SC 127; In re Roux (1833) 2 Menz 318; Stewart v Insolvent Estate Hyland (1907) 17 CTR 343.

35. Act 32 of 1916.

36. Act 99 of 1965.

37. Ss 96(4) and 95(1).

only one (besides costs of administration of the estate) which is admitted regardless of the fact that the debt might have arisen after the sequestration of the estate of the insolvent or after his death. In addition, other creditors were previously required to pay a contribution in terms of section 106 of the act to cover a shortfall on claims under section 96. Section 32 of the Insolvency Amendment Act[38] did away with this further advantage.

3.4 Merits of the preference

3.4.1 Funeral expenses

3.4.1.1 The position of this class of creditor is also exceptionally strong in other legal systems which were considered. In Canada[39] claims in respect of funeral expenses enjoy, together with the costs of administration of the deceased estate, preference over all other claims. In France[40] and England[41] these claims enjoy preference after costs of administration and in Australia[42] these costs are paid together with the costs of administration of the deceased estate after the costs of administration of the sequestrated estate and taxes

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38. Act 99 of 1965.
39. Annexure 3.1.
40. Annexure 5.2.
41. Annexure 1.1.
42. Annexure 2.3.

deducted but not yet paid. In Germany[43] a claim for funeral expenses apparently enjoys no preference.

3.4.1.2 Voet[44] gives as a reason for this preference the fact that corpses have to be buried and cannot be left lying around. Faber[45] gives the same reason. Our present law provides that the local authority or the responsible authority of the hospital or institution where the deceased died is responsible for the funeral of a destitute person or a corpse which is unclaimed or where no responsible person undertakes to bury and does bury the deceased.[46]

An additional reason for the high priority which Voet mentions is the following:[47]

> "The principle which operates in favour of religious duty appeared to be the highest of all principles."

The next of kin of a deceased undoubtedly feel morally obliged today to give him a proper funeral. Voet's warning must, however, be borne in mind:[48]

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43. Annexure 4.
44. 11.7.7.
45. See his commentary on D 11.7.14 discussed in Stewart v Insolvent Estate Hyland (1907) 17 CTR 343 at 344.
46. Health Act 63 of 1977 s 48(2).
47. 11.7.9. Gane's translation Vol 2 at 738.
48. 11.7.13. Gane's translation Vol 2 at 741. Our italics.

"So on the other hand a refund should not be allowed of excessive expenditure also, overstepping the resources and position of the deceased; but only to the extent to which on principles of fairness and of right expense ought to have been laid out on the funeral of a person of that class - a matter to be settled at the discretion of the judge."

The quotation indicates that the other creditors of the deceased should not be too heavily burdened with the costs of the deceased's funeral if his estate is insolvent.

A claim for funeral expenses can be distinguished from other claims on the ground that the incurring of such expenses entails a greater risk of loss. The undertaker or other person who incurs the expenses is hardly in a position to investigate the creditworthiness of the deceased's estate beforehand. Even if it were practically possible to do this, a person who has reason to believe that the deceased's estate is insolvent would be reluctant to incur the expenses if he had no assurance that he would be able to recover them. This could have the result that persons other than paupers would have to be buried by local authorities, which would amount to shifting the expenses on to the general public. On the other hand a funeral is an event of a personal nature which affects the next of kin and family of the deceased

most. They are the ones who wish to pay the last respects to the deceased by way of a fitting and dignified funeral. The question may well be posed why this should take place at the expense of the deceased's creditors. One would expect that the "religious duty" which Voet mentions should rest on the next of kin or possibly on the community as a whole rather than on the deceased's creditors. The argument that corpses should not be left lying around but should be buried as quickly as possible as a basis for the preference no longer carries much weight in modern society. There are measures to avoid this, as we have seen.

The National Funeral Directors' Association has made representations for the increase of the amount of R100 at present provided for by this preference. Funeral expenses, like all other expenses, continue to rise. It is undoubtedly true that the amount of R100 can no longer cover the costs of a proper funeral. It is, however, doubtful if undertakers suffer significant losses because they are unable to recover their costs in full from insolvent deceased estates. In the first place a considerable percentage of people who die are covered by funeral insurance. Where this is not the case undertakers usually insist on payment in cash. Unlike medical practitioners they are not ethically obliged to perform a service without remuneration in emergencies.

Furthermore, like most purveyors of goods and services, they are in a position to absorb their losses in the price of their services.

It is suggested that there is not sufficient justification to burden the insolvent's creditors with funeral expenses. If, however, it is felt that the preference should be retained it should rank after sequestration costs and secured claims.

3.4.2 Death-bed expenses

3.4.2.1 The fees of a doctor or nurse for medical services during the year before sequestration enjoy a fairly low preference in Germany.[49] In France the preference in respect of death-bed medical expenses is fairly high.[50] There is apparently no preference for these expenses in England, Australia or Canada.

3.4.2.2 Voet is of the opinion that this preference gained recognition in the common law as a result of an oversight:[51]

> "(They took little note of the fact that in the first passage cited the discussion was not

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49. Annexure 4.6.

50. Annexure 5.3.

51. 11.7.15. Gane's translation Vol 2 at 743.

about lotions having to do with medicine, but about those which are wont to be applied with a view to preserving the dead body against corruption; and that in the second and third passages cited a claim for or a deduction of disbursements is indeed vouch-safed, but nothing is laid down as to prefe-rence or privilege) ... Thus it has been nowadays so settled and approved everywhere by a long chain of ever similarly decided cases that it is not wise to depart from it in giving opinions."

He refers in the same section to the limitations placed on the preference and an anomaly which arose as a result thereof:[52]

"We must however keep in mind that this same view, adopted as it was originally not in reason but in error, and then as it were by custom, is commonly applied only to expen-ses incurred on a last illness, and not also to other illnesses from which the deceased previously regained health and recovered with medical aid. And this even though it may thus happen that the douceurs of medical men who cure faithfully and successfully by the principles of their art are at times

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52. 11.7.15. Ganes translation Vol 2 at 744.

postponed to the later fees of those who possibly caused the death of the deceased either by lack of judgment or by lack of skill, but whose mistakes are now covered by the earth."

3.4.2.3 An old Cape decision gives the following reasons for the preference and also indicates what must be considered to be death-bed expenses:[53]

"To my mind, it is the intention of the law to protect as far as possible the medical practitioner, who may be called in during the last sufferings of a man, and there may be circumstances which would prevent him from asking his patient for his fees until the decease of that patient. It may often happen that a medical man will not in the last illness of a patient trouble him with his account; but the present case is of a different nature. It seems that the patient had been suffering from a chronic complaint for some years, and during that time he was often able to attend to his business. There seems to be no reason why during the course of that period the doctor did not ask for his fees."

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53. McNally v Wiggett's Trustees (1905) 22 SC 686 at 688.

3.4.2.4 Strauss expresses himself on the question of whether a medical practitioner may refuse to treat a patient because he may not be able to pay as follows:[54]

> "Surely, in our free enterprise system of professional services, a doctor who is in private practice ought to be able to take reasonable steps to protect his financial interests. But the Medical Council virtually has a blanket power to make rulings on medical ethics, and might take a different view."

Earlier in the same work[55] the writer points out that the Medical Council has laid down the following guide-line:

> "A medical practitioner is free to decide whomever he will serve. A practitioner may, however, be required to justify his actions should unnecessary suffering or death result from his refusal to attend a patient; in cases of emergency, a practitioner is obliged to render assistance under all circumstances."

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54. Doctor patient and the law 31.

55. 12.

Cases where death-bed expenses are involved usually amount to emergencies.

3.4.2.5 It is of course so that medical schemes, which guarantee payment, alleviate the problem.[56] There are also measures for providing health services for the needy.[57]

3.4.2.6 It is noteworthy that neither a doctor nor a nurse enjoys any preference for their claims on the insolvency of a living person, even though they might have rendered their services in those circumstances in accordance with their ethical obligations. It is suggested that sufficient provision exists in modern society for the medical treatment and nursing of persons at state expense so that the creditors of an insolvent need not be burdened with his death-bed expenses. The preference which exists is, in any event, of such limited extent that it is of little value. Private medical and nursing services are expensive and should the preference be extended to cover actual expenses it would seriously prejudice the creditors of the insolvent estate. It is considered

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56. According to Van Assche 1978(1) De Jure at 9 more or less 75% of the Whites and 2,5% of the remaining population groups enjoyed coverage at that time.

57. Health Act 63 of 1977 s 12(b)(iv).

that this preference can justifiably be abolished. If it is retained then it must rank after the costs of administration in order of preference and must not be charged against secured creditors.

4 Costs of sequestration and administration of the estate

4.1 Section 97 of the act provides as follows:

"(1) Thereafter any balance of the free residue shall be applied in defraying the costs of the sequestration of the estate in question with the exception of the costs mentioned in sub-section (1) of section eighty-nine.

(2) The costs of the sequestration shall rank according to the following order or priority -

(a) The sheriff's charges incurred since the sequestration;

(b) fees payable to the Master in connection with the sequestration;

(c) the following costs which shall rank pari passu and abate in equal proportions if necessary, that is to say: the taxed costs of sequestration (as defined in sub-section (3)), the

fee mentioned in sub-section (4) of section sixteen, the remuneration of the curator bonis and of the trustee and all other costs of administration and liquidation including such costs incurred by the trustee in giving security for his proper administration of the estate as the Master considers reasonable, in so far as they are not payable by a particular creditor in terms of sub-section (1) of section eighty-nine, any expenses incurred by the Master or by a presiding officer in terms of sub-section (2) of section one hundred and fifty-three and the salary or wages of any person who was engaged by the curator bonis or the trustee in connection with the administration of the insolvent estate.

(3) In paragraph (c) of sub-section (2) the expression 'taxed costs of sequestration' means the costs (as taxed by the registrar of the Court) incurred in connection with the petition of the debtor for acceptance of the surrender of his estate or of a creditor for the sequestration of the

debtor's estate, but it does not include the costs of opposition to such a petition, unless the Court directs that they shall be included."

The costs mentioned in section 89(1) which are referred to in section 97(1) are the costs of maintaining, conserving and realising assets subject to a special mortgage, landlord's legal hypothec, pledge or right of retention and also by implication, assets subject to the hypothec of a hire-purchase seller.

4.2 Criticism of the wording of section 97(2)(c)

The phrase "as the Master considers reasonable, in so far as they are not payable by a particular creditor in terms of sub-section (1) of section eighty-nine" is confusing because it appears as if the phrase qualifies only certain of the costs mentioned in the sub-section. In terms of section 111(2) the master may disallow any costs if he is of the opinion that they are incorrect or improper or that the trustee acted male fide, negligently or unreasonably in incurring those costs. It would accordingly appear that the provision in section 97(2)(c) that the master must consider the fees reasonable, is unnecessary. If the qualification is retained it should also apply to the salary or wages of a person engaged by the trustee. Furthermore it should be clearly set out that

the salary or wages of someone engaged by the trustee for the conservation, realisation and maintenance of the secured asset should be charged against the secured creditor.

4.3 History of the preference

The preference was known to the common law[58] and appeared in substantially the same form in section 83 of the previous act.[59]

4.4 Merits of the preference

4.4.1 These costs enjoy the highest priority in English, Australian, German and French law. In Canada, as with us, the costs follow on funeral expenses.[60] This was also the position in the common law.

4.4.2 Voet correctly states the position as follows:[61]

> "It is clear that necessary expenses come before all claims however privileged in such wise that there is not even understood to be an estate except after deduction of what has been spent in order to

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58. Voet 11.7.9 quoted hereunder.
59. Act 32 of 1916.
60. Annexure.
61. 11.7.9. Gane's translation Vol 2 at 739.

adjust sales or in some other necessary way."

4.4.3 The costs differ from preferent claims (except funeral expenses and sometimes medical expenses) in that they are not debts which were incurred by the insolvent before sequestration. Either the estate was already insolvent or the costs were incurred in order to sequestrate the estate. If the "claimants" are not assured of payment the administration of insolvent estates will be seriously impaired. That is why sections 89(1) and 106 provide that in cases where there are no or insufficient assets to pay these costs, they must be paid by specified creditors. It is logical and fair that these costs enjoy the highest priority.

4.4.4 Section 97(2) sets out an order of priority applying inter se. It is not clear why there should be differentiation between these costs and it appears desirable that all costs of administration should rank pari passu.

4.4.5 The opinion has been expressed that section 14(2) creates a preference above secured claims in favour of the "petitioning creditor" for his costs of sequestration.[62] The wording of section 14(2) does not, however, justify this conclusion,[63] nor is there any apparent jus-

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62. Nathan South African insolvency law 338.

63. Mars The law of insolvency in South Africa 382.

tification for such a preference.

5 Costs of execution before sequestration

5.1 Section 98 of the act provides as follows:

"(1) Thereafter any balance of the free residue shall be applied in defraying -

(a) the taxed fees of the sheriff or messenger in connection with any execution upon any property of the insolvent and in connection with any proceedings which resulted in that execution; and

(b) any other taxed costs in those proceedings not exceeding a sum of five pounds;

to a total amount not exceeding the proceeds of that property if that property was still under attachment or if the proceeds of the sale in execution of that property were still in the hands of the sheriff or messenger at the time of the sequestration of the insolvent's estate.

(2) The attachment of any property in execution of any judgment shall, after the sequestration of the estate of the judgment debtor, not have the effect of conferring upon the judgment creditor any other preference than the preference provided for in sub-section (1)."

5.2 History of the preference

A similar preference was conferred by section 84 of Act 32 of 1916. The costs of a person other than the messenger or sheriff were not limited to R10[64] but only to the proceeds of the goods concerned. The preference is a relic of the more comprehensive pignus praetorium or judiciale of the common law which conferred a preference on the execution creditor for his claim and costs.[65]

It is the only common law preference which is retained as a preference in the form of a hypothec. The award is limited to the proceeds of the goods under attachment and is not merely paid out of the free residue.

5.3 Merits of the preference

A similar preference appears in Canadian law.[66]

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64. Sub-section 98(1)(b) par 5.1 above.

65. Stewart v Insolvent Estate Hyland (1907) 17 CTR 343 at 345. The history of the preference in earlier ordinances is set out in Liquidators Union and Rhodesia Wholesale Ltd v Brown & Co 1922 AD 549. See also Schorer 254 and Liquidator Mr Spares v Goldies Supplies 1982 4 SA 607 (W) 609.

66. Annexure 3.6.

The preference in its original form was unacceptable because it defeated the whole purpose of the insolvency procedure. The purpose is to bring about a concursus creditorum whereupon the creditors, apart from acknowledged preferences, share on an equal footing. If a creditor could obtain payment of his concurrent claim in full after insolvency by attaching the debtor's assets before insolvency this would defeat the purpose. The preference was accordingly abolished by statute.

In Liquidators Union and Rhodesia Wholesale Ltd v Brown & Co[67] the appeal judge made the following remark:

> "But to judge by the history of the legislation, it appears to me the Legislature was not greatly concerned about preserving this pledge,..."

The sheriff and messenger recover their costs from the persons instructing them. The costs mentioned in section 98 are the costs chargeable to a creditor who has attached his debtor's goods by judicial process before the sequestration of his estate. If he is not a preferent creditor for another reason, there is no justification for his enjoying a preference for his costs. Because the attached goods vest in the trustee of the insolvent estate, the estate is, however, spared the costs of attachment and it would not be fair for one creditor to bear those costs.

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67. 1922 AD 549 at 566.

It is suggested that the costs envisaged in section 98(1)(a) should be included in the costs of sequestration by means of a suitable amendment to section 97. The preference provided in section 98(1)(b) can then be expunged.

6 Preferences in favour of the state

6.1 Section 99(1) deals with different preferences which are payable out of the free residue of an insolvent estate. The claims rank pari passu in terms of sub-section (2) and abate in equal proportion if necessary. Before discussing the preferences separately, it is necessary in the first place to examine the position of the state as a creditor of an insolvent estate because several of the preferences apply in favour of the state.

6.2 All the legal systems which were investigated make provisions for preferences in favour of the state.[68]

6.3 The state had a comprehensive preference according to common law. It included claims against persons who collected taxes on behalf of the state, claims in respect of taxes on persons and property and claims arising out of contracts entered into with the state.[69] The common law preferences, in so far as they existed as tacit hypothecs were abolished by statute.[70]

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68. England Annexure 1.2.1; Australia Annexure 2.2 and 2.8; Canada Annexure 3.7 and 3.9; Germany Annexure 4.4; France Annexure 5.8.

69. Voet 20.2.8; Grotius 2.48.15.

70. Insolvency Act 32 of 1916 s 86; Insolvency Act 24 of 1936 s 85(1).

They have, however, been re-introduced by statute. Section 93 of the Income Tax (Consolidation) Act[71] provided, for example:

> "Any tax due and payable under the provisions of this Act shall be a first charge upon the assets of the person by whom such tax is due."

This preference apparently took precedence even over secured creditors. Provision was also made for a preference in respect of persons who collected or withheld taxes in a representative capacity.[72] Section 66(1) of the Income Tax Act[73] retained this preference but at least allowed a prior special mortgage to enjoy a higher preference.

Section 101 of the Insolvency Act[74] which apparently repealed the above-mentioned preference by implication, provided that a claim for income tax be charged against the free residue after other preferences were satisfied. The preference has been amended from time to time to provide for technical aspects, but the nature and order of priority of the preference have not altered.

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71. Act 41 of 1917.

72. Ibid ss 74, 75, 76 and 77.

73. Act 40 of 1925.

74. Act 24 of 1936.

In regard to taxes deducted by "tax collectors" but not yet paid, section 17 of the Income Tax Amendment Act,[75] provided for a preference over the free residue ranking just after secured claims and costs of administration. This preference was retained in section 99(1)(b) of the act as it is worded ~~at~~ present.

Preference has from time to time been accorded to claims by the state, which are unrelated to taxes but which arise from the state participating in commercial activities.[76]

6.4 Merits of the preference

It appears that there is a growing tendency today to regard the state as an ordinary creditor.[77] The position of power which the state as creditor occupies in England has also been curtailed:[78]

> "It follows from what I have said that the Crown is no longer in a position to say 'I come first'."

The reason for the state's preference does not appear clearly from either the sources or the decisions which were consulted. The following dictum from an English decision does give an indication in this connection:[79]

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75. Act 6 of 1963.

76. S 99(1)(cB) par 11 hereunder; s 99(1)(d) par 13 hereunder.

77. Cf the State Liability Act 20 of 1957 which normalises the position of the state as defendant.

78. Food Controller v Cork 1923 AC 647 at 670.

79. Commissioners of Taxation for the State of New South Wales v Palmer 1907 AC 179 at 182.

"Except so far as the Legislature has thought fit to interfere, the rule is one of universal application, and perhaps not unreasonable, when it is considered that, after all, it only means that the interests of individuals are to be postponed to the interests of the community."

This argument is cold comfort for the other creditors who suffer loss because of the state's preferences. The following criticism of this point of view appears to be justified:[80]

"In the case of Palmer Lord Macnaghten justifies the doctrine on the ground that its assertion results in the benefit of the general community (that is, the general body of taxpayers) although at the expense of the individual. I should have thought this was a reason for condemning the principle. Why should individuals be made to suffer for the general good, especially in a case like the present, where the general benefit is infinitesimal but the individual loss substantial? In the second place, this alleged prerogative is hostile to the general policy of the Bankruptcy Acts, which aim at equal treatment of all creditors in the matter of the distribution of the estates of a bankrupt."

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80. Admiralty v Blair's Trustee 1916 SC 247 at 248 quoted by the Scottish Law Commission Report on bankruptcy 217.

The mere fact that the state is a creditor does not justify a general preference. The preference conferred today in our law and in other legal systems is mostly limited to claims in connection with taxes.

6.5 An English decision mentions the following factors which may serve as justification for the proposition that a claim for taxes is entitled to a preference:[81]

> "Matters like wages, and such like, accrue regularly and probably at a regular rate. Taxes, as we know, are different. They are the subject of assessments which may be postponed by argument and other events for years and years, so that at any particular date it may be a wholly uncertain matter what will be the debts due when the taxes have been finally assessed ... It is common knowledge that, as a trader ... approaches his financial doom, he becomes less likely than ever to pay taxes, and, indeed, less likely than ever to get his taxes assessed."

The tax collector, as creditor, has certain problems but special statutory provisions to a large extent alleviate the effect of the problems.

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81. Re Pratt 1950 2 AE 994 at 1002.

6.6 Other considerations, which have been advanced in favour of a preference for taxes, are the following:

(a) Debts due to the community in general should in principle enjoy preference over debts due to individual creditors.

(b) The Receiver of Revenue is an involuntary creditor. He cannot choose with whom he wishes to do business.

(c) The Receiver of Revenue is in the nature of things a creditor in every insolvent estate.

(d) The Receiver of Revenue cannot protect himself by arranging security like commercial creditors.

6.7 The Scottish Law Commission which recently completed an investigation[82] considered all the preferences which exist in Scottish law in regard to different forms of tax individually and came to the conclusion that not one of them was justified. The commission's premise was that unsecured creditors should be treated on an equal footing except in so far as justifiable exceptions exist. Exceptions can be justified only on the ground of fairness or hardship which will be suffered if a concession is not made. Concerning the so-called principle that debts due to the community should take precedence, the commission

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82. Scottish Law Commission Report on bankruptcy.

pointed out that the application of this rule transfers the community liability (taxes) from the insolvent to his creditors. It would be much fairer to recover taxes, irrecoverable from an individual or company because of insolvency, from the general community. Concerning the argument that the tax collector is an involuntary creditor the commission pointed out that many other creditors find themselves in fact in the same position but receive no preference. Moreover, the tax collector has special statutory aids to facilitate and ensure the collection of taxes.

6.8 The Income Tax Act[83] contains the following measures to ensure the collection of taxes:

(a) The disadvantage that tax is usually only payable after the assessment is considerably alleviated by the system of provisional tax and employees' tax. The taxpayer pays instalments on tax long before it is assessed.[84] There is special provision in regard to persons not ordinarily resident in the Republic for the imposition of tax immediately on income derived from patents, models, trademarks, copyright etc,[85] dividends on shares[86] and interest on investments.[87]

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83. Act 58 of 1962. The following references to sections are references to sections of this act.

84. S 89bis and the Fourth Schedule.

85. S 35.

86. S 41.

87. S 64E.

(b) Tax is payable immediately notwithstanding an appeal against an assessment.[88]

(c) Failure to render a return is an offence[89] and the taxpayer can be required to pay three times the amount of the tax in the event of such failure.[90] In the event of failure the Commissioner for Inland Revenue may appoint another person to furnish the return[91]. The commissioner may obtain information from other sources regarding a taxpayer's salary, profits derived from any business, investments, interest or rent,[92] interest on debentures, debenture stock, etc, dividends on shares[93] and interest on bearer warrants.[94] If a person fails to render a satisfactory return or information, the commissioner may issue an estimated assessment.[95]

(d) The commissioner has at his disposal and exceptional civil remedy. He may file with the clerk or registrar of a competent court a statement setting out what tax or interest is owing by a person and that

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88. S 88.
89. S 75.
90. S 76.
91. S 66(8).
92. S 69.
93. S 70.
94. S 71.
95. S 78.

statement will then have all the effects of a judgment by default.[96] The correctness of an assessment on which such a statement is based may not be questioned in any proceedings in connection with the statement.[97]

(e) The commissioner may, if he deems it necessary, declare a person to be the agent of another person and require the agent to pay any tax due out of moneys, including pension, salary, wages or other remuneration, which may be held by him for, or due by him to, the other person.[98]

(f) There is provision for interest on unpaid tax.[99]

7 Amounts due in terms of the Workmen's Compensation Act

7.1 Sub-section 99(1)(a) provides as follows:

"any amount which in terms of the Workmen's Compensation Act, 1941 (Act No 30 of 1941), was, immediately prior to the sequestration of the estate, due to the Workmen's Compensation Commissioner by the insolvent in his capacity as an

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96. S 91(1)(b); Kruger v Sekretaris van Binnelandse Inkomste 1973 1 SA 394 (A) 412.

97. S 92.

98. S 99.

99. S 89(2).

employer, in respect of any assessment, penalty or other payment, or the compensation then due in respect of any workman, including the cost of medical aid and any amount paid or payable in terms of section 40(2), 44, 76(2) or 86(2) of that Act, and in the case of a continuing liability, also the capitalized value, as determined by the Workmen's Compensation Commissioner, of the pension (irrespective of whether a lump sum is at any time paid in lieu of the whole or a portion of such pension in terms of section 49 of that Act) periodical payment or allowance, as the case may be, which constitutes the liability;"

7.2 History of the preference

7.2.1 There was no similar preference in the former Insolvency Act[1] nor in the common law.

7.2.2 There was no Accident Fund to begin with, and the employer was personally responsible. Neither was there a preference on insolvency. Section 35 of the Workmen's Compensation Act,[2] however, contained the following provision: If the employer had taken out

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1. Act 32 of 1916.
2. Act 25 of 1914.

insurance to cover his liability towards his workmen in terms of Act 25 of 1914 and his estate was sequestrated or wound up in the case of a company, the claim against the insurance company vested in the workman or his dependants and not in the insolvent estate or company under liquidation. If the claim was not paid in full the balance could be claimed from the insolvent estate or company.

7.2.3 The said Act 25 of 1914 was repealed by the Workmen's Compensation Act.[3] Section 43 of this act contained provisions similar to those in section 35 of Act 25 of 1914.[4] A preference for the amount of compensation due to an employee or his dependants was introduced in section 40; the order of preference was similar to section 99 of the present Insolvency Act.

7.2.4 The Insolvency Act 24 of 1936 in its original form made specific provision for the preference which had already been created in section 40 of Act 59 of 1934.[5]

7.2.5 The Workmen's Compensation Act 30 of 1941 repealed the Workmen's Compensation Act 59 of 1934. Section 99 of this act retained the same preference as section 40 of Act 59 of 1934. There is not, however,

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3. Act 59 of 1934.

4. Par 7.2.2 above.

5. Par 7.2.3 above.

a section in the act similar to section 43 of Act 59 of 1934 or section 35 of Act 25 of 1914.[6]

7.2.6 Section 29 of the Insolvency Law Amendment Act[7] amended section 99 of the Insolvency Act by substituting for the reference to the old Workmen's Compensation Act 59 of 1934 a reference to the new Workmen's Compensation Act 30 of 1941 and a proclamation for South West Africa.

7.2.7 Section 30 of the Insolvency Amendment Act[8] amended section 99 of the principal act to include, in addition to the liability for compensation under the Workmen's Compensation Act 30 of 1941, the preference for "contributions by an employer and by his employees which are payable by such an employer under the provisions of any law and which the estate owes to any pension, sick, medical, unemployment, holiday, provident or other insurance fund"[9].

7.2.8 Section 5 of the Insolvency Amendment Act[10] introduced section 99(1)(a) as it reads at present[11] together with numerous other preferences which were previously in other acts, into section 99.

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6. Par 7.2.2 above.
7. Act 16 of 1943.
8. Act 99 of 1965.
9. See par 7.2.3 above.
10. Act 6 of 1972.
11. Par 7.1 above.

7.3 Nature of the preference

7.3.1 In the first place, the preference covers any assessment, penalty or other payment, which was due to the Workmen's Compensation Commissioner by the insolvent in his capacity as employer. The Workmen's Compensation Commissioner assesses every ordinary employer on such percentage of the annual wages of his workmen as he deems necessary for the Accident Fund.[12] Should the employer fail to report the happening of an accident to a workman within thirty days, a penalty not exceeding the amount of compensation for the accident may be imposed on him.[13] If he fails to transmit a wage statement a penalty not exceeding 10% of the amount assessed may be imposed.[14] If a wage statement sets out the amount of wages at less than the actual amount a penalty not exceeding 10% of the difference may be imposed.[15] If he fails to pay the assessment timeously a penalty not exceeding 10% of the assessment may be imposed.[16] If he fails to pay an assessment or to render a wage statement a penalty not exceeding the amount of compensation payable during the period of such default may be imposed.[17] An employer who does not pay the assessment or penalty is guilty of an offence.[18]

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12. Workmen's Compensation Act 30 of 1941 s 69(1). The following references to sections are references to sections of this act.

13. S 51(4).

14. S 69(7).

15. S 68(3).

16. S 73(1).

17. S 73(2).

18. S 73(3).

The above applies to the ordinary employer. (The employer who is individually liable in terms of section 70, is dealt with hereunder.)[19]

The ordinary employer is liable only for the assessment and penalties. In his case compensation must be recovered from the Accident Fund by the employee or his dependants.[20]

7.3.2 In the second place the preference covers the compensation which was due, including medical treatment and amounts due in terms of sections 40(2), 44, 76(2) or 86(2) of the act. Section 40(2) covers a maximum amount of R400 for a deceased workman's funeral costs. Section 44 covers the costs of a person who helps a workman, where necessary as a result of an accident, to perform the essential actions of life. Section 76(2) deals with the expenses of conveyance of a workman to hospital or his residence after an accident. An employer is prohibited from recovering a contribution towards medical expenses from a workman. If he does so the commissioner may, in terms of section 80(2), order him to refund it. Apparently the compensation and all the other amounts except the amount mentioned in section 80(2) may be claimed only from the fund or an employer who is individually liable. An ordinary employer is liable only for assessments and penalties.

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19. Par 7.3.3.

20. Ss 7 and 37.

7.3.3 The employers who are individually liable in terms of section 70 are certain government bodies and employers who have obtained insurance policies, to the satisfaction of the commissioner, covering their possible liability towards workmen in terms of the act. These employers do not contribute to the fund and are themselves liable for accidents.

7.3.4 The fund or employer who is individually liable pays certain amounts to the workman or his dependants on his disability or death.[21]

7.4 Criticism of section 99(1)(a) as worded at present

It would be clearer if the section differentiated between the liability of an ordinary employer and that of an employer who is individually liable.

7.4.1 In the case of an ordinary employer the fund pays the compensation and the employer is liable only for the assessment and penalties. The workmen are protected to this extent against the insolvency of the employer.

7.4.2 The employer who is individually liable is a body not expected to become insolvent or an employer who is covered by insurance. Such an employer is not liable for the assessment and penalties, but for compensation. There should be a provision which excludes the amounts payable by the insurance company from the insolvent

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21. Ss 38-40.

estate.[22] There is in fact a provision which excludes certain securities deposited by such employers with the commissioner from the insolvent estate and vests them in the Accident Fund.[23]

7.5 Merits of the preference

7.5.1

The English[24], Australians[25] and Canadians[26] have similar preferences.

7.5.2 The claim for compensation

It appears fair that the proceeds of insurance policies taken out for the employer's liability should not vest in the insolvent estate of the employer. If the recommendation in 7.4.2 is put into effect, the workman will, it seems, be adequately protected.

7.5.3 The claim for contributions to the Accident Fund

The preference is aimed at safeguarding the fund from loss as a result of the insolvency of employers. A workman is or his dependants are prejudiced if he dies or becomes

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22. See par 7.2.2 above.
23. S 48(3).
24. Annexure 1.2.2.
25. Annexure 2.5 and 2.8.
26. Annexure 3.7 and 3.8.

disabled as a result of an accident while working. There is this same prejudice, however, if he dies or becomes disabled under other circumstances. He can take precautions against such an eventuality but the contributions for insurance are not accorded a preference on insolvency at the cost of his or someone else's creditors.

If the Accident Fund suffers loss as a result of an employer's insolvency, contributions to the fund may be increased in general.[27] The preference has the result that loss to the fund is avoided at the expense of the insolvent employer's creditors. It appears fairer that the loss should fall on employers in general rather than on the creditors of one insolvent employer in particular. There are already exceptional provisions which help to enforce payment of an assessment or penalty. It is an offence if an employer does not pay an assessment or penalty.[28] The commissioner of the fund may transmit a statement indicating outstanding moneys to the clerk of a magistrate's court and this has the effect of a civil judgment.[29]

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27. S 69(1). See par 7.3.1 above.

28. S 73(3).

29. S 73(4).

It appears desirable that this preference should be abolished.

8 Amounts deducted or withheld in terms of the Income Tax Act

8.1 Sub-section 99(1)(b) reads as follows:

"(b) any amount which the insolvent -

(i) has under the provisions of section 35(2) of the Income Tax Act, 1962 (Act No 58 of 1962), deducted or withheld from any amount referred to in section 9(1)(b) of that Act in respect of any other person's obligation to pay normal tax;

(ii) has under the provisions of section 64E of that Act deducted or withheld from any amount of interest referred to in section 64A of that Act in respect of the non-residents tax on interest payable in respect of such amount of interest;

(iii) is under the provisions of section 99 of the said Act or section 76 of the Income Tax Ordinance, 1974 (Ordinance No 5 of 1974), of the Territory, required to pay in respect of any tax due by any other person and has deducted or withheld from any moneys, including pensions, salary, wages, remuneration and amounts of any other nature, held by him for or due by him to such person;

(iv) has under the provisions of the Fourth Schedule to the said Act or Schedule 3 to the said Ordinance deducted or withheld by way of employees' tax from remuneration or any other amount paid or payable by him to any other person; or

(v) has under the provisions of the Sixth Schedule to the said Act deducted or withheld from any insurance benefit under any insurance policy, in respect of the liability of any person for normal tax,

but did not pay to the Secretary for Inland Revenue prior to the sequestration of the estate, and any interest payable under that Act in respect of such amount in respect of any period prior to the date of sequestration of the estate."

8.2 This preference is not in respect of a tax due by the insolvent. Such tax is preferent by virtue of section 101. The preference in section 99 covers amounts in respect of the tax liability of other persons which have been deducted by the insolvent from the following income and have not yet been paid:

Income from patents, trademarks, copyright, films, videotapes or payment for scientific, technical, industrial or commercial knowledge[30] and income from investments[31] which accrue to persons and companies outside the Republic; moneys received by agents of the Commissioner of Inland Revenue;[32] salary (employee's tax)[33] or insurance benefits.[34]

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30. Income Tax Act 58 of 1962 s 35.
31. Ibid s 64A.
32. Ibid s 99.
33. Ibid Fourth Schedule.
34. Ibid Sixth Schedule.

8.3 History of the preference

A preference for taxes in general[35] and on the estates of tax collectors in particular[36] existed in the common law.[37] The preference in its present form was introduced by section 17 of the Income Tax Amendment Act[38] (section 14 of the act introduced the PAYE system) and has continued to exist since then in substantially the same form.

8.4 Evaluation of the preference

8.4.1 The position of the state as creditor was dealt with in paragraph 6 above. The type of claim which is specifically in point here is analogous to the type of claim which the state has against a tax collector for taxes which he has collected. The legislature has, in the present Insolvency Act, given to the state a stronger preference than the normal

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35. Secretary for Customs and Excise v Millman 1975 3 SA 544 (A) 548G.

36. In re Insolvent Estate of Buissinne (1828) 1 Menz 318.

37. Voet 20.2.8; Grotius 2.48.15.

38. Act 6 of 1963.

claim for income tax. According to French common law only the claim against the tax collector was preferent and not an ordinary claim for income tax.[39] In Australia[40] and Canada[41] the legislature also favours this type of claim above the ordinary claim for income tax.

8.4.2 A stronger priority is probably allocated because this is money already collected from the taxpayer but which is still in the possession of a third person at the time of the sequestration of the latter's estate. It seems fair that the person for whom the money was collected should have a stronger claim than the possessor's creditors in general. However, this is not the case in law. The owner of movable property which is in the possession or custody of a person whose estate has been sequestrated, may claim back that property.[42] However, money received and merged with the receiver's assets becomes his property:[43]

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39. Exchange Bank of Canada v The Queen 1886 AC 157.

40. Annexure 2.2 as against 2.8.

41. Annexure 3.7 as against 3.9.

42. Insolvency Act 24 of 1936 s 36(5).

43. Incorporated Law Society Transvaal v Visse 1958 4 SA 115 (T) 131G.

"Under common law money in the possession of an attorney enjoys no special protection in the event of the death or insolvency of the attorney, because an obligation to pay money gives rise to a personal right and not a real right and such personal right gives no preference over other creditors."

This appears unfair, but the matter must be regarded from the point of view of the other creditors. As soon as the money has merged with that of the debtor, the creditors have no reason to suspect and no way of finding out that the money belongs to someone else. Although it is under some circumstances an offence to do so, it is possible for the debtor to use the money as his own. It is acceptable that assets should not be available to all creditors only in those cases where specific measures are taken to keep the assets separate.[44]

8.4.3 There are numerous other creditors who are in the same position but on whom no preference is

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44. Cf Attorneys Act 53 of 1979 ss 78 and 79.

conferred. The following may serve as examples. Furniture is ordered from a cabinet maker who asks for a deposit which is paid. His estate is sequestrated before the furniture is delivered. The customer cannot compel specific performance and has a mere concurrent claim for the deposit. The same applies to the lay-by system. Because petrol may no longer be sold on credit customers pay deposits to petrol vendors to cover petrol purchases. On sequestration of the petrol vendor's estate the customer has a mere concurrent claim. Representations have been made to the Minister of Justice to confer a preference on these claims. Because many creditors find themselves in a similar position, the minister did not see his way clear to make an exception in this case.

8.4.4 As soon as employee's tax has been deducted, the taxpayer receives credit therefor.[45] In case of a shortfall on insolvency the taxpayer is not prejudiced in this regard by the sequestration of his employer's estate. The state bears the loss.

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45. Income Tax Act 58 of 1962 Fourth Schedule par 28(1).

8.4.5 The exceptional civil remedy referred to in paragraph 6.8(d) above also applies in the case of a claim for employee's tax.[46]

8.4.6 The Director-General of Co-operation and Development made representations that deductions in terms of section 18 of the Black Taxation Act[47] should enjoy the same preference as taxes deducted in terms of the Income Tax Act.[48] There is no real difference between the claims, and the request appears fair.

8.4.7 The Scottish Law Commission's findings in connection with tax collected from employees by an insolvent, pursuant to the PAYE system, but not paid over at the time of sequestration, read as follows:[49]

> "The position is rather different where money is collected under the P.A.Y.E. system by an employer who has become insolvent. The tax debt here consists (or should consist) not of the

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46. Income Tax Act 58 of 1962 Fourth Schedule par 31.

47. Act 92 of 1969.

48. Act 58 of 1962.

49. Scottish Law Commission Report on Bankruptcy par 15.7 at 222.

insolvent's own money but of money that he has collected for the Crown under a statutory requirement to do so. In any such case the Crown should be in neither a better nor a worse position than any other principal whose agent's estate has been sequestrated, that is, if the money belonging to the principal has been set apart from the agent's own funds and is identifiable, it should be excluded from the estate vesting in the trustee in sequestration. If, on the other hand, the money has been inmixed with the agent's own funds and is no longer separable, the principal should forfeit his claim to it. Under existing law the Inland Revenue is, however, in a much stronger position than any other principal, because an employer is accountable to the Inland Revenue not simply for sums collected by him but for sums which he should have collected even if he has not in fact done so. That is not unreasonable in a question between an employer and the Inland Revenue, but it has the effect of giving the Inland Revenue an absolute preference for the deductions over the relevant period (of 12 months) which an insolvent employer was liable to make. There is no apparent justifica-

tion for the special privilege accorded to the Inland Revenue. We recommend, therefore, that any preference for monies collected under the P.A.Y.E system should be abolished and the Inland Revenue's claim against a bankrupt employer treated in the same way as any other claim by a principal in the sequestration of his agent's estate."

8.4.8 It is suggested that the above approach is fair towards everyone and should be followed. It is accordingly recommended that the preference provided for in section 99(1)(b) of the act should be abolished.

9 Amounts due to the Compensation Fund for Mines and Works

9.1 Sub-section 99(1)(c) provides as follows:

"(c) any amount which in terms of the Pneumoconiosis Compensation Act, 1962 (Act No 64 of 1962), was, immediately prior to the sequestration of the estate due to the General Council for Pneumoconiosis Compensation by the insolvent in his capacity as an owner or a former owner of a mine, and

any interest due thereon in respect of any period prior to the date of sequestration of the estate;"

9.2 Act 64 of 1962 was repealed by the Occupational Diseases in Mines and Works Act[50] which re-enacted the earlier act with amendments. In terms of the provisions of section 12(1) of the Interpretation Act[51] the reference to an amount due to the General Council for Pneumoconiosis Compensation must be construed as an amount due to the Compensation Fund for Mines and Works in terms of the Occupational Diseases in Mines and Works Act.[52]

9.3 Nature of the preference

The Compensation Commissioner for Occupational Diseases determines in respect of each controlled mine or controlled works in such manner as he deems fit and

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50. Act 78 of 1973.

51. Act 33 of 1957.

52. Act 78 of 1973. The following references to sections are references to sections of this act.

with due regard to the risk of the mine or works in question an amount payable by the owner to the fund, in respect of each shift worked by a person at the mine during which such person performed risk work.[53] The owner of the mine pays to the fund in respect of each such shift an amount determined by the minister for the purposes of research on the health of persons working in mines or works and for research on medical treatment for compensatable diseases.[54] The owner pays interest at a rate determined by the commissioner and approved by the minister.[55] A penalty not exceeding R10 per shift may be imposed if the owner fails to pay an amount due.[56] The minister pays out of public funds any amount irrecoverable from the owner of the mine or works.[57] Compensation is paid out of this fund to persons who contract certain diseases in the mines or works or to their dependants.[58]

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53. S 62.

54. S 63.

55. S 64.

56. S 65.

57. S 74.

58. Ss 78-99 and 106-115.

The works are works which are connected with diggings and the mining industry. No person is entitled to benefits under this act and under the Workmen's Compensation Act or any other law.[59]

9.4 History of the preference

It appears that there was no such common law preference. A similar preference appeared in various earlier acts immediately after section 100 of the present Insolvency Act in order of priority.[60] The preference was elevated to section 99 of the Insolvency Act as worded at present, by the Insolvency Amendment Act.[61]

9.5 Merits of the preference

The preference is very similar to the preference for contributions to the Accident Fund which was dealt with in paragraph 7.5.3 above.[62]

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59. S 100.

60. Act 40 of 1919 s 18; Act 35 of 1925 s 58; Act 47 of 1946 s 38; Act 57 of 1956 s 67; Act 64 of 1962 s 123.

61. Act 6 of 1972.

62. Compare par 7.3.4 above with par 9.3 above.

An important difference is that the state[63] and not the fund[64] carries the shortfall in an insolvent estate.

It was suggested above that a claim for contributions to the Accident Fund[65] and a claim by the state[66] are not entitled to a preference. It follows that this creditor should likewise not be entitled to a preference.

10 Amounts due in terms of the Customs and Excise Act

10.1 Section 99(1)(cA) provides as follows:

> "the amount of any customs, excise or sales duty or interest, fine or penalty which in terms of the Customs and Excise Act, 1964 (Act No 91 of 1964), was, immediately prior to the sequestration of the estate, due by the insolvent;"

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63. Par 9.3 above.
64. Cf par 7.5.3 above.
65. Par 7.5.3.
66. Par 6.

10.2 History of the preference

The preference falls under tax on property for which the state had a common law hypothec.[67] The tacit hypothec was abolished by section 86 of the previous Insolvency Act.[68] Statutory hypothecs were, however, re-introduced later. Certain provisions were made for attachment and sale of assets.[69] Other provisions restored the hypothec in all its glory and went even further.[70]

The present provision in connection with the hypothec appears in section 114(1)(a) of the Customs and Excise Act 91 of 1964:[71]

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67. Voet 20.2.8; Grotius 2.48.15.

68. Act 32 of 1916. Now Insolvency Act 24 of 1936 s 85(1).

69. Excise Act 45 of 1942 s 89; Excise Act 62 of 1956 s 89.

70. Customs Act 35 of 1944 s 142(1); Customs Act 55 of 1955 s 146.

71. Secretary for Customs and Excise v Millman 1975 3 SA 544 (A) 551A. Cf also Rand Bank Bpk v Regering van die Republiek van Suid-Afrika 1974 4 SA 764(T).

"The lien envisaged by sec 114(1)(a) is far more extensive than the legal hypothec enjoyed by the State at common law in respect of taxes due to it, for, whereas the latter extended over the property of the debtor only, the former extends also over property belonging to third persons..."

There must however be an attachment of the property before sequestration in order to perfect the hypothec.[72]

The preference on the free residue in section 99(1)(cA) was introduced by section 6 of the General Law Amendment Act.[73] It confers on the creditor a further preference if the subject matter of his hypothec realises too little for payment of his claim in full.

10.3 Merits of the preference

The position of the state as creditor has already been dealt with in paragraph 6 above.

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72. Millman's case supra at 551F and 552D.

73. Act 62 of 1973.

In this case the state already has a hypothec which confers a considerable advantage on it.[74] It also has the right to demand security before it licenses a customs and excise warehouse.[75]

The reasons given by the Department of Customs and Excise for the preference on the free residue are as follows: The giving of security causes problems. With big firms like petroleum and tobacco companies the deed of security amounts to millions of rands and the firms encounter great difficulty in obtaining the necessary cover here or overseas. Some of the smaller firms leading a precarious existence would have to discontinue their activities should the department insist on security. Because the right of retention may be exercised only before liquidation the department must constantly be on its guard lest it be caught unawares by liquidation. The exercise and discharge of the right of retention demands many man-hours which could fruitfully be devoted to sales duty inspections. If the state were not entitled to a preference out of the free residue these arguments would carry no weight. The state already has, in this case, other advantages apart from a preference. Practical problems in making full use of the advantages cannot justify a preference on the free residue.

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74. Par 10.2 above.

75. Customs and Excise Act 91 of 1964 s 61(1). This right has been in existence for some time cf Customs Management Act 9 of 1913 ss 58, 59 and 114.

The preference conferred at present also enjoys a priority higher than the preference relating to tax in general.[76]

11 Amounts provided by the state from the National Supplies Procurement Fund

11.1 Section 99(1)(cB) provides as follows:

> "any amount provided to the insolvent by the State from the National Supplies Procurement Fund for any purpose contemplated in the National Supplies Procurement Act, 1970 (Act No 89 of 1970);"

11.2 The National Supplies Procurement Fund was established by virtue of section 12 of the National Supplies Procurement Act.[77] The purpose of the act is to enable the state to acquire and exercise control over goods and services in the interests of the security of the Republic. The fund is used for the acquisition of such goods and services. Although it does not appear clearly from the act, the money in respect of which section 99(1)(cB) of the Insolvency Act confers a preference, is money provided out of the fund to suppliers of goods and services to enable them to supply goods or services for the benefit of the state. In the nature of things the amounts involved are large.

11.3 Section 5A of Act 89 of 1970 provides that goods which pursuant to an arrangement in terms of this act

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76. Insolvency Act 24 of 1936 s 101.

77. Act 89 of 1970.

are stored or have been acquired or are to be supplied or delivered or sold and facilities or property at the disposal of any person for supplying a service which he is required to supply in terms of the act are not subject to seizure under any judgment of a court and are not deemed to form part of that person's insolvent estate.

11.4 The state has a contractual relationship with the person who must deliver goods or services under the act. The state must obviously secure its position contractually as far as possible by means of guarantees and securities. In addition the state enjoys the protection afforded by section 5A of the act (mentioned above). In so far as guarantees and securities do not provide sufficient protection the state is always in a position to select its suppliers and to determine their creditworthiness beforehand. Furthermore, services rendered in the national interest are pre-eminently services the costs of which in case of loss should be borne by the general public rather than the creditors of the supplier's insolvent estate. It is suggested that this preference is not justified.

12 Sales tax

12.1 Section 99(1)(cC) makes provision for the following preference:

> "the amount of any sales tax, interest, fine or penalty which in terms of the Sales Tax Act, 1978, was, immediately prior to the sequestration of the estate, due by the insolvent;"

12.2 The merits of the preference in regard to taxes in general has already been discussed above.[78] The remarks made there also apply to sales tax. The Sales Tax Act[79] contains detailed measures aimed at the collection and payment of the tax. The tax is usually payable monthly in the case of businesses.[80] If the taxpayers do not lodge returns the commissioner may estimate the tax.[81] An appeal against an assessment does not suspend the obligation to pay tax.[82] There are provisions for penalties and interest.[83] The commissioner can take judgment by means of a simple procedure.[84] The commissioner may recover the tax by means of agents and persons acting in a representative capacity.[85] The commissioner may demand security for the tax and on default cancel the registration certificate.[86] Where registration is required in respect of goods such as aircraft, boats, vehicles, etc, registration shall not be effected until sales tax has been paid.[87]

In conformity with the conclusions reached in paragraphs 6 and 8 above, this preference is not justified.

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78. Par 6.

79. Act 103 of 1978. The following references to sections are references to sections of this act.

80. S 16.

81. S 18.

82. S 22(5).

83. Ss 24 and 25.

84. S 26(2). Cf par 6.8(d) above.

85. Ss 29 and 31.

86. S 28. Cf par 10.3 above.

87. S 35.

13. Appreciation contribution in terms of the Community Development Act

13.1 Sub-section 99(1)(d) provides as follows:

> "the amount of any appreciation contribution which in terms of the Community Development Act, 1966 (Act No 3 of 1966), was, immediately prior to the sequestration of the estate, due to the Community Development Board by the insolvent;"

13.2 Section 34 of the Group Areas Development Act[88] and section 47 of the Community Development Act[89] contained a similar preference. Section 5 of the Insolvency Amendment Act[90] introduced the provision into section 99 of the Insolvency Act.

13.3 Sections 34(4)(a) and 35(1)(a)(i) of the Community Development Act[91] originally made provision for cases where an appreciation contribution was due to the Community Development Board. Both these provisions were repealed by the Community Development Amendment Act 19 of 1978. The remaining references to appreciation contributions in the act[92] are meaningless in the light of the

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88. Act 69 of 1977.

89. Act 3 of 1966.

90. Act 6 of 1972.

91. Act 3 of 1966.

92. Act 3 of 1966 ss 12(b), 41(3) and 44(2)(a)(iii)

repeal of the first-mentioned two sections. Section 99(1)(d) should be deleted from the Insolvency Act.

14. Amounts due by an employer to the Unemployment Insurance Fund

14.1 Section 99(1)(e) provides as follows:

> "any amount which in terms of the Unemployment Insurance Act, 1966 (Act No 30 of 1966), was, immediately prior to the sequestration of the estate, due to the Unemployment Insurance Fund by the insolvent in his capacity as an employer, in respect of any contribution penalty or other payment;"

14.2 It appears that there was no similar common law preference. The Unemployment Benefit Act[93] did not provide for a preference on insolvency. Section 48 of the Unemployment Insurance Act 53 of 1946 and section 59 of the Unemployment Insurance Act 30 of 1966 contained a preference similar to the present one. The provision quoted above was introduced by section 5 of the Insolvency Amendment Act[94] into section 99 of the Insolvency Act.

14.3 The Unemployment Insurance Act[95] applies to persons

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93. Act 25 of 1937.

94. Act 6 of 1972.

95. Act 40 of 1966. The following references to sections are references to sections of this Act.

whose yearly income does not exceed R12 000. It does not apply to persons whose earnings consist only of a share in takings or are calculated purely on a commission basis.[96] Each employer and contributor shall contribute to the fund 0,3% of the salary of the employee in the case of the employer, and 0,5% in the case of the contributor. The employer may deduct the contributor's share from his salary. The state contributes 25% of this amount, with a maximum of R7 million per financial year to the fund.[97] On default the Director-General: Manpower may impose a penalty not exceeding 10% of the unpaid amount.[98] If an employer tenders an amount which is less than the amount payable the Director-General may impose a penalty not exceeding the difference between the amount tendered and the amount payable.[99] When a contributor is unemployed he or she is entitled to unemployment, sick or maternity benefits.[1] On the death of a contributor his dependants are entitled to a benefit.[2] If the fund is strong, the rate of benefits may be increased. If the

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96. S 2(2).

97. S 29.

98. S 31(1).

99. S 31(5).

1. S 34.

2. S 38.

fund becomes weak the rate of contributions may be increased or the rate of benefits may be reduced within certain limits. Parliament must consent to any alterations.[3]

14.4 Merits of the preference

14.4.1 The English[4], Australians[5] and Canadians[6] have similar preferences.

14.4.2 The preference corresponds largely with those discussed in paragraphs 7 and 9 above. The preference benefits contributors to the fund and their employers at the expense of the creditors of the individual employer. In conformity with the conclusion in regard to similar preferences above, it appears fairer that contributors and their employers in general, should bear the loss.

14.4.3 As far as the employees' contributions are concerned it is arguable that the money has been deducted by the employer and merely has to be paid over so that the fund has a stronger claim to the money than the employers' creditors. This argument has already been dealt with and rejected in paragraphs 8.4.2, 8.4.3 and 8.4.7 above.

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3. S 45.
4. Annexure 1.2.2.
5. Annexure 2.8.
6. Annexure 3.7.

14.4.4 There are special provisions to enforce payment of amounts by an employer. It is an offence if an employer does not pay the amounts due to the fund[7]. On conviction the court must determine the amount unpaid and order the employer to pay the amount within a period fixed by the court.[8] Such an order has all the effects of a civil judgment.[9]

14.4.5 It is suggested that this preference is not justified.

15 Contributions in respect of pension and similar funds

15.1 Section 99(1)(f) makes provision for the following preference:

> "any other contributions payable by the insolvent (including any such contributions payable in respect of any of his employees) under the provisions of any law, which, immediately prior to the sequestration of the estate, were due by the insolvent, in his capacity as an employer, to any pension, sick, medical, unemployment, holiday, provident or other insurance fund."

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7. S 61(1)(j)(i).
8. S 31(2).
9. S 31(3).

15.2 It appears that there was no similar common law preference. This preference was introduced into section 99 of the Insolvency Act by section 30 of the Insolvency Amendment Act[10] and was enacted in its present form by section 5 of the Insolvency Amendment Act.[11]

15.3 Nature of the preference

15.3.1 A prerequisite of this preference is that the contributions are payable by the insolvent in terms of a statutory provision.[12]

15.3.2 The preference is apparently aimed at compulsory contributions to funds which came into existence under the Labour Relations Act.[13]

15.3.2.1 Employers and groups of employers may form an industrial council.[14]

15.3.2.2 The councils may conclude agreements to regulate conditions of service of the employees concerned, which may include:[15]

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10. Act 99 of 1965. See par 7.2.7 above.
11. Act 6 of 1972.
12. Millman v African Eagle Life Assurance Society 1981 4 SA 630 (C).
13. Act 28 of 1956. The following references to sections are references to sections of this act.
14. S 18.
15. S 24(1)(r).

"the establishment of pension, sick, medical, unemployment, holiday, provident and other insurance funds and the levying upon employers and employees of contributions towards such fund..."

15.3.2.3 The Minister of Manpower may, by notice in the Government Gazette, declare the agreements binding on the parties to the agreement or on other employers and employees in the same occupation.[16]

15.3.2.4 Numerous agreements have from time to time been made binding in Regulation Gazettes. The agreement of the Building Industry in the Transvaal is cited as an example.[17] It makes provision for the following funds, inter alia. A vacation fund which provides annual leave pay. A benefit fund which compensates employees when they are unable to work because of bad weather, sickness or permanent disability. A pension fund, military service fund and a medical fund. There is also a stabilisation fund which compensates for time lost because of change of employment or unemployment. The contributions are payable by employers but they may recover certain amounts from the employees' remuneration.

15.3.2.5 It is an offence if an employer fails to pay amounts in terms of an agreement.[18] On conviction the court must determine the amount underpaid by the employer[19]

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16. S 48.

17. Regulation Gazette 2894 of 26 October 1979.

18. S 53(1)

19. S 53(2)(c).

and order him to pay that amount within such period as the court may fix.[20] Such an order has the same effect as a civil judgment.[21] It is not a defence to the charge that the employer's failure was due to a lack of means.[22]

15.4 Merits of the preference

15.4.1 The preference shows correspondence with those discussed in paragraphs 7, 9 and 14 above.

15.4.2 The remarks in paragraphs 14.4.1, 14.4.2 and 14.4.3 also apply here. Special provisions to enforce payment by an employer were dealt with in 15.3.2.5.

15.4.3 It is suggested that this preference is not justified.

16 Salary or wages of former employees of the insolvent

16.1 Section 100 of the act confers the following preference:

> "(1)(a) Thereafter any balance of the free residue shall be applied in paying the salary or wages, for a period not exceeding two months prior to the date

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20. S 54(1).

21. S 54(3).

22. S 53(7).

of sequestration of the estate, due to an employee who was engaged by the insolvent and in paying any fee due to a nurse or an accountant or auditor registered under the Public Accountants and Auditors Act, 1951 (Act No 51 of 1951), who was engaged, whether full-time or part-time, by the insolvent before the said date to nurse himself, his wife or minor child or to keep or write up or audit the books relating to the insolvent's affairs, as the case may be: Provided that not more than two hundred pounds shall be paid out under this sub-section to any employee, nurse, accountant or auditor.

(b) For the purposes of paragraph (a) a commercial traveller engaged on a commission basis or on a salary and commission basis shall be deemed to be an employee engaged by the insolvent, and any commission earned by him shall be regarded as his salary or wages or part of his salary or wages, as the case may be.

(2) If on the date of sequestration any leave is due to any such employee or any bonus in respect of leave or holiday due to him has accrued to such employee, he shall be entitled to salary or wages in respect of any period, not exceeding twenty-one

days, of leave due to him or to such bonus whether or not payment thereof is then due or to both such salary or wages and such bonus, as the case may be: Provided that not more than one hundred pounds shall be paid out under this sub-section to any such employee in respect of such salary or wages and bonus.

(3) An employee shall be entitled to salary or wages in terms of sub-section (1) or (2) even though he has not proved his claim therefor in terms of section forty-four; but the trustee may require such employee to submit an affidavit in support of his claim for such salary or wages.

(4) The claims referred to in sub-sections (1) and (2) shall rank pari passu and abate in equal proportion, if necessary."

16.2 History of the preference

16.2.1 Voet states the position as follows:[23]

"Then again male and female domestic servants have outside the Roman law a privilege in most places as regards their wages, if they are dwelling with

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23. 20.4.37. Gane's translation Vol 3 at 610.

their master at the time when he dies or goes bankrupt, and have not made an agreement for interest on wages already due."

The preference is referred to in certain old decisions.[24]

In Billau v Grobbelaar's Trustee[25] the court decided that the preference was not a general rule of Dutch law and was accordingly not part of our common law either.

16.2.2 Provision was made for the following preference, ranking immediately after section 98 of the present Insolvency Act, in the old Insolvency Act:[26] Two months' salary (or two weeks if employment is on a weekly basis) with a maximum of R100.

16.2.3 Section 100 of the present Insolvency Act made provision in its original form for the following preference:

(a) Salary or wages for 2 months or 2 weeks, as the case may be, with a maximum of R100, but not for services rendered more than 3 months before sequestration;

(b) 14 days' salary in lieu of leave.

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24. See eg Kilgour v Lisbon Berlin Transvaal Gold Fields Limited (1886) 2 SAR 86; In re Henry Acutt's Insolvent Estate (1883) 4 NLR 15.

25. 1906 TS 443.

26. Act 32 of 1916.

16.2.4 Section 13 of the General Law Amendment Act[27] effected the following amendments to section 100:

(a) The maximum amount of R100 was increased to R200.

(b) A provision similar to the present section 100(1)(b) was inserted to provide for the commission of a commercial traveller.

(c) The period of 14 days in respect of salary in lieu of leave was increased to 21 days.

16.2.5 Section 31 of the Insolvency Amendment Act[28] amended section 100 to read as it now does. The amendments which it introduced were as follows:

(a) The preference for salary was increased to R400.

(b) A preference was conferred on a nurse or an accountant or auditor registered under law for certain services rendered, subject to a maximum of R400.

(c) Payment of 21 days' salary in lieu of leave was limited to R200.

(d) It was clearly stated that the preference for salary payable to an employee or fees to a nurse, accountant or auditor ranked pari passu with the claim for leave money.

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27. Act 32 of 1952.

28. Act 99 of 1965.

16.3 Comment on section 100 as it is now worded

16.3.1 The two months' salary may be for any period of two months irrespective of how long before sequestration this period was. This is apparent if the section is compared with section 85(2) of the present Insolvency Act and section 100(1) of the Insolvency Act 24 of 1936 in its original form.[29]

16.3.2 It appears that the two-month limitation does not apply to "any fee due to a nurse or an accountant or auditor". Fees due for a longer period are also taken into account. As far as the accountant or auditor are concerned only fees in regard to the keeping and auditing of the insolvent's books are taken into account.

16.3.3 Only a "commercial traveller" (which is not defined in the act) may preferently claim commission as salary. Persons such as estate agents and motor-car salesmen are clearly not covered.

16.3.4 Nurses, accountants or auditors do not share in the advantage of not having formally to prove the preferent part of their claims.[30]

16.4 Merits of the preference

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29. Par 16.2.3 above.

30. S 100(3).

16.4.1 Salary

All the systems considered make provision for such a preference.[31]

16.4.2 The following dictum will perhaps give an indication of the reason for the preference:[32]

> "It is not easy to see why, in the case of an insolvent tradesman, the shop servants, who have helped to create any estate that remains, should not have a privilege for their wages; but the house servants, who were probably instruments for spending the estate, should have a privilege."

In another dictum,[33] reference was also made to the opinion that "those by whose labour the estate had been kept together should be preferred ..."

This argument is not altogether satisfactory. There are numerous other creditors who may have contributed to the preservation of the insolvent estate but who receive no

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31. English Annexure 1.2.3; Australians Annexure 2.4; Canadians Annexure 3.3; Germans Annexure 4.3; French Annexure 5.4.

32. In re Henry Acutt's Insolvent Estate (1883) 4 NLR 15 at 18.

33. Billau v Grobbelaar's Trustee 1906 TS 443 at 453.

legal preference. Examples are a banker who advances money or a merchant who supplies provisions to a concern on credit. As the preference is at present worded in the act, it is not confined to persons who have contributed to the preservation of the estate. An employee whose wrong policy or decisions led to the failure of a concern or an employee unnecessarily employed is nevertheless entitled to the preference.

16.4.3 A more acceptable argument for the preference rests on considerations of fairness. A salaried person has no choice but to render his services on a credit basis. The services rendered by an employee are to so great an extent linked with his person that it would be unpractical to expect an employer to pay his salary in advance and on breach of contract to claim the services or a cash substitute.

The employee accordingly renders his services but receives his remuneration only at the end of the period concerned. A salaried person's salary is, in most cases, his only means of support. Should he be deprived of his salary cheque for one month, he would in most cases be plunged into financial difficulties. There is little that he can do to safeguard himself against this risk. The creditworthiness of his employer is certainly a factor to be taken into consideration when he enters into employment, but there are numerous other factors which

make is difficult for him to safeguard his position. His employment is, as a rule, his career and the feeling of security it gives him fulfils an important psychological need. It is unfair and frequently unpractical in the labour market to expect the employee to change his occupation, if doubt arises about his employer's credit-worthiness. His only protection is a preferent claim in the case of insolvency. There is no procedure by means of which he can recover his loss from a larger section of the community.

16.4.4 Numerous representations have been made that the preference of a salaried person should be improved. This applies to the maximum amount of the preference as well as to its order of priority.

16.4.5 If the recommendations made above regarding the abolition of the other preferences are accepted, then claims for salary will rank in priority after the costs of administration. Should any of the other preferences be retained, they should not take priority over the claim of the salaried person.

16.4.6 The protection which salaried persons deserve must be weighed up against the interests of concurrent creditors. It is undesirable that employees should be encouraged by the protection of a preference to remain in employment with a concern which clearly cannot make the grade. A limitation must be placed on the period for which the preference is valid. The present limitation

of two months appears fair. It also appears to be fair that the preference should apply for any two months before sequestration and not necessarily to the two months immediately before sequestration.[34] An employee who left the sinking ship five months before sequestration has as much claim to the preference as one who went down with the ship. If a trustee retains an employee in employment after sequestration, he pays the salary in full as part of the costs of administration.

16.4.7 Creditors may also be protected by excluding certain person from the preference. The Canadians do not grant a preference to a spouse or former spouse, a parent, child, brother, sister, uncle or aunt of an insolvent or an official or director of a company in liquidation.[35]

16.4.8 The maximum of R400 obviously no longer has the value it had when it was fixed in 1965. If at all possible, the determination of the maximum preference by reference to an amount of money should be avoided. Such an amount is soon outdated, and the legislature is not known for its regularity in keeping such amounts up to date.[36] Certain other legal systems referred to above[37] have a

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34. Cf par 16.3.1 above.

35. Cf Annexure 3.10, 3.11 and 3.13.

36. An extreme example is the R40 in section 100 of Ordinance 6 of the Cape, 1843, which still remains at R40 in section 394(7)(a) of the Companies Act 61 of 1973 for a similar case.

37. Par 16.4.1.

maximum amount.[38] A limitation on the amount is apparently the only practical limitation which may be imposed on a preference based on an exorbitantly high salary. The purpose of the preference is not so much to pay the full salary but rather to assist the employee to meet his reasonable obligations. A figure of R1 500 as a maximum preferent claim per employee would probably be a reasonable amount today. If practicable the minister should be authorised to increase the amount by proclamation, after the consumers' price index has shown a certain rise.[39]

16.4.9 Trade unions and other persons sometimes pay the employees' salaries on the insolvency of employers to avoid hardship and disruption.

It is advisable to encourage this practice and to make it clear that a person who pays salary claims against an insolvent estate acquires the preference which the employee as creditor would have had.[40]

16.4.10 Section 100(3) provides that a preferent claim for salary may be paid even though the claim has not been proved. This advantage is not of much value since a

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38. England £800; Australia $1500; Canada $500.

39. Cf Annexure 2.4.

40. Cf the position in French law Annexure 5.10 and Australia Annexure 2.4.

trustee who pays claims before confirmation of the account, does so in any event at his own risk.[41] If it is thought advisable that a salaried person should be paid as soon as possible after sequestration, the necessary authority and indemnity must be introduced into the act. The sub-section as it now stands has the advantage that an employee can avoid the risk of paying a contribution.

16.4.11 Accumulated leave and bonus

Apart from the preference for two months' salary a former employee also has a preference for accrued leave and any bonus due up to a maximum of R200. If the reason for the preference for salary, namely the avoidance of hardship rather than the provision of full compensation, is taken to its logical conclusion, there will probably not be sufficient justification for a preference in respect of accrued leave and a bonus. However, leave privileges and bonusses are an integral part of a salaried person conditions of service today. These, together with his salary, in fact form his salary package. The protection of this claim to a certain degree is possibly justified for this reason. It appears desirable that claims of this nature together with claims in respect of salary or wages should enjoy a preference up to a specified maximum.

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41. Mars The law of insolvency in South Africa 387.

16.4.12 Claim by a nurse engaged to nurse an insolvent his wife or minor child

16.4.12.1 Section 82 of the old Insolvency Act[42] and section 96(3) of the present act in its original form made provision for a preference for nursing fees as part of the death-bed expenses. Section 31 of the Insolvency Amendment Act[43] introduced the present preference in section 100 and section 29 of the act amended section 96(3) to read as it does now. The nurse's fees need no longer necessarily be part of the death-bed expenses but may be incurred at any time before death.[44] The preference was limited to R400 and was ranked lower in priority.

16.4.12.2 The nurses mentioned here are nurses who render services to their patients in their private capacity. They have a contractual relationship with their patients. They offer their services for a set fee per hour or per day or for any other period. Medical funds make provision for such fees in certain cases. All patients do not, however have the benefit of a medical fund. Unlike a medical doctor who has a great number of patients and whose losses in respect of some of them do not make an appreciable difference to his total income, a private

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42. Act 32 of 1916.

43. Act 99 of 1965.

44. Par 16.3.2 above.

nurse usually has one or a few patients at a time. Her income is similar to a salary which she receives for her services.

In regard to salary[45] and commission[46] it is suggested that only persons who render services full-time to one employer should be entitled to a preference. If a preference is conferred on a nurse who is not in full-time employment of one person, this will constitute a departure from this principle. The fact that nurses may render services only to a few persons does not distinguish them from persons who work for a couple of employers on a commission basis or a merchant who renders services to a few customers. It appears that for the sake of uniformity the preference conferred on a nurse should be limited to cases where the nurse is in the full-time employment of one person.

16.4.13 Claim by accountants or auditors for keeping writing up or auditing of books

16.4.13.1 No legal system which was considered confers a preference for this claim.

16.4.13.2 Section 31 of the Insolvency Amendment Act[47] introduced this preference.

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45. Par 16.4.1 above.

46. Par 16.4.14.4 below.

47. Act 99 of 1965.

16.4.13.3 The following argument was advanced at the time to justify the preference.

16.4.13.4 Fees for keeping and writing up books

> "In the concluding stages of the affairs of a client whose business is precariously situated, the accountant is frequently called upon to do work in the preparation of additional statements of affairs and balance sheets, so as to help the client and possibly assist him over a difficult stage and enable shareholders or creditors to arrive at a decision as to whether sequestration or liquidation or judicial management is called for. It is in the interest of creditors that a debtor's books should be kept up to date at all times. In fact, it is an offence not to have a contemporaneous record of affairs ..."

16.4.13.5 The preference covers only accountants and auditors registered in terms of the Public Accountants and Auditors Act.[48] The Southern African Institute of Chartered Secretaries and Administrators made representations that the same preference should be conferred on them, because they do the same sort of work.

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48. Act 51 of 1951.

Attorneys' fees are preferent if they are incurred for an application for the sequestration of an estate.[49] Should a client find himself in financial difficulties and his attorney performs other services in an attempt to find the best way out of the dilemma, his claim for costs is not preferent.

Numerous unqualified persons or qualified persons not attached to a professional group may be approached to perform services for a person in financial difficulties and they enjoy no preference. Accountants and auditors certainly perform a considerable amount of this type of work but probably not enough to justify a preference.

16.4.13.6 It is in the interest of creditors that the records of a company should be up to date. The trustee can do the necessary after sequestration at the expense of the estate if it is in the interests of the creditors.

16.4.13.7 Accountants and auditors are in a good position to protect their interests. They are surely the first outsiders to become aware of the fact that a client is in financial difficulties.

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49. S 97(2)(c) and (3), par 4.1 above.

16.4.13.8 It is apparently customary for fees for the keeping and writing up of books to be paid only after the work has been completed. There are, however, no apparent reasons why other arrangements cannot be made in appropriate cases. When a concern is not able to pay or secure payment of fees for such services immediately, it will in most cases be advisable for the concern to be declared insolvent instead of continuing its precarious existence.

16.4.13.9 It is suggested that there is not sufficient justification for this preference.

16.4.13.10 Fees for auditing books

It has been argued as follows:

> "In terms of the Companies Act every company is obliged to appoint a qualified auditor. This is because it is considered to be in the public interest for an audit to be performed of every company's affairs. There are grounds for believing that, in terms of the provisions of the Act, an auditor is, in the absence of exceptional circumstances, compelled to remain in office until

the end of his period of appointment. A professional man, other than an auditor, can refrain from rendering further services."

16.4.13.11 Only persons qualified under the Public Accountants and Auditors Act[50] may act as auditor for a company[51] and a company must have an auditor.[52]

16.4.13.12 The statement that an auditor may resign only in exceptional circumstances is not apparent from the present Companies Act. Section 280(1) provides as follows:

"The auditor of a company may at any time during the period of his office resign as such provided the requirements of this section are complied with."

The requirements of the section which have to be complied with are that the auditor must report on material irregularities in the conduct of the company's affairs if he has not already done so. It is not necessary to conduct a special audit for this purpose.[53]

16.4.13.13 The remarks in 16.4.13.7 and 16.4.13.8 supra also apply here.

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50. Act 51 of 1951.
51. Companies Act 61 of 1973 s 275(1)(g).
52. Ibid ss 269-271 and 273.
53. Ibid s 280(2).

16.4.13.14 Is it improper for an auditor to refuse to carry out further services if it seems that he may not be paid therefore? The disciplinary rules for accountants and auditors[54] do not make specific provision for this. The rules are not, however, comprehensive and rule 2(1)(m) provides that it is improper conduct if an accountant or auditor "conducts himself in a manner which is discreditable on the part of a registered accountant or auditor or which tends to bring the profession of accounting into disrepute".

The position appears similar to that of medical practitioners,[55] but there is a difference. The position of a doctor who refuses to treat a patient who is critically ill because he is afraid that he will not be paid differs from that of an auditor who thinks that a concern is going under and who is not prepared to render services for the concern on credit. If the Public Accountants' and Auditors' Board wishes to improve the image of the profession by prohibiting such conduct, it appears fair that this should be at the expense of members of the profession and not at the expense of their clients' creditors.

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54. Regulations 1569 in Regulation Gazette 565 of 15 October 1965 as amended.

55. Par 3.4.2.4 above.

16.4.14 Claim of a commercial traveller for commission

16.4.14.1 This preference applies only to a commercial traveller and not to any other services on a commission basis. The English,[56] Australians,[57] Canadians[58] and Germans[59] expressly include a claim for commission in the preferent claim for salary or wages, without limiting commission to that of commercial travellers.

16.4.14.2 The Estate Agents' Board have made representations that their members should also be protected. Most estate agents work on a commission basis exclusively. Commission is usually payable only after the property transaction is registered in the deeds office. Whereas an ordinary employee can look for other work if his employer does not pay him, the estate agent must necessarily wait for months for his commission and he is powerless if his principal's financial position weakens.

16.4.14.3 There are numerous salesmen in business who work, for the most part, on a commission basis and it seems unfair that only commercial travellers have a preference in respect of commission. If salaried persons qualify for a preference, persons in a similar position who earn commission, should be entitled to the same preference.

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56. Annexure 1.2.3.

57. Annexure 2.4.

58. Annexure 3.3.

59. Annexure 4.3.

16.4.14.4 Making all claims for commission preferent could open the door to abuse. A person could couch a contract in terms entitling him to commission on sales rather than as a partnership agreement. He would enjoy some of the advantages of a partner and at the same time acquire a preference on insolvency, while a partner may not claim in competition with any other creditors.[60] A housewife who works as an estate agent in her spare time does not arouse the same sympathy as an employee who earns a commission or salary as his chief source of livelihood. The same applies to persons who earn commission on a casual basis or incidentally to their main business on investments made or new business introduced to some enterprise or other.

The only feasible limitation would appear to be that persons who render services full-time to an employer or other person and are reimbursed either in whole or in part by way of commission, should be dealt with on the same basis as a salaried person in respect of commission claimable for work done within any two months before sequestration.

17 Income tax

17.1 Section 101 of the act provides as follows:

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60. Par 2.4.2 above.

"Thereafter any balance of the free residue shall be applied in paying -

(a) any tax on persons or the incomes or profits of persons for which the insolvent was liable under any Act of Parliament or Ordinance of the Territory or a Provincial Council in respect of any period prior to the date of sequestration of his estate, whether or not that tax has become payable after that date;

(a)bis any amount payable by the insolvent under any Act of Parliament by way of interest in respect of any period prior to the date of sequestration of his estate in respect of any tax referred to in paragraph (a);

(b) in the case of an insolvent partnership, so much of any tax due and payable by any partner as is referable to the taxable income derived by him from the partnership, the amount so referable being deemed to be a sum which bears to the total amount due by him as tax the same ratio as his taxable income derived from the partnership bears to his total taxable imcome from all sources within the Republic."

17.2 The preference in respect of tax in general has already

been fully dealt with above.[61] It suffices to suggest that the preference provided for in section 101 of the act should be abolished.

18 Bonds over movables

18.1 Section 102 reads as follows:

> "Thereafter any balance of the free residue shall be applied in the payment of any claims proved against the estate in question which were secured by a general mortgage bond, in their order of preference with interest thereon calculated in manner provided in sub-section (2) of section one hundred and three."

18.2 This preference did not appear in the old Insolvency Act[62] but it was known to the common law.[63]

18.3 Apart from exceptions which can hardly occur today, section 86 of the Insolvency Act provides that no general mortgage bond confers any preference in respect of immovable property. A general clause in a mortgage bond hypothecating immovable property also confers no preference in respect of any property. Section 102, according to its wording, covers only a general bond over movables.

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61. Par 6.

62. Act 32 of 1916.

63. Vrede Koöp Landboumaatskappy Bpk v Uys 1964 2 SA 283 (O).

18.4 The position of a special mortgage over movables is not clear. A "special mortgage" is defined in section 2 of the Insolvency Act as "a mortgage bond hypothecating any immovable property or a notarial mortgage bond hypothecating specially described movable property in terms of section one of the Notarial Bonds (Natal) Act, 1932 (Act No. 18 of 1932) but excludes any other mortgage bond hypothecating movable property". This definition was introduced by section 2(c) of Act 16 of 1943. Section 2 also contains the following definition: "'security' in relation to the claim of a creditor of an insolvent estate, means property of the estate over which the creditor has a preferent right by virtue of any special mortgage, landlord's legal hypothec, pledge or right of retention." It is therefore clear that only the notarial bond holder in Natal may have movables hypothecated to him as security in his capacity as mortgagee. Any other special mortgage does not confer any security over movables and according to the wording of section 102 such a special mortgagee has no preference either in terms of that section. It has, however, been decided that the common law preference of a special mortgage over movables has not been excluded by the Insolvency Act.[64]

The following problem arises in practice. A creditor has a special mortgage over movables. There are other

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64. Vrede Koöp Landboumaatskappy Bpk v Uys 1964 2 SA 283 (O).

assets forming part of the free residue[65] which assets are not subject to the mortgage bond. The balance of the free residue after the preferences mentioned in sections 96 to 101 have been paid cannot be awarded to the creditor because in that event he receives a preference over assets which are not subject to his mortgage. Neither the Insolvency Act nor the text books on insolvency provide a solution to the problem. The only solution is to draw up two free residue accounts, one for the free residue assets subject to the mortgage and the other for the remainder of the free residue. After certain administration costs have been charged to the respective accounts in accordance with the usual rules[66] the remainder of the administration costs and preferent claims in terms of sections 96 and 98 to 101 must be charged proportionately to the two accounts.

18.5 According to Mars[67] priority in terms of section 102 between competing general mortgages over movables or between a general and a special mortgage over movables is determined by reference to the date of registration.[68]

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65. See par 2.1 above.

66. S 89(1).

67. The law of insolvency in South Africa 359.

68. S 87 of the Insolvency Act provides that this is the position in regard to "a mortgage to secure the payment of future debts". With the exception of specific notarial bonds in Natal, see par 18.4 above, mortgages over movables do not confer security. The act does not, therefore, provide for the order of priority amongst other mortgages over movables and the common law applies. Cf Van der Merwe Sakereg (Law of things) 453.

18.6 If the holder of a special or a general mortgage bond over movables, takes possession of the movables before sequestration he holds them in pledge as a secured creditor.[69]

18.7 The mortgagee over movables is entitled as a preferent creditor in terms of section 102 to interest on his claim from the date of sequestration to date of payment of his claim if his claim is paid in full. No other preferent creditor[70] is entitled to such interest.[71]

18.8 Like any legal notion which has, so to speak, fallen between two stools in the process of legal development, this preference must be regarded as sui generis. The intention of the parties as appears from the document is to stipulate for a secured claim. If the property which is the subject matter of the mortgage is not in the possession of the mortgagee, the law does not confer a real right and the creditor is accordingly not a secured creditor. As far as a special mortgage under the common law and a general mortgage under section 102 are concerned the law confers a preferent claim on insolvency over the free residue before payment of concurrent creditors. This obviously applies only to those movables in the free residue over which the mortgage was registered. Unlike other preferent claims payable out of the free residue[72] the creditor, like a secured creditor,

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69. Barclays Bank v Natal Fire Extinguishers 1982 4 SA 650 (D) 656C.

70. Ss 96-101.

71. Ss 102 and 103.

72. S 103(b).

receives interest on his claim from date of sequestration to date of payment if there are sufficient funds.[73]

18.9 Merits of the preference

18.9.1 It was not necessary in early Dutch law (which obtained in Ceylon), to register a mortgage bond. There was therefore no publication of the preference. This evoked criticism:[74]

> "That any man should be suffered to obtain for himself a fictitious credit, by remaining in possession and holding himself out to the world as the ostensible owner of valuable property up to the period of insolvency, and that upon such insolvency some individual creditor should by virtue of some special security step in and sweep all that property, to the prejudice of the general creditors, is a state of things so contrary to the first principles of sound credit and common justice, that it has been expressly provided against by the law of England..."

18.9.2 Our law requires publication of a mortgage bond before it can confer a preference. Publication takes place by registration in the deeds office. The system works well as far as immovables are concerned. If a person avers that he owns immovable property, it is a simple process to

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73. S 102.

74. Tatham v Andree (1863) 1 Moo PCCNS 386 at 395.

ascertain, at the deeds office for the area where the property is situate, whether he is the owner and whether the property is encumbered with a mortgage bond.

As far as movables are concerned the notarial bond "shall be registered in the deeds registry for the area in which the debtor resides and carries on business, or if he resides and carries on business in areas served by different deeds registries, in the deeds registry for the area in which he resides and in every deeds registry serving any area in which he carries on business ..."[75] If the notarial bond is so registered the registration is effective for the whole Republic.[76]

A person may, after the notarial bonds have been duly registered change his place of residence to the area of another deeds office or commence business there. A cautious creditor will therefore have to make enquiries at all deeds offices where such bonds are registered (there are at present seven deeds offices

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75. Deeds Registries Act 47 of 1937 s 62(1).

76. Ibid s 62(2).

spread over the whole country which register notarial bonds).

Another problem (which is also encountered with immovables) is that there is no guarantee that a mortgage bond will not be registered over all the person's movable assets at a later stage. Such a mortgagee will have on insolvency priority above earlier concurrent creditors.

18.9.3 It seems, nevertheless, that this preference is justified. Although he will have to take some trouble, a prospective creditor can find out whether a mortgage bond was registered over a person's assets at a specific time. If he does not wish to run the risk that such a mortgage bond may be registered later, he himself may have such a mortgage bond registered. The registration of a mortgage bond will not prevent the mortgagor from alienating the assets mortgaged or encumbering them with real rights, but the mortgagee may secure for himself a real right over the property before sequestration, by attaching it.

18.9.4 The wording of section 102 must be amended to cover both general and special mortgages over

movables. It should also provide for the position where the mortgage does not cover all the assets in the free residue. It is furthermore not clear why this preferent creditor, in contrast with other preferent creditors on the free residue, is entitled to interest. Section 87 must be amended to regulate the order of priority of these mortgages inter se.

19 Résumé

19.1 It should be accepted as a general premise that the unsecured creditors should be dealt with on an equal footing except for justified preferences. Justified preferences must be based on considerations of fairness, not only to the preferent creditor concerned but also to the general body of creditors. The interest of the community as a whole and any hardship which a creditor would suffer in the absence of a preference should also be taken into account.

19.2 It is recommended that in applying these criteria only the following preferences on the free residue of an insolvent estate are justified:

(a) sequestration costs and costs of administration pari passu;

(b) claims by a former employee of the insolvent in respect of salary or wages, limited to two months' salary or wages and claims in respect of bonus or leave, subject to a maximum amount of R1 500 (or an amount fixed by the minister from time to time) per employee, provided that commission due to someone in full-time employment of an employer is for the purposes of this preference reckoned as salary or wages;

(c) claims in respect of a mortgage over movables to the extent that the free residue was subject to the mortgage.

19.3 It is proposed that all other preferences at present provided for should be abolished.

Annexure

Position in other legal systems

1 England

The position as set out in Halsbury's laws of England Volume 3 is briefly as follows (allowance having been made for costs of administration):

1.1 Funeral expenses and costs of administration of a deceased estate before sequestration are payable in full in priority to all other debts.[77]

1.2 The other preferences rank equally.[78]

1.2.1 The following taxes are preferent: "Rates" due and payable in the period within 12 months before sequestration.[79] Also "assessed taxes and property or income tax, capital gains tax and corporation tax" limited to one year's assessment. Amounts due by an employer in respect of current tax deducted for a period of 12 months before sequestration. "Value added tax" and "car tax".[80] "Excise duties on bet-

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77. Par 762.

78. Par 763.

79. Par 764.

80. Par 765.

ting, gaming and bingo" due in the period within 12 months before sequestration.[81]

1.2.2 Amount due by an employer for "industrial injuries insurance", "national insurance" and "redundancy fund contributions" in respect of services for 12 months before sequestration.[82]

1.2.3 Paragraph 766 sets out the position in regard to salary and wages as follows:

> "All wages or salaries, whether or not earned wholly or in part by way of commission, of any clerk or servant in respect of services rendered to the bankrupt or the deceased insolvent during four months before the date of the receiving order or death are preferential to the extent of sums due not exceeding £200."

The amounts include remuneration in respect of a period of leave.

Paragraph 767 deals with a similar preference for "wages of labourers and workmen". The provision in

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81. Par 769.

82. Par 768.

regard to commission was introduced into the 1914 Act in 1916 and the maximum of £200 was increased to £800 in 1976. Paragraph 770 deals with "Any sum ... to be paid ... as compensation to a former employee who has performed national service ..." The amount of this preference, namely £50 per claimant, was also increased in 1976 to £800.

Volume 16, paragraph 786-31 and 32, points out that that portion of arrear salary, salary for a minimum period of notice, vacation bonus and a basic award for unjustified dismissal, which are not recoverable from the insolvent estate, may be recovered from the "Redundancy Fund" with certain limitations. This also applies to contributions in respect of an "occupational pension scheme".

Paragraph 780 (Volume 3) points out that a trustee may on the insolvency of an employer pay back a reasonable portion of the fee paid by an apprentice or an articled clerk for his training.

1.3 Certain creditors are paid only after all other claims have been paid with interest in full:

1.3.1 ... Any money or assets lent or entrusted by a wife to her husband to carry on a business forms part of his insolvent estate and the wife may claim a dividend only after all other claims have been paid. The same applies to a similar claim by a husband.[83]

1.3.2 Where a loan is made to a person who carries on business or who wishes to commence a business in exchange for part of the profits, the lender may claim a dividend only after all other claims have been paid in full. The same rule applies where a person advances money as capital for a business for his and the borrower's joint benefit.[84]

2 Australia[85]

The preferences in order of priority are as follows:

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83. Par 781.

84. Par 782.

85. McDonald, Henry & Meek's Australian bankruptcy law and practise. The following references to sections are, unless otherwise stated, references to sections of the Bankruptcy Act 33 of 1966. In 1980 amending legislation was passed. The effects of the amendments are shown at 2.4 and 2.8.

2.1 Costs of administration.[86]

2.2 Tax deducted from salary, wages or dividends but not yet paid to the commissioner.[87]

2.3 Funeral expenses and costs of administration of a deceased estate which has been sequestrated.[88]

2.4 Salary, wages or commission of an employee for services rendered before sequestration with a maximum of $600. This has now been increased to $1500 or a greater amount prescribed for this purpose.[89] Provision has also now been made that a person who advanced money for the payment of salary, wages or commission, enjoys the preference which the employee would have had.[90]

2.5 Compensation for personal injury during employment which was due before sequestration (previously with a maximum

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86. S 109(1)(a)-(c).

87. Income Tax Assessment Act 1936 ss 221p and 211yu.

88. S 109(1)(d).

89. S 109(1)(e).

90. S 109(2).

of $2 000 in each case).[91] This provision does not apply to the part of the liability which is covered by insurance.[92]

2.6 All amounts owing to an employee for long, sick, annual or "recreation leave".[93]

2.7 A reasonable portion of the money paid by an apprentice for an apprenticeship indenture which is not completed after sequestration.[94]

2.8 An assessment for income tax or income tax and "social services" contributions in terms of an act, subject to a maximum of one year's assessment.[95] This provision has now been deleted.

2.9 Preference conferred by a special resolution at a general meeting of creditors.[96] Such a resolution

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91. S 109(1)(f).

92. S 109(5).

93. S 109(1)(g).

94. S 109(1)(h).

95. S 109(1)(j).

96. S 109(1)(j).

must be brought to the attention of the insolvent and creditors[97] and they are afforded the opportunity of applying to court to expunge or amend the resolution.[98]

2.10 Any money or assets lent or made available to an insolvent by his spouse form part of the insolvent estate and the spouse receives a dividend on her claim only after all other creditors' capital claims have been paid in full.[99]

3 Canada[1]

The preferences in order of priority are as follows:

3.1 Where the insolvent is deceased reasonable funeral expenses and costs of administration of the deceased estate.[2]

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97. S 109(8)(a).

98. S 109(9).

99. S 111.

1. Houlden & Morawetz Bankruptcy law of Canada. The following references to sections are references to sections of An Act Respecting Bankruptcy RSC 1970 cB-3.

2. S 107(1)(a).

3.2 Costs of administration of the insolvent estate.[3]

3.3 Wages, salary, commission or compensation for any clerk, servant, travelling salesman or workman for services during 3 months before sequestration not exceeding $500 in each case. A travelling salesman is entitled to disbursements as well for 3 months not exceeding a further $300.[4]

3.4 That portion of municipal taxes which does not constitute a preferential lien or charge against the insolvent's real property, not exceeding the amount of the insolvent's interest in the property.[5]

3.5 A lessor's claim for arrear rental for a period of 3 months before sequestration and also accelerated rent for a period of 3 months after sequestration if entitled thereto under the lease.[6]

3.6 Fees and costs of the first attachment of the

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3. S 107(1)(b) and (c).

4. S 107(1)(d).

5. S 107(1)(e).

6. S 107(1)(f).

assets of the insolvent before sequestration, limited to the value of the assets.[7]

3.7 Amounts deducted or withheld for liability of the insolvent under the Unemployment Insurance Act, Workmen's Compensation Act or the Income Tax Act.[8]

3.8 Claims resulting from injuries to workmen of the insolvent to which the Workmen's Compensation Act does not apply, to the extent that moneys were received from persons or companies who indemnified the insolvent.[9]

3.9 Claims by the Crown not previously mentioned.[10]

3.10 A spouse or former spouse may not claim wages, salary or commission until all other claims have been paid.[11]

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7. S 107(1)(g).
8. S 107(1)(h).
9. S 107(1)(i). Cf par 7.2.2 and par 7.4.2 above.
10. S 107(1)(j).
11. S 108(2).

3.11 A parent, child, brother, sister, uncle or aunt, whether by blood or marriage, does not acquire a preference for salary, wages, commission or compensation by virtue of section 107.[12]

3.12 Someone who advances money for a business and who will receive part of the profits, either as interest or otherwise, may on insolvency not reclaim anything before all the other claims have been paid.[13]

3.13 If a company is wound up an officer or director of the company may claim no preference for wages, salary, commission or compensation for work performed or services rendered in any capacity to the company.[14]

4. Germany[15]

The preferences in order of priority are as follows:

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12. S 109.

13. S 110.

14. S 111.

15. The position is given as set out in European Bankruptcy Law 128. See also Konkursordnung ss 58-61 and Manual of German Law Volume II 267.

4.1 Costs of administration and an allowance to the insolvent for the support of himself and his family.

4.2 Costs for transactions enforced by the trustee (a type of costs of administration) and claims grounded on unjust enrichment.

4.3 Claims for arrears for the year preceding sequestration for:

4.3.1 Remuneration of employees and trainees of the insolvent.

4.3.2 Employees' reimbursements arising from restraint of competition agreements.

4.3.3 Business agents' remuneration and commission subject to certain limitations.

4.3.4 Pensions due to pensioners of the insolvent.

4.4 Tax payable during the year before sequestration.

4.5 Fees of churches, schools and other bodies for the year before sequestration.

4.6 Fees of doctors, veterinarians, chemists, midwives and nurses for medical and nursing services during the year before sequestration.

4.7 Claims by children and others whose property was administered in law by the insolvent.

5 France[16]

The preferences in order of priority are as follows. Items 1 and 4 apply to movables and immovables and the rest only to movables:

5.1 Legal costs incurred for the preservation and realisation of assets.

5.2 Funeral expenses of the insolvent and his dependants.

5.3 Death-bed medical expenses.

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16. The position as contained in the following works is briefly set out: Amos & Walton's introduction to French law 247-252; French Civil Code (as amended up till 1 July 1976) ss 2095-2113.

5.4 Salary and wages. Employees have a preference for the current and previous year. Wage earners' and apprentices' claims are limited to six months' wages. There is also provision for payment in lieu of leave and claims under labour legislation in connection with dismissals.

5.5 Pari passu with 5.4 but over movables only : "Social security" contributions, usually for one year only.

5.6 Debts incurred for necessities for the insolvent and his family were formerly preferent for one year if they were supplied wholesale or for six months if they were supplied retail. Boarding and lodging house costs for a year were included in this preference. This preference does not appear in the edition of the code mentioned above.

5.7 Amounts due to an insured under an insurance policy.

5.8 Amounts due to the state under various acts. The order of preference depends on the provisions of the acts concerned, some ranking before the above-mentioned and others thereafter.

5.9 There are also various special preferences which are simmilar to rights of retention and hypothecs in our law. Worthy of mention is a preference conferred under certain conditions on a seller of movable and immovable property.

5.10 The code (section 2112) specifically provides that assignees enjoy the same preference as the assignors.