

INSOLVENCY

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Insolvency Act 1912

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Insolvency Act 1912

TABLE OF AMENDMENTS

The Insolvency Act 1912 No 48 was made on 16 July 1912 and commenced on 23 December 1912 (Papua Government Gazette 23 December 1912). This Act applied in the Republic from 23 September 1922 (Laws Repeal and Adopting Act 1922, s 14 and Sch 3).

| Amending Legislation | Certified | Date of Commencement |
|--|------------------|---------------------------------|
| Adaptation of Laws Order 1969 GN No 188/1969 | 9 October 1969 | 31 January 1968 |
| Statute Law Revision Act 2011 No 8 | 15 April 2011 | Sch 1[77], [78]: 15 April 2011 |
| Crimes Act 2016 No 18 | 12 May 2016 | Sch 2 items 69, 70: 12 May 2016 |
| Revised Written Laws Act 2021 No 7 | 1 June 2021 | 1 June 2021 |

An Act to provide for the distribution of the estates of insolvent debtors amongst their creditors, and their release from their debts, and for other purposes.

Be it enacted by the Lieutenant-Governor of the Territory of Papua with the advice and consent of the Legislative Council and is adopted by the Republic:

PART 1 — PRELIMINARY

1 Short title and commencement

This Act may be cited as the *Insolvency Act 1912* and came into effect on 23 December 1912.

[s 1 subst Act 8 of 2011 s 12 and Sch 1[77], opn 15 Apr 2011]

2 Division

[s 2 rep Act 8 of 2011 s 12 and Sch 1[77], opn 15 Apr 2011]

3 Interpretation

In this Act:

‘Court’ means the Supreme Court established under the *Constitution* and the *Supreme Court Act 2018*;

[def am GN No 188/1969 O 3, opn 31 Jan 1968]

‘creditor’ means also any 2 or more persons being jointly interested as partners or otherwise and incorporated and joint stock companies;

‘creditors present at any meeting’ and **‘creditors assembled at any meeting’** include creditors who are represented by some person duly authorised by such creditors in writing;

‘debt provable in insolvency’ includes any debt or liability by this Act made provable in insolvency;

‘Examining Magistrate’ means any Resident Magistrate before whom a person is ordered to attend for examination under this Act;

‘property’ means and includes money goods things in action land and every description of property whether real or personal also obligations easements and every description of estate interest and profit present or future vested or contingent arising out of or incident to property as above defined;

‘Registrar’ means the Registrar of Courts;

[def am GN No 188/1969 O 3, opn 31 Jan 1968]

‘Registry’ means the Registry of Courts; and

‘secured creditor’ means any creditor holding any mortgage charge or lien on the insolvent’s estate or any part of it as security for a debt due to him or her.

[s 3 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

4 Mode of calculating majority of creditors

Whenever under this Act it shall be necessary to compute a majority of creditors no creditor whose debt does not exceed \$10 shall be counted in reckoning a majority in number but the debt due to such creditor shall be taken into account in reckoning a majority in value.

[s 4 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

5 Repeal and saving

[s 5 omitted by the Law Revision Commission under powers authorised by Act 10 of 2019]

6 Application of Act to future insolvencies

[s 6 omitted by the Law Revision Commission under powers authorised by Act 10 of 2019]

PART 2 — CONSTITUTION AND POWERS OF COURT – PRACTICE

7 **Supreme Court to be Court of insolvency**

(1) The Supreme Court shall be the Court of insolvency.

(2) All the powers under this Act conferred upon the said Court may be exercised by a single Judge.

[s 7 am GN No 188/1969 O 3, opn 31 Jan 1968; Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

8 **Judge may sit in chambers**

A Judge may sit in chambers for the despatch of such business as may without detriment to the public advantage arising from the discussion of questions in open court be heard in chambers and when sitting in chambers he or she shall have in all respects like power and jurisdiction as when sitting in Court.

9 **Powers of Judge in insolvency**

Every Judge in insolvency shall for the purposes of this Act have all the powers and jurisdiction of a Judge of the Supreme Court and the orders of such Judge may be enforced accordingly in the same manner as those of a Judge of the Supreme Court or in such other manner as may be prescribed.

[s 9 am GN No 188/1969 O 3, opn 31 Jan 1968; Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

10 **Court may review its orders**

The Court may review, rescind or vary any order made by it in pursuance of this Act.

[s 10 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

11 **Special case may be stated**

In any insolvency or other proceeding within the jurisdiction of the Court the parties concerned may at any stage of the proceedings state any question or questions in a special case for the opinion of the Court and if in such case it is stated that the decision of the Court shall be final, no appeal shall lie therefrom.

12 **Mode of taking evidence**

The Court may in all matters within its jurisdiction at its discretion take the whole or any part of the evidence *vivâ voce* upon oath or by interrogatories in writing or upon affidavit or in any of such ways and may issue commissions for the purpose of taking evidence at any place either within or outside the Republic.

13 **Court may award costs**

The Court may award costs in any matters under this Act and costs so awarded shall be recoverable in the same manner as costs awarded by an order of the Supreme Court and the like remedies may be had on an order under this Act for costs as on any such order of the Supreme Court or such other remedies as may be prescribed.

[s 13 am GN No 188/1969 O 3, opn 31 Jan 1968; Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

14 General power of the Court

Subject to the provisions of this Act, the Court shall have full power to decide all questions of priorities and all other questions whatsoever whether of law or fact arising in any case of insolvency coming within the cognizance of the court or which the court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.

[s 14 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

15 Commitment to prison

Where the Court commits a person to prison, the commitment may be to such convenient prison as the court thinks expedient and if the Chief Correctional Officer of the Correctional Centre refuses to receive any prisoner so committed he or she shall be liable for every such refusal to a penalty not exceeding \$100.

GENERAL RULES

16 General rules may be made from time to time

(1) General rules in this Act described as rules of the Court may be made from time to time for the effectual execution of this Act and of the objects of it and the regulation of the practice and procedure upon insolvency petitions and the proceedings thereon and the said general rules may from time to time be revoked and altered.

(2) All such rules shall be made by the Chief Justice.

[s 16 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

17 Matters to be provided for by general rules

Any general rules made may prescribe regulations:

- (a) as to the service of insolvency petitions including provisions for substituted service;
- (b) as to the valuing of any debts provable in an insolvency;
- (c) as to the valuation of securities held by creditors;
- (d) as to the giving or withholding interest or discount on or in respect of debts or dividends;
- (e) as to the funds out of which costs are to be paid the order of payment and the amount of taxation;
- (f) as to the fees to be charged and collected for any business done by the Court of insolvency or any officer of it and as to whether the same shall be collected by stamps or otherwise; and
- (g) as to any other matter or thing whether similar or not to those above enumerated in respect to which it may be expedient to make rules for carrying into effect the objects of this Act,

and any rules so made shall be deemed to be within the powers conferred by this Act and shall be of the same force as if they were enacted in this Act.

[s 17 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

18 Continuance of rules in force

Until rules have been made under this Act and so far as such rules do not extend

the principles, practice and rules on which the Supreme Court has heretofore acted in dealing with insolvency proceedings shall be observed by the Court in insolvency cases under this Act.

[s 18 am GN No 188/1969 O 3, opn 31 Jan 1968; Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

APPLICATION OF THE ACT TO DEBTORS

19 Joint stock companies excluded

[s 19 omitted by the Law Revision Commission under powers authorised by Act 10 of 2019]

20 Otherwise this Act to apply

The provisions of this Act respecting adjudication of insolvency shall extend and be applicable to all debtors resident within the Republic or having property within the Republic.

PRACTICE

21 Adjudication to be by Supreme Court

All adjudications of insolvency shall be made by the Supreme Court or a Judge and not otherwise.

[s 21 am GN No 188/1969 O 3, opn 31 Jan 1968]

22 Proceedings to be by petition

Proceedings for adjudication of insolvency shall be by a petition.

23 Petition when presented and how

A petition for adjudication of insolvency under Section 22 shall be presented and filed in the Registry.

24 Annuling adjudication

A person prejudicially affected by any adjudication of insolvency may within the prescribed time and on the prescribed notice to all parties apply to the Court to annul the adjudication and if sufficient cause be shown the Court shall annul the same accordingly.

PART 3 — DEBTOR'S PETITION

25 Debtor's petition

A debtor may petition for adjudication of insolvency against himself or herself and the filing of such petition shall be an act of insolvency.

26 Form of debtor's petition

Debtors' petitions may be in the following form or to the like effect:

To the Registrar of Courts

The Petition of A.B. of showeth that your petitioner is unable to meet his or her engagements with his or her creditors.

Your petitioner prays that he or she be adjudicated insolvent,

and shall be signed by the petitioner and attested by some justice of the peace or commissioner for oaths or the Registrar.

[s 26 am GN No 188/1969 O 3, opn 31 Jan 1968]

27 Petitions by partnerships

A petition for insolvency against a partnership may be presented by the majority of the members of it who at the time of presenting the petition are usually resident within the Republic.

28 Adjudication on petition

When a debtor's petition shall have been presented the Court shall forthwith after such presentation proceed to adjudicate thereon and upon due proof make adjudication of insolvency against the petitioner.

PART 4 — CREDITOR'S PETITION

29 Acts of insolvency

Any debtor liable to the provisions of this Act who shall have committed any of the following acts shall be deemed to have committed an act of insolvency and shall be liable to be adjudicated insolvent upon the petition of any creditor or creditors competent to present such petition that is to say:

- (a) if the debtor has in the Republic or elsewhere made a conveyance or assignment of his or her property to a trustee or trustees for the benefit of his or her creditors generally;
- (b) if the debtor has in the Republic or elsewhere made a fraudulent conveyance gift delivery or transfer of his or her property in whole or in part;
- (c) if the debtor has with intent to defeat or delay his or her creditors done any of the following things namely, departed out of the Republic or being out of the Republic, remained out of the Republic or departed from his or her dwelling-house or otherwise absented himself or herself or begun to keep house;
- (d) if the debtor has filed in the prescribed manner a declaration admitting his or her inability to pay his or her debts;
- (e) if the debtor has presented a petition for adjudication of insolvency against himself or herself under Part 3;
- (f) if an execution issued against a debtor on any legal process for the purpose of obtaining payment of not less than \$50 has been levied by seizure and the debtor has not *bona fide* satisfied such process by payment or otherwise within 4 days from such seizure;
- (g) if the debtor has after the presentation of a petition for adjudication of insolvency against him or her paid, given or delivered or caused to be paid given or delivered to the creditor or creditors presenting such petition money or any satisfaction as security for his or her or their debt or debts or any part, whereby the petitioning creditor or creditors may receive more in the dollar than other creditors;
- (h) if the debtor has given or executed any fraudulent warrant of attorney or *cognovit actionem*;
- (i) if the creditor presenting the petition has served on the debtor in the prescribed manner a debtor's summons requiring him or her to pay a sum due of an amount of not less than \$50 and the debtor has for such time succeeding the service of the summons as may be specified therein neglected to pay such sum or to secure or compound for the same to the satisfaction of the creditor;
- (j) if a debtor having against him or her the sentence, judgment or decree of any competent court and being thereunto required has failed to satisfy the same or to point out to the officer charged with the execution for sufficient disposable of property to satisfy the debt;
- (k) if at any meeting of his or her creditors a debtor shall have consented to present a petition under Part 3 and shall not within 48 hours from the time of such consenting, or such further time as may be rendered necessary by illness, distance or other sufficient cause, have presented such petition;

- (l) if at any meeting of his or her creditors a debtor shall have admitted that he or she is unable to meet his or her engagements or shall offer a composition of less than 20 cents in a dollar in cash and having been requested by a majority of the creditors present at such meeting to present a petition under Part 3 shall not within 48 hours after such request, or such further time as may be rendered necessary by illness distance or other sufficient cause, have presented such petition;
- (m) if a debtor has given or made any preference to or in favour of any creditor which if the debtor were adjudicated insolvent under this Act would be deemed a fraudulent preference of such creditor; or
- (n) if a debtor has been adjudged or declared bankrupt or insolvent by a court of a Commonwealth country having jurisdiction in bankruptcy or insolvency or for the relief of insolvent debtors or has presented a petition to any such court praying adjudication of bankruptcy or insolvency against himself or herself.

[s 29 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

30 Act of insolvency shall be committed within 6 months prior to presentation of the petition

No person shall be adjudged an insolvent on any of the grounds in Section 29 unless the act of insolvency on which the adjudication is grounded has occurred within 6 months before the presentation of the petition for adjudication.

31 Amount of petitioning creditor's debt

- (1) A single creditor if the debt due to him or her by a debtor amounts to \$50 or upwards or 2 creditors not being partners if the aggregate amount of debts due to them by a debtor amounts to \$70 or upwards or 3 or more creditors not being partners if the aggregate amount of debts due to them by a debtor amounts to \$100 or upwards may present a petition to the court praying that the debtor be adjudged an insolvent and alleging as the ground for such adjudication any one or more of the acts or defaults defined to be acts of insolvency.
- (2) Any number of creditors in partnership shall for the purposes of this Section be deemed to be a single creditor.

32 Nature of petitioning creditor's debt

- (1) The debt of the petitioning creditor shall be a liquidated sum due at law or in equity and subsisting at the time when the act of insolvency was committed at the time of presenting the petition.
- (2) It shall not be a secured debt unless the petitioner states in his or her petition that he or she will give up such security for the benefit of the creditors in the event of the debtor being adjudicated insolvent or unless the petitioner gives an estimate of the value of his or her security in which latter case, he or she may be admitted as a petitioning creditor to the extent of the balance of the debt due to him or her after deducting the value so estimated.
- (3) A person under subsection (2) shall on an application being made by the trustee within the prescribed time after the date of adjudication give up his or her security to such trustee for the benefit of the creditors upon payment of such estimated value.

- (4) For a person who has given credit to a debtor for valuable consideration for any sum payable at a certain time which time had not elapsed when the act of insolvency was committed may petition or join in petitioning whether the time for payment has arrived at the date of presenting the petition or not.

33 Proceedings in relation to a debtor's summons

- (1) A debtor's summons may be granted by a Judge of the Supreme Court on a creditor proving to his or her satisfaction that a debt sufficient to support a petition in insolvency is due to the creditor from the person against whom the summons is sought and that the creditor has failed to obtain payment of his or her debt after using reasonable efforts to do so.
- (2) The summons shall be in the prescribed form resembling as nearly as circumstances admit a writ issued by the Supreme Court.
- (3) It shall state that in the event of the debtor failing to pay the sum specified in the summons or to compound for the same to the satisfaction of the creditor a petition may be presented against him or her praying that he or she may be adjudged an insolvent.
- (4) The summons shall have an indorsement thereon to the like effect or such other prescribed indorsement as may be best calculated to indicate to the debtor the nature of the document served upon him or her and the consequences of inattention to the requisitions made.

[s 33 am GN No 188/1969 O 3, opn 31 Jan 1968]

34 Debtor may apply to dismiss summons

- (1) A debtor served with a debtor's summons may apply to a Judge of the Supreme Court in the prescribed manner and within the prescribed time to dismiss such summons on the ground that he or she is not indebted to the creditor serving such summons or that he or she is not indebted to such amount as will justify such creditor in presenting an insolvency petition against him or her and such Judge may dismiss the summons with or without costs if satisfied with the allegations made by the debtor or it may upon such security, if any, being given as may seem just for payment to the creditor of the debt alleged by him or her to be due and the costs of establishing such debt stay all proceedings on the summons for such time as will be required for the trial of the question relating to such debt.
- (2) Such trial shall be had either before the Supreme Court or a Judge or some other court by law competent to try and determine questions relating to debts of a like amount.

[s 34 am GN No 188/1969 O 3, opn 31 Jan 1968]

35 Form of creditor's petition

Creditors' petitions for adjudication of insolvency may be in the form following or to the like effect:

To the Registrar of Courts.

The humble petition of A.B. of etc

(1) That C.D. of E. merchant [or as the case may be] is indebted to him or her in the sum of \$

(2) *That your petitioner is informed and believes that the said C.D. lately and whilst indebted to your petitioner committed an act of insolvency that is to say [here state act or acts of insolvency relied on].*

Your petitioner prays that the said C.D. be adjudged insolvent.

[s 35 am GN No 188/1969 O 3, opn 31 Jan 1968]

36 Concise statements of insolvency

In petitions the following short statements of acts of insolvency may be used and if such or the like statements are used they shall be sufficient:

- (a) made a conveyance or assignment of his or her property for his or her creditors;
- (b) made a fraudulent conveyance or gift or delivery or transfer of his or her property or part of his or her property to wit to E.F.;
- (c) with intent to defeat or delay his or her creditors departed out of the Republic or remained out of the Republic or etc;
- (d) filed a declaration of insolvency;
- (e) filed an insolvency petition;
- (f) suffered his or her property to be seized in execution for \$50 and upwards and detained for 4 days;
- (g) fraudulently preferred a petitioning creditor to wit E.F.;
- (h) gave a fraudulent warrant of attorney or *cognovit actionem*;
- (i) failed for days to pay secure or compound a debt of \$ which he or she was required to pay by a debtor's summons;
- (j) failed to satisfy or point out property to satisfy an execution;
- (k) at a creditors' meeting consented to present an insolvency petition and failed to do so for 48 hours without excuse;
- (l) at a creditors' meeting admitted his or her insolvency or offered a composition and being requested by a majority of creditors to present an insolvency petition failed to do so for 48 hours without excuse;
- (m) made a fraudulent preference of a creditor to wit E.F.; or
- (n) was adjudged insolvent or bankrupt or presented a petition or as the case may be for adjudication of insolvency or bankruptcy against himself or herself.

37 Verification of petition

- (1) A petition shall be verified in Court by the oath or affirmation of the petitioner or petitioners.
- (2) Where the petitioning creditor is a body corporate or joint stock company or company authorised to sue in the name of a public officer, the petition may be verified by the manager, secretary or other authorised officer of such body corporate or company.
- (3) Where the petitioning creditors are 2 or more persons in partnership, the petition may be verified by one only of the partners.
- (4) Where the petitioning creditor is out of the Republic the petition may be verified by his or her attorney or agent within the Republic duly authorised on his or her behalf.

38 Signature of petition

The petition shall be signed by the petitioner or some person by this Act authorised to verify the same.

[s 38 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

39 Form of verification

- (1) The verification shall be by affidavit in the form following or to the like effect and annexed to or subscribed to the petition:

I X.Y. of etc make oath and say that the statements in the above [or the annexed] petition are to the best of my belief true in substance and in fact.

- (2) The affidavit in subsection (1) shall be *prima facie* evidence to support the petition.

40 Authority to present petition to be verified

Where a petition is verified by a person, other than the petitioner or one of the petitioners, such person shall in addition to verifying the same show also in his or her affidavit accompanying the petition that he or she is authorised under this Act to verify the petition.

[s 40 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

41 Petitions shall be served

A petition shall be served upon the debtor.

[s 41 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

42 Indorsement on petitions for service

- (1) A copy of the petition served shall have a summons in the form following or to the like effect:

“To the within-named C.D.

You are hereby required to enter an appearance to the within petition at the Supreme Court within days from the service hereof on you exclusive of the day of service otherwise you will be adjudicated insolvent.”

- (2) The summons in subsection (1) shall be signed by the Registrar and sealed by the seal of the Court.

[s 42 am GN No 188/1969 O 3, opn 31 Jan 1968]

43 Mode of service

The service of petitions under this Part may be effected either personally or in such other manner as may be prescribed or as the Court may direct.

[s 43 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

44 Proceedings if no appearance entered, no fee for appearance

- (1) Where at the expiration of 4 days after the day of service or such further time as may be prescribed or as the court may think necessary to enable the debtor to appear the debtor shall not have entered an appearance to the petition at the place appointed by the summons the Supreme Court or a Judge may proceed at any time, upon due proof of service to adjudicate the debtor insolvent.

- (2) No fee shall be demanded of a debtor for entering an appearance to a petition.

[s 44 am GN No 188/1969 O 3, opn 31 Jan 1968]

45 Proceedings on appearance

Where the debtor appears, the petition shall be set down for hearing in chambers before a Judge.

46 Affidavits showing cause may be filed

A debtor intending to show cause against any petition may file any affidavit or affidavits intended to be used by him or her for that purpose in the Registry.

47 Proceedings at hearing of petition

- (1) Where the debtor appears, the Court at the hearing of the petition shall require proof of the debt of the petitioning creditor and of the act of insolvency, or if more than one act of insolvency is alleged in the petition of someone of the alleged acts of insolvency and if satisfied with such proof shall adjudge the debtor to be insolvent.
- (2) The Court may adjourn the petition, either conditionally or unconditionally, for the procurement of further evidence or for any other just cause, or may dismiss the petition with or without costs as the Court thinks just.

48 Proceedings if debt of petitioning creditor contested

Where the debtor appears on the petition and denies that he or she is indebted to the petitioner or that he or she is indebted to such amount as would justify the petitioner in presenting an insolvency petition against him or her the court upon such security, if any, being given as the court may require for payment to the petitioner of any debt which may be established against him or her in due course of law and of the costs of establishing such debt may stay all proceedings on the petition for such time as may be required for trial of the question relating to such debt and such trial shall be had in manner provided with respect to disputed debts under debtors' summonses.

49 Where proceedings stayed court may adjudge debtor insolvent on petition of another creditor

Where proceedings are stayed under Section 48, the Court may if by reason of the delay caused by such stay of proceedings or for any other cause it thinks just adjudge the debtor an insolvent on the petition of some other creditor and shall thereupon dismiss upon such terms as it thinks just the petition proceedings in which have been stayed.

50 On payment by debtor to petitioning creditor the latter shall forfeit his or her debt and pay it to the trustee

Where any debtor after the presentation of a petition for adjudication of insolvency against him or her shall pay money to the petitioning creditor or give or deliver or procure to be given or delivered to him or her any satisfaction or security for his or her debt whereby such petitioning creditor may receive more in the dollar in respect of his or her debt than the other creditors such petitioning creditor shall forfeit his or her whole debt and shall also repay or deliver up such money or satisfaction or security or the full value to the trustee.

51 Petitioning creditor to pay costs of proceedings

The petitioning creditor shall defray the costs and expenses of all proceedings in

the insolvency until and inclusive of the order of adjudication and such costs and expenses having been first taxed shall be repaid to him or her out of the first monies that shall be received from the estate of the insolvent.

52 **Petitions against partnerships**

- (1) A creditor of a partnership may present a petition for adjudication of insolvency against all or any one or more of the members of the partnership, if any one of the partners has committed an act of insolvency in respect of the estate of the partnership.
- (2) An order of adjudication made under subsection (1) shall be valid although it does not include all the partners.
- (3) Following the order in subsection (2), the like proceedings shall be had and taken and concerning such estate and such partner or partners as are provided to be had and taken concerning other estates and persons.
- (4) Notwithstanding subsections (1), (2) and (3), no order shall extend or be construed to prevent any creditor of any partnership from proceeding against any partner or the separate estate of any partner of it in respect of debts due by the partnership in the same way as he or she might proceed against him or her in respect of debts due by such partner in his or her individual capacity.

GENERAL PROVISIONS

53 **Time for delivery of statement of debts, etc, to trustee**

An order of adjudication made under Parts 3 and 4 shall specify a time and place at which the debtor is to come in and deliver to the trustee a full true and accurate statement verified on oath of his or her debts and liabilities of every kind and of the names and residences so far as known of his or her creditors and of the causes of his or her inability to meet his or her engagements.

[s 53 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

54 **Advertisement of adjudication; order conclusive evidence**

- (1) A copy of the order of the Court adjudging the debtor to be insolvent shall be published in the Gazette and be advertised locally in such manner, if any, as may be prescribed and the date of such order shall be the date of the adjudication for the purposes of this Act.

[subs (1) am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

- (2) The production of a copy of the Gazette containing such order as aforesaid shall be conclusive evidence in all legal proceedings of the debtor having been duly adjudged an insolvent and of the date of the adjudication so that it shall not be necessary in any such proceedings to prove any petitioning creditor's debt or act of insolvency in order to support the adjudication.

ABSCONDING DEBTORS

55 **Court may cause absconding debtors to be arrested; preserving right of the debtor to apply to dismiss the summons; discharge of the debtor; what arrests are valid; payment or security for debt after arrest**

- (1) Where after a debtor's summons has been granted and before a petition for adjudication of insolvency is presented against the debtor it appears to the

court that there is probable reason for believing that the debtor is about to leave the Republic or to quit his or her place of residence with a view of avoiding payment of the debt for which the summons has been granted or of avoiding service of a petition of insolvency or of avoiding appearing to such petition or of avoiding examination in respect of his or her affairs or otherwise avoiding delaying or embarrassing proceedings in insolvency the court may by warrant addressed to any constable or prescribed officer of the court cause the debtor to be arrested and safely kept as prescribed until such time as the court may order.

- (2) Nothing in this Section contained shall be construed to alter or qualify the right of the debtor to apply to the court in the prescribed manner to dismiss the summons or to pay secure or compound for the debt within the time in this Act provided without being deemed to have committed an act of insolvency.

[subs (2) am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

- (3) Upon any such payment or composition being made or such security offered as the Court thinks reasonable the debtor shall be discharged out of custody unless the Court otherwise order.
- (4) No arrest under this Section shall be valid unless the debtor be served with the debtor's summons before or at the time of his or her arrest.
- (5) No payment or composition of a debt made or security for the same given after an arrest made under this Section shall be exempted from the provisions of this Act relating to fraudulent preferences.

[subs (5) am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

56 Arrest of insolvent under certain circumstances

The Court may by warrant addressed to any constable or prescribed officer of the court cause a debtor to be arrested and any books, papers, monies, goods and chattels in his or her possession to be seized and him or her and them to be safely kept as prescribed until such time as the Court may order under the following circumstances:

- (a) if after a petition of insolvency is presented against such debtor it appear to the Court that there is probable reason for believing that he or she is about to leave the Republic or to quit his or her place of residence with a view of avoiding service of the petition or of avoiding appearing to the petition or of avoiding examination in respect of his or her affairs or otherwise delaying or embarrassing the proceedings in insolvency;
- (b) if after a petition in insolvency has been presented against such debtor it appears to the Court that there is probable cause for believing that he or she is about to remove his or her goods or chattels with a view of preventing or delaying such goods or chattels being taken possession of by the trustee or that there is probable ground for believing that he or she has concealed or is about to conceal or destroy any of his or her goods or chattels or any books, documents or writings which might be of use to his or her creditors in the course of his or her insolvency; or
- (c) if after the service of the petition on such debtor or after an adjudication in insolvency against him or her, he or she removes any goods or chattels in his or her possession above the value of \$5 without the leave of the trustee or if without good cause shown he or she fails to attend any examination ordered by the Court.

57 Power to summon witnesses before adjudication

- (1) The Court may before adjudication summon to attend before itself or in any place other than within the Central Division of the Territory, before any magistrate the debtor or a person whom it may think capable of giving any information concerning any act of insolvency committed by the debtor and may require a person so summoned to produce any books or documents in his or her possession or power.
- (2) The Examining Magistrate may examine such person and if such person being so summoned shall without reasonable excuse refuse or neglect to attend the examining magistrate may order by warrant such person to be arrested and brought before him or her for examination and may order the seizure of all or any of the books or documents which such person may have been ordered to produce and may also punish such person so refusing or neglecting to appear by fine not exceeding \$100 or imprisonment not exceeding 6 months or both as in his or her discretion such examining magistrate may think fit.

**PART 5 — CONSEQUENCES OF ADJUDICATION — CUSTODY AND
VESTING OF PROPERTY**

58 Definition of commencement of insolvency

- (1) The insolvency of a debtor whether the adjudication is made upon his or her own or a creditor's petition shall subject to the provisions of subsection (2) be deemed to have relation back to and to commence at the time of the act of insolvency being completed on which the order is made adjudging him or her to be insolvent or if the insolvent is proved to have committed more acts of insolvency than one to have relation back to and to commence at the time of the first of the acts of insolvency that may be proved to have been committed by the insolvent within 6 months next preceding the presentation of the petition whereon the adjudication is founded.
- (2) The insolvency shall not relate to any such prior act of insolvency unless it be proved that at the time of committing such prior act the insolvent was indebted to some creditor or creditors in a sum or sums sufficient to support a petition in insolvency and that such debt or debts are still remaining due at the time of the adjudication.

59 Creditors bound by insolvency

- (1) Where a debtor shall be adjudicated an insolvent no creditor to whom the insolvent is indebted in respect of any debt provable in the insolvency shall have any remedy against the property or person of the insolvent in respect of such debt except in manner directed by this Act.

[subs (1) am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

- (2) This Section shall not affect the power of any creditor holding a security upon the property of the insolvent to realise or otherwise deal with such security in the same manner as he or she would have been entitled to realise or deal with the same if this Section had not been passed.

60 Discharge of prisoner for debt or mesne process

A person who shall be in custody of the sheriff or of any gaoler or officer under *mesne* process or in execution on any judgment decree or order for any debt or demand provable in insolvency being made against him or her be entitled to apply to the Court for and obtain an order discharging him or her out of custody in respect of it either absolutely or on such terms as the court may think fit to impose and shall be discharged accordingly.

61 Power of Court after presentation of petition to restrain suits, etc

- (1) The Court may at any time after the presentation of an insolvency petition against the debtor restrain further proceedings in any action suit execution or other legal process against the debtor in respect of any debt provable in insolvency or it may allow such proceedings whether in progress at the commencement of the insolvency or commenced during its continuance to proceed upon such terms as the court may think just.
- (2) The Court may also at any time after the presentation of such petition

appoint a receiver or manager of the property or business of the debtor against whom the petition is presented or of any part of it and may direct immediate possession to be taken of such property or business or any part of it.

(3) Applications under this Section may be made *ex parte*.

62 Official trustee

The Minister may appoint an official trustee and in case the official trustee shall die or leave the Republic or be removed from his or her office may appoint another person to be official trustee in his or her office who shall thereupon succeed to all the rights powers duties and liabilities of his or her predecessor and in whom shall vest by virtue of his or her appointment without any conveyance or assignment for that purpose all the property vested in his or her predecessor as official trustee.

63 Security to be given by official trustee

The official trustee shall before entering on his or her duties if required by the Minister give such security by bond for the due performance of it as the Court shall direct.

64 Official trustee to pay into revenue 5% of sums collected

- (1) The official trustee shall pay into the public revenue of the Republic a sum at the rate of \$10 for every \$200 that shall come by him or her to his or her hands as such trustee as the proceeds of property realised or debts collected by him or her while acting as such trustee.
- (2) Such percentage shall not be chargeable upon any monies that shall come to his or her hands by devolution from any elected trustee that may have preceded him or her in his or her office.

65 Official trustee to take possession on debtor's petition being presented

Immediately upon the presentation of a petition for adjudication under Part 3, the official trustee shall take or cause to be taken possession of all the property of the petitioner wherever situate and shall retain the same in his or her possession and custody until adjudication of insolvency has been made or the petition has been dismissed.

[s 65 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

66 Order for the election of trustee

Every order adjudging a debtor insolvent shall appoint some day not earlier than 6 days nor later than 30 days from the date of the order for holding a general meeting of his or her creditors for the election of a trustee.

67 Official trustee to act until trustee is elected

Until a trustee is elected by the creditors, the official trustee shall be the trustee for the purposes of this Act and immediately upon the order of adjudication

being made the property of the insolvent shall forthwith pass to and vest in him or her and shall continue to be vested in him or her unless and until a trustee is elected as aforesaid.

[s 67 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

68 Power and duty of trustee

The official trustee shall upon his or her appointment take or cause to be taken possession of the property of the insolvent and shall cause such of the same as is of a perishable nature to be sold and shall preserve the residue until after the time for the election of a trustee as herein provided shall have elapsed.

69 Property of insolvent how divisible

When an order has been made adjudging a debtor insolvent the property of the insolvent shall become divisible amongst his or her creditors in proportion to the debts proved by them in the insolvency.

70 Descriptions of insolvent's property divisible amongst creditors

The property of the insolvent divisible amongst his or her creditors and in this Act referred to as the property of the insolvent shall not comprise the following particulars:

- (a) property held by the insolvent on trust for any other person;
- (b) the tools, if any, of his or her trade and the necessary wearing apparel and bedding of himself or herself, his wife or her husband and children to a value inclusive of tools and apparel and bedding not exceeding \$40 in the whole; and
- (c) the property and interest of the insolvent in a policy of insurance on his or her own life so far as the same are protected by the provisions of any other written law for the time being in force relating to the protection of life insurances and other like provident arrangements,

But it shall comprise the following particulars:

- (d) all such property as may belong to or be vested in the insolvent at the commencement of the insolvency or may be acquired by or devolve on him or her during its continuance;
- (e) the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his or her own benefit at the commencement of his or her insolvency or during its continuance; and
- (f) all goods and chattels being at the commencement of the insolvency in the possession order or disposition of the insolvent by the consent and permission of the true owner of which goods and chattels the insolvent is reputed owner or of which he or she has taken upon himself or herself the sale or disposition as owner:

Provided that things in action other than debts due to him or her in the course of his or her trade or business shall not be deemed goods and chattels within the meaning of this Section.

[s 70 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011; omitted by the Law Revision Commission under powers authorised by Act 10 of 2019]

71 Certain actions may be continued by insolvent

Notwithstanding anything herein contained an insolvent may continue in his or her own name and for his or her own benefit any action commenced by him or her before adjudication for any personal injury or wrong done to himself or herself or to any of his or her family but the whole or any part of the sum recovered in any such action before the close of the insolvency shall if the Court so order be paid over by the insolvent to the trustee.

72 General meeting of creditors for the election of a trustee

- (1) The general meeting of creditors for the election of a trustee shall be held at the Registry or some convenient place near thereto.
- (2) A notice of such meeting shall be given in the prescribed form in the Gazette and the prescribed newspapers or such newspapers, if any, as the court shall direct in each case and by affixing a copy of it in some conspicuous place in the registry and the post office nearest to the place where the debtor carried on business or resided at the date of presenting the petition.

73 Creditors shall prove; mode of proof; certificate of proof

- (1) A creditor desiring to vote at such meeting shall first make preliminary proof that a debt provable under the insolvency is due to him or her.
- (2) Any such proof may be made by affidavit in the prescribed form before the Registrar or any magistrate, commissioner for oaths or justice of the peace who for such purpose shall have authority to administer oaths and who upon such proof being made to his or her satisfaction shall if required deliver a certificate to the creditor in the form following or to the like effect:

In the insolvent estate of A.B.
C.D. has proved before me a debt of \$ in this estate.
Dated at E.F. [*R.M. or etc.*]

74 Mode of transmitting certificate

- (1) A certificate shall be filed in the Registry.
- (2) Every such certificate shall entitle the creditor named therein to vote at such general meeting as a creditor in respect of a debt of the amount stated in the certificate.

75 Proceedings at meeting

The creditors assembled at such general meeting (hereinafter called the first meeting of creditors) shall and may do as follows:

- (a) they may by resolution appoint some fit person resident in the Republic whether a creditor or not to fill the office of trustee of the property of the insolvent at such remuneration as they may from time to time determine, if any, or they may resolve to leave his or her appointment to the committee of inspection hereinafter mentioned;
- (b) they shall when they appoint a trustee by resolution declare what security, if any, is to be given and to whom by the person so appointed before he or she enters on the office of trustee;

- (c) they may by resolution appoint some other fit person or persons not exceeding 5 in number and being creditors qualified to vote at such first meeting of creditors or authorised in the prescribed form by creditors so qualified to vote to form a committee of inspection for the purpose of superintending the administration by the trustee of the insolvent's property; or
- (d) they may by resolution give directions as to the manner in which the property is to be administered by the trustee and it shall be the duty of the trustee to conform to such directions unless the Court for some just cause otherwise orders.

76 Further provisions as to first meeting of creditors

The first meeting of creditors shall be held in the prescribed manner and subject to the prescribed regulations as to the quorum adjournment of meeting and all other matters relating to the conduct of meeting or the proceedings thereat: Provided that:

- (a) the meeting shall be presided over by the Registrar or in the event of his or her being unable to attend through illness or any unavoidable cause by such chairman as the meeting may elect;
- (b) a person shall not be entitled to vote as a creditor unless at or previously to the meeting he or she has in manner hereinbefore prescribed proved a debt provable under the insolvency to be due to him or her;
- (c) no creditor shall vote in respect of any unliquidated or contingent debt or any debt the value of which is not ascertained;
- (d) a secured creditor shall for the purpose of voting be deemed to be a creditor only in respect of the balance, if any, due to him or her after deducting the value of his or her security and the amount of such balance shall until the security be realised be determined in the prescribed manner or alternatively he or she may however at or previously to the meeting of creditors give up the security to the trustee and thereupon he or she shall rank as a creditor in respect of the whole sum due to him or her;
- (e) votes may be given either personally or by proxy;
- (f) an ordinary resolution shall be decided by a majority in value of the creditors present personally or by proxy at the meeting and voting on such resolution; and
- (g) a special resolution shall be decided by a majority in number and three-fourths in value of the creditors present personally or by proxy at the meeting and voting on such resolution.

77 Evidence of appointment of trustee

- (1) The appointment of a trustee shall be reported to the Court and the Court upon being satisfied that the requisite security, if any, has been entered into by him or her shall give a certificate declaring him or her to be trustee of the insolvency named in the certificate and such certificate shall be conclusive evidence of the appointment of the trustee and such appointment shall date from the date of the certificate.
- (2) When the official trustee holds the office of trustee or when the trustee is changed a like certificate of the court may be made declaring the person therein named to be trustee and such certificate shall be conclusive evidence of the person therein named being trustee.

78 Meeting may be adjourned

The Registrar or other chairman may adjourn the first meeting of creditors from time to time and from place to place subject to the directions of the Court.

79 Property to vest in trustee when elected

On the appointment of a trustee, the property of the insolvent shall forthwith be divested from the official trustee and pass to and be vested in the trustee so appointed.

80 Meaning of ‘trustee’

The expression ‘*trustee*’ when used in this Act shall include the person for the time being filling the office of trustee whether he or she be the official trustee or not.

81 Appointment of new trustee if votes given improperly

Where the proof of any creditor or creditors who has or have voted at the election of a trustee and without whose vote or votes the trustee would not have been elected shall afterwards be expunged or reduced, the Court may at any time upon the application of a majority in value of the creditors who have proved order a fresh meeting to be held for the election of a new trustee in lieu of the one originally appointed which meeting shall be summoned and held at such place as the Court shall think fit and in the same manner as nearly as may be as the first meeting of creditors and if a new trustee is elected at such meeting the Court shall give him or her a certificate declaring him or her to be such trustee.

82 Court may order meeting for election of new trustee

The Court may at any time upon sufficient cause shown, order a meeting for the election of a new trustee to be held at such time and place and in such manner as shall to it seem fit.

83 Indemnity to trustees

(1) No trustee appointed under this Act shall be made personally liable by reason only that any of the matters upon which an adjudication of insolvency has been founded is insufficient to support such adjudication or in respect of any receipt by him or her in his or her official capacity of any money or negotiable instruments if he or she shall have dealt with the same as directed by the Court or required by this Act or any order made in pursuance of it.

[subs (1) am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

(2) Where any action is brought against any trustee under this Act in respect of such money or negotiable instruments, a Judge of the Supreme Court may upon proof of it stay or set aside the proceedings in any such action so far as the trustee is concerned and make such order as to costs as he or she shall think fit.

[subs (2) am GN No 188/1969 O 3, opn 31 Jan 1968; Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

AS TO TRUSTEES AND COMMITTEE OF INSPECTION**84 Provisions as to trustees and committee of inspection**

The following provisions shall extend and apply to trustees and committee to the trustee and committee of inspection:

- (a) the creditors may if they think fit appoint more persons than one to the office of trustee and where more than one are appointed they shall declare whether any act required or authorised to be done by the trustee is to be done by all or any one or more of such persons but all such persons are in this Act included under the term 'trustee' and shall be joint tenants of the property of the insolvent;
- (b) the creditors may also appoint persons to act as trustees in succession in the event of one or more of the persons first named declining to accept the office of trustee;
- (c) if any vacancy occur in the office of trustee by death resignation or otherwise the creditors in general meeting shall fill up such vacancy and a general meeting for the purpose of filling up such vacancy may be convened by the continuing trustee if there be more than one or by the Registrar on the requisition of any creditor;
- (d) if through any cause whatever there is no trustee acting during the continuance of an insolvency the official trustee shall be and act as such trustee;
- (e) the Court may upon cause shown suspend or remove any trustee;
- (f) the creditors may by special resolution at a meeting specially called for that purpose of which the prescribed notice has been given remove the trustee and appoint another person to fill his or her office and the Court shall give a certificate declaring him or her to be the trustee;
- (g) if a trustee be adjudged insolvent or be or become resident out of the Republic he or she shall cease to be trustee and the registrar shall if there be no other trustee call a meeting of creditors for the appointment of another trustee in his or her place;
- (h) the property of the insolvent shall pass from trustee to trustee and shall vest in the trustee for the time being during his or her continuance in office without any conveyance assignment or transfer whatever;
- (i) the trustee of an insolvent may sue and be sued by the official name of 'the trustee of the property of an insolvent' inserting the name of the insolvent and by that name may hold property of every description make contracts sue and be sued enter into any engagements binding upon himself or herself and his or her successors in office and do all other acts necessary or expedient to be done in the execution of his or her office;
- (j) the certificate of appointment of a trustee shall for all purposes of any law in force in the Republic requiring registration enrolment or recording of conveyances or assignments of property be deemed to be a conveyance or assignment of property and may be registered enrolled and recorded accordingly;
- (k) any member of the committee of inspection may resign his or her office by notice in writing signed by him or her and delivered to the trustee;
- (l) the creditors may by resolution fix the quorum required to be present at a meeting of the committee of inspection;
- (m) any member of the committee of inspection may be removed by a special resolution at any meeting of creditors of which the prescribed notice has been given stating the object of the meeting;
- (n) on any vacancy occurring in the office of a member of the committee of inspection by removal, death, resignation or otherwise the trustee shall convene a meeting of creditors for the purpose of filling up such vacancy;

- (o) the continuing members of the committee of inspection may act notwithstanding any vacancy in their body and where the number of members of the committee of inspection is for the time being less than 5 the creditors may increase that number so that it do not exceed 5;
- (p) no defect or irregularity in the election of a trustee or of a member of the committee of inspection shall vitiate any act *bona fide* done by him or her and no act or proceeding of the trustee or of the creditors shall be invalid by reason of any failure of the creditors to elect all or any members of the committee of inspection;
- (q) if a member of the committee of inspection become an insolvent or cease to reside in the Republic, his or her office shall thereupon become vacant;
- (r) where there is no committee of inspection any act or thing or any direction or consent by this Act authorised or required to be done or given by such committee may be done or given by the Court on the application of the trustee; and
- (s) the Court may at any time make an order or the creditors may at any time pass a special resolution declaring that all or any of the things by this Act authorised to be done by the trustee with the consent of the committee of inspection may be done by the trustee without such consent and upon such order or resolution being made or passed, the provisions of this Act relating to the committee of inspection shall as to the things so authorised cease to apply.

[s 84 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

AS TO PROPERTY DEVOLVING ON TRUSTEE

85 Proceeds of sale on seizure of goods

- (1) Where the property of a person has been taken in execution in respect of a sum of not less than \$100 and sold, the sheriff or bailiff or other officer of the Supreme Court or District Court as the case may be shall retain the proceeds of such sale in his or her hands for a period of 14 days and upon notice being served on him or her within that period of an insolvency petition having been presented against such person shall hold the proceeds of such sale after deducting as much of it as shall be sufficient to defray the costs and expenses of the execution creditor on trust to pay the same to the trustee.

[subs (1) am GN No 188/1969 O 3, opn 31 Jan 1968]

- (2) Where no notice of such petition having been presented be served on him or her within such period of 14 days or if such notice having been served the person against whom the petition has been presented is not adjudged an insolvent on such petition or on any other petition of which the sheriff, bailiff or other officer has notice he or she may deal with the proceeds of such sale in the same manner as he or she would have done had no notice of the presentation of an insolvency petition been served on him or her.

86 Appropriation of portion of pay of officers to creditors

Where an insolvent is or has been an officer or Deputy Registrar or otherwise employed or engaged in the service of the Republic or is in the enjoyment of any pension or compensation whatever granted by Act the trustee during the insolvency and the Registrar after the close of the insolvency shall receive for

distribution amongst the creditors so much of the insolvent's salary emolument or pension as the Court upon the application of the trustee thinks just and reasonable to be paid in such manner and at such times as the Court with the consent in writing of the Minister directs.

87 Appropriation of portion of salary to creditors

Where an insolvent is in the receipt of a salary or income other than as aforesaid, the Court upon the application of the trustee shall from time to time make such order as it thinks just for the payment of such salary or income or of any part of it to the trustee during the insolvency and to the Registrar if necessary after the close of the insolvency to be applied by him or her in such manner as the Court may direct.

88 Conveyances, etc, which are acts of insolvency void against trustee, except conveyances to trustees for creditors of debtor and executions levied and paid without notice of petition

Every conveyance, assignment, gift, delivery or transfer of any property and every dealing with property which would under this Act be deemed an act of insolvency shall be and are hereby declared to be absolutely void against the trustee of the insolvent appointed under this Act:

- (a) provided that in the case of a conveyance or assignment of all the debtor's property for the benefit of all his or her creditors all dealings with such property and all acts and things *bona fide* made or done by the trustee of such conveyance or assignment shall be valid and not affected by the adjudication unless such trustee had before or at the time of any such dealings acts or things notice that proceedings had been taken or were about to be taken for the purpose of obtaining adjudication of insolvency against the debtor; and
- (b) provided further that in the case of an execution levied by seizure and sale the proceeds whereof have been lawfully paid over under the provisions of this Act to the person at whose suit the execution was issued such payment shall be valid and the person receiving the same shall not be affected by the adjudication unless at the time of payment to him or her he or she had notice that a petition for adjudication had been presented against the debtor.

[s 88 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

89 Avoidance of voluntary settlements

- (1) Any settlement of property made by a person not being a settlement made before and in consideration of marriage or made in favor of a purchaser or incumbrancer in good faith and for valuable consideration or a settlement made on or for the wife or husband or children of the settlor of property which has accrued to the settlor after marriage in right of his wife or her husband shall if the settlor becomes insolvent within 2 years after the date of such settlement be void as against the trustee of the insolvent appointed under this Act and shall also be void as against such trustee if the settlor becomes insolvent at any subsequent time within 3 years after the date of such settlement unless the parties claiming under such settlement can prove

that the settlor was at the time of making the settlement able to pay all his or her debts without the aid of the property comprised in such settlement.

[subs (1) am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

(2) Any covenant or contract made by a person in consideration of marriage for the future settlement upon or for his wife or her husband or children of any money or property wherein he or she had not at the date of his or her marriage any estate or interest whether vested or contingent in possession or remainder and not being money or property of or in right of his wife or her husband shall upon his or her becoming insolvent before such property or money has been actually transferred or paid pursuant to such contract or covenant be void against his or her trustee appointed under this Act.

[subs (2) am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

(3) **'Settlement'** shall for the purposes of this Section include any conveyance or transfer of property.

90 **Avoidance of fraudulent preferences**

Every conveyance, assignment, gift, delivery or transfer of property or charge made every payment made every obligation incurred and every judicial proceeding taken or suffered by any debtor unable to pay his or her debts as they become due from his or her own monies in favor of any creditor or a person in trust for any creditor with a view of giving such creditor a preference over the other creditors shall if a petition for adjudication of insolvency be presented against such-debtor within 6 months after the date of making taking paying or suffering the same and adjudication of insolvency be made on such petition be deemed fraudulent and void as against the trustee of the insolvent appointed under this Act but this Section shall not affect the rights of a purchaser, payee or incumbrancer in good faith and for valuable consideration:

Provided that pressure by a creditor shall not be sufficient to exempt any transaction from the operation of this Section.

[s 90 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

91 **Certain conveyances, etc, to be deemed fraudulent preferences**

Every conveyance, assignment, gift, delivery or transfer of property or charge thereon made executed or given by any debtor unable to pay his or her debts as they become due from his or her own monies in favor of any creditor or a person in trust for any creditor not being for a reasonable and sufficient consideration given at the time of making or giving the same shall if a petition for adjudication of insolvency be presented against such debtor within 6 months after the date of making, executing or giving the same and adjudication of insolvency be made thereon be deemed a fraudulent preference and shall be void as against the trustee of the insolvent under this Act and shall not be available to the creditor as against the trustee and the property conveyed transferred or charged or the full value shall be recoverable by the trustee from such creditor or a person who shall hold the same in trust for such creditor or a person to whom such creditor or person holding the same in trust shall have conveyed transferred delivered or mortgaged the same if such person had at the time of such conveyance transfer delivery or mortgage notice of such fraudulent preference.

[s 91 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

92 Certain conveyances, etc, to be deemed fraudulent unless bona fides is proved

Every conveyance assignment gift delivery or transfer of property or charge thereon made executed or given by any debtor unable to pay his or her debts as they become due from his or her own monies and the effect whereof is to defeat or delay the creditors of such debtor or to diminish the property to be divided amongst his or her creditors shall if a petition for adjudication of insolvency be presented against the debtor within 6 months thereafter be deemed fraudulent and void as against the petitioning creditor and if adjudication of insolvency be made on such petition shall also be deemed fraudulent and void as against the trustee in the insolvency unless in either case it shall be proved that such conveyance assignment gift delivery transfer or charge was in fact made in good faith proof shall be upon the party alleging the validity of the transaction:

Provided that pressure by a creditor shall not be sufficient to protect any such transaction nor shall any such transaction acquire any validity by reason only that it was made or done in pursuance of an antecedent agreement.

93 Court may require conveyance of property out of the Republic

When any insolvent has any property elsewhere than in the Republic the Court may upon the application of the trustee order the insolvent to execute all such deeds instruments and writings and do and concur in all such acts matters and things as may be necessary to enable the trustee to realise or make available the whole or such part of it or of the proceeds of it as the Court may think proper for distribution amongst the creditors of the insolvent.

94 Payment and delivery of money by agents to trustees, no lien on papers

(1) Any banker, attorney or agent of an insolvent shall pay and deliver to the trustee all monies and securities in his or her possession or power as such banker, attorney or agent, unless he or she be by law entitled to retain the same as against the insolvent or the trustee.

(2) Where a person contravenes subsection (1), he or she shall be guilty of a contempt of court and may be punished accordingly on the application of the trustee:

Provided that no person shall be entitled as against the trustee to withhold possession of any books of account papers or writings relating to the estate or to claim any lien.

95 Protection of certain transactions with insolvent

Nothing in this Act contained shall render invalid:

(a) any payment made in good faith and for value, received to any insolvent before the date of the order of adjudication by a person not having at the time of such payment notice of any act of insolvency committed by the insolvent and available against him or her for adjudication;

(b) any payment or delivery of money or goods belonging to an insolvent made to such insolvent by a depository of such money or goods before the date of the order of adjudication who had not at the time of such payment or delivery notice of any act of insolvency committed by the insolvent and available against him or her for adjudication; and

- (c) any contract or dealing with any insolvent made in good faith and for valuable consideration before the date of the order of adjudication by a person not having at the time of making such contract or dealing notice of any act of insolvency committed by the insolvent and available against him or her for adjudication.

[s 95 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

96 Protection of certain transactions entered into by, or in relation to the property of the insolvent

Subject and without prejudice to the provisions of this Act relating to the proceeds of the sale and seizure of goods and to the provisions of this Act avoiding certain settlements and avoiding on the ground of their constituting fraudulent preferences or otherwise of certain conveyances, charges, payments and judicial proceedings, the following transactions by and in relation to the property of an insolvent shall be valid notwithstanding any prior act of insolvency:

- (a) any disposition or contract with respect to the disposition of property by conveyance, transfer, charge, delivery of goods, payment of money or otherwise howsoever made by any insolvent in good faith and for valuable consideration before the date of the order of adjudication with a person not having at the time of the making of such disposition of property notice of any act of insolvency committed by the insolvent and available against him or her for adjudication; and
- (b) any execution or attachment against the property of the insolvent executed in good faith by seizure and sale before the date of the order of adjudication if the person on whose account such execution or attachment was issued had not at the time of the same being so executed by seizure and sale notice of any act of insolvency committed by the insolvent and available against him or her for adjudication.

[s 96 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

AS TO DISCOVERY OF INSOLVENT'S PROPERTY

97 Power of Court to summon persons before it suspected of having property of insolvent

The Court may, on the application of the trustee or any creditor at any time after an order of adjudication has been made against an insolvent order the insolvent or his wife or her husband or a person whatever known or suspected to have in his or her possession any of the estate or effects belonging to the insolvent or supposed to be indebted to the insolvent or a person whom the Court may deem capable of giving information respecting the insolvent his or her trade dealings or property to attend before it or in any place other than within the Central Division of the Territory before any magistrate at a time or times to be specified in the order and may thereby also require any such person to produce any documents in his or her custody or power relating to the insolvent his or her dealings or property and if a person so summoned after having been tendered a reasonable sum for expenses refuses to come before it or before the Examining Magistrate at the time appointed or refuses to produce such documents having no lawful impediment made known to and allowed by the Court or Examining Magistrate at the time of sitting such Court or Examining Magistrate may by

warrant addressed to any constable or prescribed officer cause such person to be apprehended and brought up for examination.

98 Question to be answered although crinating

No question put to any insolvent on any examination under this Act shall be deemed unlawful by reason only that the answer may expose him or her to punishment in respect of some one or more acts or things made punishable as misdemeanors under the provisions of Division 9.3 of the *Crimes Act 2016*. [s 98 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011; Act 18 of 2016 s 287 and Sch 2 item 69, opn 12 May 2016]

99 Examination of parties by court

The Court or Examining Magistrate may examine or cause to be examined upon oath either by word of mouth or by written interrogatories a person so brought before it in manner aforesaid concerning the insolvent his or her dealings or property and if any such person shall refuse to answer to the satisfaction of the Court or examining magistrate, such Court or Examining Magistrate may commit him or her to prison for any period not exceeding 6 calendar months as in its discretion shall seem just.

100 Order of Court for payment of amount admitted on examination

Where a person on his or her examination before the Court or Examining Magistrate shall appear to be indebted to the insolvent the Court or Examining Magistrate may on the application of the trustee order him or her to pay to the trustee at such time and in such manner as to the Court or Examining Magistrate seems expedient the amount appearing to be due or any part either in full discharge of the whole amount in question or not as the Court or Examining Magistrate thinks fit with or without costs of the examination.

POSSESSION OF PROPERTY

101 Seizure of property of insolvent

- (1) A person acting under warrant of the Court may seize and attach any property of the insolvent divisible among his or her creditors under this Act and in the insolvent's custody or possession or in that of any other person and with a view to such seizure or attachment may break open any house building or room of the insolvent's where the insolvent is supposed to be or any building or receptacle of the insolvent where any of his or her property is supposed to be.
- (2) Where the Court is satisfied that there is reason to believe that property of the insolvent is concealed in a house or place not belonging to him or her, the Court may if it thinks fit grant a search warrant to any constable or prescribed officer of the Court who may execute the same according to the tenor of it.

[s 101 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

102 Attachment custody

- (1) The person making any such seizure or attachment shall leave with the

person in whose possession any such property is attached a copy of the warrant together with an inventory of such property having subjoined a notice that such property has been attached by him or her.

- (2) Any property so attached may be removed or secured on the premises by sealing up any repository room or closet and some person may be left on the premises in custody of it.

103 Reward for discovery of concealed property

A person who shall make discovery or give to the trustee information which shall lead to the discovery of any concealed property of an insolvent not before come to the knowledge of the trustee shall be entitled to such reward not exceeding one-tenth of the value of the property so discovered as the Court may allow.

POST LETTERS

104 Post letters addressed to insolvent

The Court upon the application of the trustee may from time to time order that for such time as the Court thinks fit not exceeding 3 months from the date of the order of adjudication post letters addressed to the insolvent at any place or any of the places mentioned in the order shall be re-directed sent or delivered by the chief postmaster or the officers acting under him or her to the trustee or otherwise as the Court directs and the same shall be done accordingly.

PART 6 — ADMINISTRATION OF PROPERTY

GENERAL PROVISIONS AFFECTING ADMINISTRATION OF PROPERTY

105 Conduct of insolvent

- (1) The insolvent shall to the utmost of his or her power aid in the realisation of his or her property and the distribution of the proceeds amongst his or her creditors.
- (2) The insolvent shall on or before the day appointed by the order of adjudication for that purpose deliver to the trustee the statement mentioned in the order of adjudication and shall also give such inventory of his or her property such list of his or her creditors and debtors and of the debts due to and from them respectively submit to such examination upon oath or otherwise by the trustee in respect of his or her property or his or her creditors, for which purpose the trustee shall have power to administer oaths, attend such meetings of his or her creditors wait at such times on the trustee execute such powers of attorney, conveyances, deeds and instruments and generally do all such acts and things in relation to his or her property and the distribution of the proceeds amongst his or her creditors as may be reasonably required by the trustee or may be prescribed by rules of court or be directed by the Court by any special order or orders made in reference to any particular insolvency or made on the occasion of any special application by the trustee or any creditor.
- (3) Where the insolvent wilfully fails to perform the duties imposed on him or her by this Section or if he or she fails to deliver up possession to the trustee of any part of his or her property which is divisible amongst his or her creditors under this Act and which may for the time being be in the possession or under the control of such insolvent, he or she shall in addition to any other punishment to which he or she may be subject be guilty of a contempt of court and may be punished accordingly.

[subs (3) am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

106 Conduct of trustee; meetings of committee

- (1) The trustee shall in the administration of the property of the insolvent and in the distribution of it amongst his or her creditors have regard to any directions that may be given by resolution of the creditors at any general meeting or by the committee of inspection and any directions so given by the creditors at any general meeting shall be deemed to override any directions given by the committee of inspection.
- (2) The trustee shall call a meeting of the committee of inspection once at least every 2 months when the committee may audit his or her accounts and determine whether any or what dividend is to be paid.
- (3) The Trustee may also call special meetings of the committee as he or she thinks necessary.

107 Trustee may manage at discretion, etc, meetings of creditors

- (1) Subject to the provisions of this Act and to such directions as aforesaid, the

trustee shall exercise his or her own discretion in the management of the estate and its distribution amongst the creditors.

[subs (1) am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

- (2) The trustee shall from time to time summon general meetings of the creditors for the purpose of ascertaining their wishes.

108 Appeal from trustee, Court may summon meetings

- (1) The insolvent or any creditor debtor or other person aggrieved by any act or decision of the trustee may appeal to the Court and the Court may confirm reverse or modify the act or decision complained of and make such order in the premises as it thinks just.
- (2) The Court may from time to time during the continuance of an insolvency summon general meetings of the creditors for the purpose of ascertaining their wishes and may if the Court thinks fit direct the Registrar to preside at such meetings.

109 Trustee to be in position of a receiver

The trustee shall in relation to and for the purpose of acquiring or retaining possession of the property of the insolvent be in the same position in all respects as if he or she were a receiver of such property appointed by the Supreme Court in its equitable jurisdiction and the Court may on his or her application enforce such acquisition or retention of property accordingly.

[s 109 am GN No 188/1969 O 3, opn 31 Jan 1968]

110 Trustee may apply to Court for advice or direction

- (1) The trustee may upon a statement in writing verified by affidavit apply to the Court for and obtain its opinion, advice or direction on any question respecting the management of the insolvent estate or his or her duty in connection therewith.
- (2) A notice of any such application shall be given to all persons interested or such of them as the Court shall direct and any trustee acting upon the opinion, advice or direction of the Court so obtained shall be deemed to have acted rightly in respect of the subject matter of the application provided that he or she shall not have been guilty of any wilful fraud, concealment or misrepresentation in obtaining such opinion, advice or direction.

111 Regulations as to general meeting of creditors subsequent to first meeting

The provisions of this Act with respect to the first general meeting of creditors shall apply to any subsequent general meeting of creditors in an insolvency with this exception that subsequent meetings of creditors may be summoned by the trustee or by a member of the committee of inspection and that such meetings may, unless otherwise directed by the Court in the case of meetings summoned by the Court, be presided over by a person chosen by the creditors assembled at such meeting and that any creditor whose debt has been proved or the value of whose debt has been ascertained at or subsequently to such first meeting shall be allowed to be present and to vote at that meeting.

[s 11 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

DEALINGS WITH INSOLVENT'S PROPERTY

112 Possession of property by trustee

- (1) Where any portion of the property of the insolvent consists of stock shares in ships or any other property transferable in the books of any company office or person the right to transfer such property shall be absolutely vested in the trustee to the same extent as the insolvent might have exercised the same if he or she had not become insolvent.
- (2) Where any portion of the property of the insolvent consists of things in action, any action, suit or other proceeding for the recovery of such things instituted by the trustee shall be instituted in his or her official name as in this Act provided and such things shall for the purpose of such action, suit or other proceeding be deemed to be assignable in law and to have been duly assigned to the trustee in his or her official capacity.

[subs (2) am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

- (3) The trustee shall, as soon as practicable may take possession of the deeds, books and documents of the insolvent and all other property capable of manual delivery.
- (4) The trustee shall keep in such manner as rules of court shall direct proper books of account showing his or her receipts and disbursements and dealings with the estate and also books in which he or she shall from time to time make or cause to be made entries or minutes of proceedings at meetings and of such other matters as rules of court shall direct and any creditor of the insolvent may subject to the control of the Court personally or by his or her agent inspect such books.

113 Disclaimer as to onerous property, remedies for persons affected

- (1) When any property of the insolvent acquired by the trustee under this Act consists of land of any tenure burdened with onerous covenants of unmarketable shares in companies of unprofitable contracts or of any other property that is unsaleable or not readily saleable by reason of its binding the possessor to the performance of any onerous act or to the payment of any sum of money the trustee notwithstanding he or she has endeavoured to sell or has taken possession of such property or exercised any act of ownership in relation thereto may by writing under his or her hand disclaim such property.

[subs (1) am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

- (2) Upon the execution of such disclaimer the property disclaimed shall if the same is a contract be deemed to be determined from the date of the order of adjudication and if the same is a lease be deemed to have been surrendered on the same date and if the same be shares in any company be deemed to be forfeited and to have reverted to the company on and from that date and if any other species of property it shall revert to the person entitled on the determination of the estate or interest of the insolvent but whether there shall be a person in existence so entitled or not in no case shall any estate or interest therein remain in the insolvent.

- (3) A person interested in any disclaimed property may apply to the Court and the Court may upon such application order possession of the disclaimed property to be delivered up to him or her or make such other order as to the possession of it as may be just.
- (4) A person injured by the operation of this Section other than a company shares wherein are forfeited under this Section shall be deemed a creditor of the insolvent to the extent of such injury and may accordingly prove the same as a debt under the insolvency.

114 Limitation of time, proviso in case of lease

The trustee shall not except as hereinafter provided be entitled to disclaim any property in pursuance of this Act in cases where an application in writing has been made to him or her by a person interested in such property requiring such trustee to decide whether he or she will disclaim or not and the trustee has for a period of not less than 28 days after the receipt of such application or such further time as may be allowed by the Court, declined or neglected to give notice whether he or she disclaims the same or not:

Provided that if the insolvent shall at the date of adjudication be the lessee of any premises the trustee instead of disclaiming immediately may elect to retain the same for a period not exceeding 3 months and not being later than the expiration of the lease and at the end of such period may disclaim the same.

[s 14 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

115 Power of trustee to deal with property

Subject to the provisions of this Act the trustee shall have power to do the following:

- (a) to receive and decide upon proof of debts in the prescribed manner;
- (b) to carry on the business of the insolvent so far as may be necessary for the beneficial winding up of the same;
- (c) to exercise any powers the capacity to exercise which is vested in him or her under this Act and to execute all powers of attorney, deeds and other instruments expedient or necessary for the purpose of carrying into effect the provisions of this Act;
- (d) to sell all the property of the insolvent, including the goodwill of the business if any and the book debts due or growing due to the insolvent, by public auction or private contract with power if he or she thinks fit to transfer the whole of it to a person or company or to sell the same in parcels;
- (e) to give receipts for any money received by him or her which receipt shall effectually discharge the person paying such monies from all responsibility in respect of the application of it;
- (f) to prove rank claim and draw a dividend in the matter of the insolvency of any debtor of the insolvent; and
- (g) to deal with any property to which the insolvent is beneficially entitled as tenant in tail in the same manner as the insolvent might have dealt with the same.

[s 15 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

116 Power of trustee to compromise, etc, to allow insolvent to manage property

- (1) The trustee may with the sanction of the committee of inspection do all or any of the following:

- (a) mortgage, pledge any part of the property of the insolvent for the purpose of raising money for the payment of his or her debts;
 - (b) appoint the insolvent himself or herself to superintend the management of the property or of any part of it or to carry on the trade of the insolvent, if any, for the benefit of the creditors and in any other respect to aid in administering the property in such manner and on such terms as the creditors direct;
 - (c) bring or defend any action suit or other legal proceeding relating to the property of the insolvent;
 - (d) refer any dispute to arbitration compromise all debts, claims and liabilities whether present or future certain or contingent liquidated or unliquidated subsisting or supposed to subsist between the insolvent and any debtor or person who may have incurred any liability to the insolvent upon the receipt of such sums payable at such times and generally upon such terms as may be agreed upon;
 - (e) make such compromise or other arrangement as may be thought expedient with creditors or persons claiming to be creditors in respect of any debts provable under the insolvency;
 - (f) make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the insolvent made or capable of being made on the trustee by a person or by the trustee on a person;
 - (g) divide in its existing form amongst the creditors according to its estimated value any property which from its peculiar nature or other special circumstances cannot advantageously be realised by sale; and
 - (h) employ a shorthand writer to take notes of the proceedings at any meeting of creditors or of any examination held under this Act.
- (2) The sanction given for the purposes of this Section may be a general permission to do all or any of the above mentioned things or a permission to do all or any of them in any specified case or cases.

[s 116 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

117 Power of trustee to accept composition or general scheme of management

- (1) The trustee may with the sanction of a special resolution of the creditors assembled at any meeting of which the prescribed notice has been given specifying the object of such meeting accept any composition offered by the insolvent or assent to any general scheme of settlement of the affairs of the insolvent upon such terms as may be thought expedient and with or without a condition that the order of adjudication is to be annulled subject nevertheless to the approval of the Court to be testified by the Judge of the Court signing the instrument containing the terms of such composition or scheme or embodying such terms in an order of the Court.
- (2) Where the annulling the order of adjudication is made a condition of any composition with the insolvent or of any general scheme for the liquidation of his or her affairs the Court if it approves of such composition or general scheme shall annul the adjudication on an application made by or on behalf of a person interested and the adjudication shall be annulled from and after the date of the order annulling the same.
- (3) The provisions of any composition or general scheme made in pursuance of

this Act may be enforced by the Court on a motion made in a summary manner by a person interested and any disobedience of the order of the Court made on such motion shall be deemed to be a contempt of court.

[subs (3) am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

- (4) The approval of the Court shall be conclusive as to the validity of any such composition or scheme and it shall be binding on all the creditors so far as relates to any debts due to them and provable under the insolvency.

118 Trustee may employ legal practitioner and if a legal practitioner may be paid for his or her services

The trustee may from time to time employ a legal practitioner or other agent and where the trustee is himself or herself a legal practitioner he or she may contract to be paid a certain sum by way of percentage or otherwise as a remuneration for his or her services as trustee including all professional services and any such contract shall notwithstanding any law to the contrary be lawful.

119 Trustee to pay monies into bank

The trustee shall pay all sums from time to time received by him or her into such bank and to such account as the majority of the creditors in number and value at any general meeting shall appoint and failing such appointment into such bank and to such account as the Court may appoint and if after either of such appointments be at any time keep in his or her hands any sum exceeding \$100 for more than 10 days he or she shall unless he or she can prove to the satisfaction of the Court that his or her reason for retaining the money was sufficient be subject to the following liabilities in that he or she shall:

- (a) pay interest at the rate of \$40 per centum per annum on the excess of such sum above \$100 as he or she may retain in his or her hands; and
- (b) on the application of any creditor be dismissed from his or her office by the Court and shall have no claim for remuneration and shall be liable to any expenses to which the creditors may be put by or in consequence of his or her dismissal.

120 Power to order sale in case of equitable mortgage

Where any debt or sum of money due to or by an insolvent be charged upon any land by way of equitable mortgage the Court may upon the application of the trustee or other person being such equitable mortgagee and upon notice to all parties mortgage.

121 Power of trustee to redeem before time appointed

Where the insolvent has made any conveyance, assurance, delivery, deposit or pledge of any deeds writings goods or chattels subject to a condition for redemption or redelivery on payment of money or otherwise at a future day which has not arrived at the date of presenting the petition the trustee may before the time appointed for such redemption has arrived make payment or tender of money or other performance according to such condition as fully as the insolvent might have done at the time so appointed and upon such tender or payment shall be entitled to have and receive the deeds, writings, goods or chattels so conveyed assured delivered, deposited or pledged and to recover the

same from the person to whom they were so conveyed, assured, delivered, deposited or pledged or any other person having notice of such condition in whose possession they may be.

122 Mortgagee may bid at sale

Any mortgagee may with the leave of the Court first obtained bid at the sale of any mortgaged property.

PROOF OF DEBTS AND DISTRIBUTION OF ASSETS

123 Description of debts provable in insolvency; mode of proof; appeal

- (1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise shall not be provable in insolvency and no person having notice of any act of insolvency available for adjudication against the insolvent shall prove for any debt or liability contracted by the insolvent subsequently to the date of his or her so having notice.
- (2) Save as aforesaid all debts and liabilities present or future certain or contingent to which the insolvent is subject at the date of the order of adjudication or to which he or she may become subject during the continuance of the insolvency by reason of any obligation incurred previously to the date of the order of adjudication shall be deemed to be debts provable in insolvency.
- (3) All debts shall be proved before the trustee in the insolvency.
- (4) An estimate shall be made according to the rules of the court for the time being in force so far as the same may be applicable and where they are not applicable at the discretion of the trustee of the value of any debt or liability provable as aforesaid which by reason of its being subject to any contingency or contingencies or for any other reason does not bear a certain value.
- (5) A person aggrieved by any estimate made by the trustee as aforesaid may appeal to the Court and the Court may if it think the value of the debt or liability incapable of being fairly estimated make an order to that effect and upon such order being made such debt or liability shall for the purposes of this Act be deemed to be a debt not provable in insolvency.
- (6) Where the Court think that the value of the debt or liability is capable of being fairly estimated it may direct such value to be assessed either before the Court itself or some other competent court and may give all necessary directions for such purpose and the amount of such value when assessed shall be provable as a debt under the insolvency.
- (7) **'Liability'** shall for the purposes of this Act include any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement or undertaking whether such breach does or does not occur or is or is not likely to occur or capable of occurring before the close of the insolvency and generally it shall include any express or implied engagement, agreement or undertaking to pay or capable of resulting in the payment of money or money's worth whether such payment be as respects amount fixed or unliquidated as respects time present or future certain or

dependent on any one contingency or on 2 or more contingencies as to mode of valuation capable of being ascertained by fixed rules or assessable only by a jury or as matter of opinion.

[s 123 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

124 Rebate of interest on future debts

- (1) Whenever any proof shall be made in respect of any debt of fixed or ascertained amount which has not accrued due at the date of adjudication such proof shall be allowed for the full amount of such debt and the creditor shall be entitled to receive dividends thereon equally with the other creditors but after deducting for the purposes of the first dividend a rebate at the prescribed rate by way of discount.
- (2) The rebate shall be computed upon so much of the debt as shall remain unpaid at the time of the declaration of the first dividend and shall be computed from the time of such declaration to the time at which the debt would have become payable according to the terms on which it was contracted:

Provided that in estimating the value of any such debt for the purpose of counting the vote of the creditor a like rebate shall be made computed from the time of voting to the time at which the debt would have become payable as aforesaid.

125 Trustee may expunge or reduce proof

The trustee may at any time upon the application of any creditor or of the insolvent or on his or her own motion and after the prescribed notice, expunge or reduce any proof of debt.

126 Preferential debts

- (1) The debts hereinafter mentioned shall be paid in priority to all other debts excepting rent as hereinafter provided. Between themselves such debts shall rank equally and shall be paid in full unless the property of the insolvent is insufficient to meet them in which case they shall abate in equal proportions between themselves that is to say:
 - (a) all local rates due from him or her at the date of the order of adjudication and having become due and payable within 12 months next before such date;
 - (b) all rates and assessments assessed on him or her up to the first day of January or first day of July next before the date of the order of adjudication and not exceeding in the whole one year's assessment;
 - (c) all wages or salary of any Deputy Registrar, servant, labourer or workman, other than a native under a contract of service under the provisions of any Act relating to native labour, in the employment of the insolvent not exceeding 3 months wages or salary and not exceeding \$100:

Provided that such wages or salary shall be claimed in respect of the three months next before the date of the order of adjudication; and
 - (d) all wages of any native under a contract of service entered into under the provisions of any Act relating to native labour.

[subs (1) am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

- (2) Save as aforesaid all debts provable under the insolvency shall be paid *pari passu*.

127 Provisions in case of apprenticeship

- (1) Where at the time of the presentation of the petition for adjudication a person is apprenticed or is an articulated Deputy Registrar to the insolvent, the order of adjudication shall if either the insolvent or apprentice or Deputy Registrar give notice in writing to the trustee to that effect be a complete discharge of the indenture of apprenticeship or articles of agreement and if any money has been paid by or on behalf of such apprentice or Deputy Registrar to the insolvent as a fee the trustee may on the application of the apprentice or Deputy Registrar or of some person on his or her behalf pay such sum as such trustee subject to an appeal to the Court thinks reasonable out of the insolvent's property to or for the use of the apprentice or Deputy Registrar regard being had to the amount paid by him or her or on his or her behalf and to the time during which he or she served with the insolvent under the indenture or articles before the commencement of the insolvency and to the other circumstances of the case.
- (2) Where it appears expedient to the trustee, he or she may on the application of any apprentice or articulated Deputy Registrar to the insolvent or a person acting on behalf of such apprentice or articulated Deputy Registrar instead of acting under subsection (1) transfer the indenture of apprenticeship or articles of agreement to some other person.

128 No distress to proceed after presentation of petition

- (1) No distress for rent shall be made or levied or proceeded in against the property of a debtor after an order of adjudication has been made against him or her or after a petition has been presented by him or her under Part 3 but the landlord or person to whom the rent is payable shall be entitled to receive out of the estate in priority to all other creditors so much rent as shall be then due together with a sum in lieu of rent proportioned to the period, if any, that has elapsed between the last date at which rent became due and the date of the order of adjudication but so that the whole sum so received shall not exceed the amount of 3 months rent.

[subs (1) am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

- (2) The landlord or person entitled to rent may prove for any surplus that may be due above such sum.

129 Proof in case of rent and periodical payment

When any rent or other payment falls due at stated periods and the order of adjudication is made at any time other than one of such periods the person entitled to such rent or payment may prove for a proportionate part of it up to the day of the adjudication as if such rent or payment grew due from day to day.

130 Interest on debts

Interest on any debt provable in insolvency computed up to the date of adjudication may be allowed by the trustee under the same circumstances in which interest would have been allowable if an action had been brought for such debt.

131 Proof in respect of distinct contracts

Where any insolvent is at the date of the order of adjudication liable in respect of distinct contracts as member of 2 or more distinct firms or as a sole contractor and also as member of a firm the circumstance that such firms are in whole or in part composed of the same individuals or that the sole contractor is also one of the joint contractors shall not prevent proof in respect of such contracts against the properties respectively liable upon such contracts.

132 Allowance to insolvent for maintenance or service

The trustee with the consent of the creditors testified by a resolution passed in general meeting or of the committee of inspection may from time to time during the continuance of the insolvency make such allowance as may be approved by the creditors or committee of inspection to the insolvent out of the estate for the support of the insolvent and his or her family or in consideration of his or her services if he or she is engaged in winding up his or her estate.

133 Set-off

Where there have been mutual credits, mutual debts or other mutual dealings between the insolvent and any other person proving or claiming to prove a debt under his or her insolvency an account shall be taken of what is due from the one party to the other in respect of such mutual dealings and the sum due from the one party shall be set off against any sum due from the other party and the balance of such account and no more shall be claimed or paid on either side respectively but a person shall not be entitled under this Section to claim the benefit of any set-off against the property of an insolvent in any case where he or she had at the time of giving credit to the insolvent or of incurring the debt to the insolvent notice of an act of insolvency committed by such insolvent and available against him or her for adjudication.

134 Provision as to secured creditor

- (1) A creditor holding a specific security on the property of the insolvent or on any part of it may on giving up his or her security prove for his or her whole debt.
- (2) He or she shall also be entitled to a dividend in respect of the balance due to him or her after realising or giving credit for the value of his or her security in manner and at the time prescribed.
- (3) The trustee with the consent of the committee of inspection may at any time within 30 days after proof has been tendered by a secured creditor require such creditor to give up his or her security on payment of the specified value and the creditor shall on such payment give up his or her security accordingly and do make and execute all necessary acts, conveyances and assurances for that purpose:
Provided that a secured creditor who has proved may at any time before he or she is so required to give up his or her security correct his or her valuation of it by making fresh proof of his or her debt.
- (4) A creditor holding such security as aforesaid and not complying with the foregoing conditions shall be excluded from all share in any dividend.

DIVIDENDS

135 Distribution of dividends

The trustee shall from time to time when the committee of inspection

determines declare a dividend amongst the creditors who have proved in the insolvency and shall distribute the same accordingly and in the event of his or her not declaring a dividend for the space of 6 months he or she shall summon a meeting of the creditors and explain to them his or her reasons for not declaring the same.

136 Provision for creditors residing at a distance

In the calculation and distribution of a dividend it shall be obligatory on the trustee to make provision for debts provable in insolvency appearing from the insolvent's statements or otherwise to be due to persons resident in places so distant from the place where the trustee is acting that in the ordinary course of communication they have not had sufficient time to tender their proofs or to establish them if disputed and also for debts provable in insolvency the subject of claims not yet determined.

137 Right of creditor who has not proved debt before declaration of dividend

Any creditor who has not proved his or her debt before the declaration of any dividend or dividends shall be entitled to be paid out of any monies for the time being in the hand of the trustee any dividend or dividends he or she may have failed to receive before such monies are made applicable to the payment of any future dividend or dividends but he or she shall not be entitled to disturb the distribution of any dividend declared before his or her debt was proved by reason that he or she has not participated therein.

138 Final dividend

When the trustee has converted into money all the property of the insolvent or so much of it as can in the joint opinion of himself or herself and of the committee of inspection be realised without needlessly protracting the insolvency he or she shall declare a final dividend and give notice of the time at which it will be distributed.

139 Notice of dividends

The trustee shall cause notice to be given in the Gazette and such other newspapers as may be prescribed of all dividends and monies payable to creditors and when and where the same are to be paid.

140 Insolvent entitled to surplus

The insolvent shall be entitled to any surplus remaining after payment of his or her debts with interest at the prescribed rate and of the costs, charges and expenses of the insolvency.

141 No action for dividend

No action or suit for a dividend shall lie against the trustee but if the trustee refuses to pay any dividend the Court may if it thinks fit order the trustee to pay the same and also to pay out of his or her own monies interest thereon for the time that it is withheld and the costs of the application.

JOINT AND SEPARATE ESTATES

142 Property of partners to be vested in same trustee

Where one member of a partnership has been adjudicated an insolvent and any other adjudication is made against a member of the same partnership then unless the Court otherwise directs the property of such last-mentioned member shall vest in the trustee appointed in respect of the property of the first-mentioned member of the partnership and the Court may give such directions for amalgamating the proceedings in respect of the properties of the members of the same partnership as it thinks just.

143 Joint creditor may prove for purpose of voting

Where one partner of a firm is adjudged insolvent, any creditor to whom the insolvent is indebted jointly with the other partners of the firm or any of them may prove his or her debt for the purpose of voting at any meeting of creditors and shall be entitled to vote at that meeting but shall not receive any dividend out of the separate property of the insolvent until all the separate creditors have received the full amount of their respective debts.

144 Joint and separate dividends

Where joint and separate properties are being administered dividends of the joint and separate properties shall subject to any order to the contrary that may be made by the Court on the application of a person interested be declared together and the expenses of and incident to such dividends shall be fairly apportioned by the trustee between the joint and separate properties regard being had to the work done for and the benefit received by each property.

145 Suits by trustee and insolvent's partners

- (1) Where a member of a partnership is adjudged insolvent, the Court may authorise the trustee with consent of the creditors testified by a special resolution to commence and prosecute any action or suit in the names of the trustee and of the insolvent's partner or partners and thereupon such proceedings may be had as if such action or suit had been commenced with the consent of such partner or partners and any release by such partner or partners of the debt or demand to which the action or suit relates shall be void.
- (2) Notice of the application for authority to commence the action or suit shall be given to such partner or partners and he or she or they may show cause against it and on his or her or their application the Court may if it thinks fit direct that he or she or they shall receive his or her or their proper share of the proceeds of the action or suit and if he or she or they do not claim any benefit therefrom he or she or they shall be indemnified against costs in respect of it as the Court directs.

146 On payment or release of debts insolvency may be annulled

Where the insolvent or a person on his or her behalf pay in full all his or her creditors or obtain a release of the debts due by the insolvent to such creditors the insolvent may apply to the Court for an order annulling the adjudication and the Court upon being satisfied that all the creditors of the insolvent have been

paid in full or have released their debts may make such order upon such terms as to commission or remuneration or charges already incurred as may seem just.

PART 7 — CLOSE OF INSOLVENCY AND CERTIFICATE

LAST EXAMINATION OF INSOLVENT

147 Court to appoint sitting for last examination or adjournment

- (1) The Court shall on the application of the trustee or if he or she omit to make such application then on the application of the insolvent appoint some day not earlier than one month from the date of the order of adjudication for the insolvent to attend in Court to pass his or her last examination of which appointment the prescribed notice shall be given but the Court shall have power from time to time to enlarge or extend the time so appointed.
- (2) At the time so appointed or at any enlargement or adjournment of it the Court may in any of the following cases adjourn such examination for such period as the Court may think fit that is to say:
 - (a) if the examination and accounts of the insolvent are not satisfactory and it appears to the Court that his or her failure to give further or better information or accounts is attributable to any neglect or default on his or her part;
 - (b) if it appears to the Court that the insolvent has wilfully disobeyed any order of the Court in his or her insolvency; or
 - (c) if the Court shall think it fit that an adjournment should be made.

148 Where to be held

The Court may order that the last examination shall be held before any magistrate in any place than within the Central Division of the Territory who for such purpose shall have all the powers of the Court under Section 147.

CLOSE OF INSOLVENCY

149 Close of insolvency

- (1) When the whole property of the insolvent or so much of it as can in the joint opinion of the trustee and committee of inspection be realised without needlessly protracting the insolvency has been realised for the benefit of his or her creditors or a composition or arrangement has been completed the trustee shall make a report accordingly to the Court and the Court if satisfied that the whole of the property of the insolvent has been realised for the benefit of his or her creditors or that so much of it as can be realised without needlessly protracting the insolvency has been so realised or that a composition or arrangement has been completed shall make an order that the insolvency has closed and the insolvency shall be deemed to have closed at and after the date of such order.
- (2) A copy of the order closing the insolvency shall be published in the Gazette and the production of a copy of such Gazette containing a copy of the order shall be conclusive evidence of the order having been made and of the date and contents of it.

DISCHARGE OF INSOLVENT

150 Certificate may be granted on certain conditions

At any time after the insolvent has passed his or her last examination or at any earlier time with the consent of the creditors testified by a special resolution the insolvent may upon the prescribed notice apply to the Court for a certificate of discharge but such certificate shall not be given unless it is proved to the Court either:

- (a) that the insolvency has arisen from circumstances for which the insolvent cannot justly be held responsible;
- (b) that a special resolution of his or her creditors has been passed to the effect that his or her insolvency has arisen from such circumstances as last aforesaid and that they desire that a certificate of discharge shall be granted to him or her; or
- (c) that the gross amount realised in the estate is equal to the total amount of debts proved in the estate,

But the Court may nevertheless suspend for such time as it deems to be just or withhold altogether the certificate of discharge if it appears to the Court by sufficient evidence that the insolvent has made default in giving up to his or her creditors the property which he or she is required by this Act to give up or that a prosecution has been commenced against him or her in pursuance of the provisions of any Act or law relating to the punishment of fraudulent debtors.

[s 150 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

151 Application for certificate after lapse of time

- (1) Whether any application shall have been made under Section 150 or not the Court at the time and in the circumstances following may on the application of any insolvent who has not obtained a certificate of discharge and after the prescribed notice grant such certificate and for such purpose may alter or vary any decision theretofore pronounced:
 - (a) at the expiration of 12 months from the date of adjudication with the assent testified in writing of a majority in number of the creditors whose debts amount to \$20 and upwards who have proved in the estate; or
 - (b) at the expiration of 2 years without the consent of any creditor:
Provided that upon any such application, the insolvent shall make oath that he or she has made a full and fair discovery of his or her estate and has not granted or promised any payment or security and has not entered into any collusive agreement for the purpose of obtaining such consent.
- (2) The Court may nevertheless upon any such application withhold the certificate or suspend the same for such period as it shall deem just.

152 Application at the end of 3 years

- (1) At the expiration of 3 years from the date of the order of adjudication any insolvent who has not obtained a certificate of discharge may with the consent testified in writing of a majority of the creditors whose debts amount to \$20 and upwards who have proved in the estate apply after the prescribed notice to the Court for a certificate.
- (2) Upon its being proved to the satisfaction of the Court that such consent has

been obtained and has been so obtained without fraud or collusion the Court shall grant the certificate of discharge:

Provided that upon any such application the insolvent shall make oath that he or she has made a full and fair discovery of his or her estate and has not granted or promised any payment or security and has not entered into any collusive agreement for the purpose of obtaining such consent.

153 Conditional certificate

Where on any application for a certificate the Court shall be of opinion that a certificate ought not to be granted unconditionally it may grant a certificate subject to any condition touching any salary, pension, emoluments, profits, wages, earnings or income which may afterwards become due to or earned by the insolvent and generally touching after acquired property.

154 Payments, etc, to influence creditors void

Any payment, contract, covenant or security for the payment of any money made or given by an insolvent or other person to or in trust for any creditor for the purpose or with intent to persuade or induce such creditor to forbear opposing the granting of a certificate or to consent to the granting of a certificate or to forbear appealing against the granting of a certificate shall be void and the money, if any, paid may be recovered and any money so agreed to be paid or secured shall not be recoverable.

155 Form and date of certificate

The certificate of discharge shall be in the prescribed form and shall be under the hand of the Registrar and seal of the Court but shall not be drawn up or take effect until after the expiration of the time allowed for appeal or if an appeal be brought until after the decision of the Nauru Court of Appeal thereon and shall bear date either the day after the expiration of the time allowed for appeal or the day of the decision of the court of appeal as the case may require.

156 Effect of certificate

- (1) A certificate of discharge shall not release the insolvent from any debt or liability incurred by means of any fraud or breach of trust nor from any debt or liability whereof he or she has obtained forbearance by fraud or from any debt or liability due by him or her as trustee of an insolvent estate in respect of any sum of money improperly retained or employed by him or her as such trustee.
- (2) Shall release the insolvent from all other debts provable under the insolvency with the exception of:
 - (a) debts due to the Republic; and
 - (b) debts with which the insolvent stands charged at the suit of the Republic or of a person for any offence against a statute relating to any branch of the public revenue or at the suit of the sheriff or other public officer on a bail bond entered into for the appearance of a person prosecuted for any such offence,and he or she shall not be discharged from such excepted debts unless the Treasurer with the approval of the Minister certifies in writing his or her consent to his or her being discharged therefrom.

157 Effect as evidence, pleading

A certificate of discharge shall be sufficient evidence of the insolvency and of the validity of the proceedings therein and in any proceedings that may be instituted against an insolvent who has obtained a certificate of discharge in respect of any debt from which he or she is released by such certificate the insolvent may plead that the cause of action occurred before his or her discharge and may give this Act and the special matter in evidence.

[s 157 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

158 Exception of joint debtors

The certificate of discharge shall not release a person who at the date of the order of adjudication was a partner with the insolvent or was jointly bound or had made any joint contract with him or her.

STATUS OF UNDISCHARGED INSOLVENT

159 Status of undischarged insolvent

Where a person who has been made insolvent has not obtained his or her discharge then from and after the close of his or her insolvency, the following consequences shall ensue:

- (a) no portion of a debt provable under the insolvency shall be enforced against the property of the person so made insolvent until the expiration of 3 years from the close of the insolvency and during that time if he or she pay to his or her creditors such additional sum as will with the assets realised in the estate make up 40 cents in \$2 on all debts proved in the insolvency he or she shall be entitled to a certificate of discharge in the same manner as if an amount equal to \$2 on such debts had originally been paid out of his or her property; and
- (b) at the expiration of a period of 3 years from the close of the insolvency if the insolvent has not obtained a certificate of discharge any balance remaining unpaid in respect of any debt proved in the insolvency but without interest in the meantime shall be deemed to be a subsisting debt in the nature of a judgment debt and subject to the rights of a person who have become creditors of the debtor since the close of his or her insolvency may be enforced against any property of the debtor with the sanction of the Supreme Court or a Judge of it but to the extent only and at the time and in manner directed by such court or Judge and after giving such notice and doing such acts as may be prescribed in that behalf.

[s 159 am GN No 188/1969 O 3, opn 31 Jan 1968]

PART 8 — SUPPLEMENTAL PROVISIONS

AS TO PROCEEDINGS

160 Supplemental regulations as to proceeding in insolvency

The following provisions shall apply to proceedings in insolvency namely:

- (a) where 2 or more insolvency petitions are presented against the same debtor or against debtors being members of the same partnership the Court may consolidate the proceedings or any of them upon such terms as the Court thinks fit;
- (b) where the petitioner does not proceed with due diligence on his or her petition, the Court may substitute as petitioner any other creditor to whom the debtor may be indebted in the amount required by this Act in the case of a petitioning creditor;
- (c) proofs of debt may be made by affidavit sworn before any justice of peace, commissioner for oaths or Registrar or in any other mode which may be prescribed or which may be deemed satisfactory by the trustee;
- (d) a corporation may prove a debt vote and otherwise act in insolvency by an agent duly authorised;
- (e) in any case of creditors being partners anything by this Act authorised to be done by a creditor may be done by any one or more of the members of such partnership in the name and on behalf of the partnership;
- (f) a creditor may in the prescribed manner by instrument in writing appoint a person to represent him or her in all matters relating to any debtor or his or her affairs in which a creditor is concerned in pursuance of this Act and such representative shall thereupon for all the purposes of this Act stand in the same position as the creditor who appointed him or her but no such appointment shall be made by way of sale of a debt or chose in action;
- (g) when a debtor who has been adjudicated an insolvent dies, the Court may order that the proceedings in the matter be continued as if he or she were alive; and
- (h) the Court may at any time on proof to its satisfaction that proceedings in insolvency ought to be stayed by reason that negotiations are pending for the liquidation of the affairs of the insolvent by arrangement or for the acceptance of a composition by the creditors in pursuance of the provisions herein contained or on proof to its satisfaction of any other sufficient reason for staying the same make an order staying the same either altogether or for a limited time on such terms and subject to such conditions as the Court may think just.

[s 160 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

161 Consequences of annulling of adjudication, order annulling to be gazetted

- (1) Whenever any adjudication in insolvency is annulled, all sales and dispositions of property and payments duly made and all acts theretofore done by the trustee or a person acting under his or her authority or by the Court shall be valid but the property of the debtor who was adjudged an insolvent shall in such case vest in such person as the Court may appoint or

in default of any such appointment revert to the insolvent for all his or her estate or interest therein upon such terms and subject to such conditions if any as the Court may declare by order.

- (2) A copy of the order of the Court annulling the adjudication of a debtor as an insolvent shall be forthwith be published in the Gazette and advertised locally in the prescribed manner and the production of a copy of the Gazette containing such order shall be conclusive evidence of the fact of the adjudication having been annulled and of the terms of the order annulling the same.

162 Formal defects not to invalidate proceedings

- (1) No proceeding in insolvency shall be invalidated by any formal defect or by any irregularity unless the Court before which an objection is made to such proceeding is of opinion that substantial injustice has been caused by such defect or irregularity and that such injustice cannot be remedied by any order of such Court.
- (2) The Court may if it think fit make an order declaring that any such proceeding is valid notwithstanding any such defect or irregularity.

EVIDENCE

163 Evidence of proceedings at meeting of creditors

The Registrar or any other person presiding at a meeting of creditors under this Act shall cause minutes of all resolutions and proceedings of such meeting to be kept and duly entered in a book and from time to time to be duly filed in Court and any such minute as aforesaid if purporting to be signed by the chairman of the meeting at which such resolutions were passed or proceedings had or a certified copy of it as herein provided shall be received as evidence in all legal proceedings and until the contrary is proved every general meeting of the creditors in respect of the proceedings of which minutes have been so made shall be deemed to have been duly held and convened and all resolutions passed or proceedings had at that meeting to have been duly passed and had.

[s 163 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

164 Evidence of proceedings in insolvency

Any petition or copy of a petition in insolvency, any order or copy of an order made by the Court, any certificate or copy of a certificate made by the Court in insolvency, any deed or copy of a deed or arrangement in insolvency and any other instrument or copy of an instrument affidavit or document made or used in the course of any insolvency proceedings or other proceedings had under this Act may if any such instrument as aforesaid or copy of an instrument appears to be sealed with the seal of the court or purports to be signed by a Judge in insolvency under this Act or sealed with the seal of the Registry in insolvency under this Act be receivable in evidence in all legal proceedings whatever.

[s 164 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

165 Evidence in insolvency

- (1) Any evidence or depositions taken before any Examining Magistrate shall be transmitted to the Court.

- (2) Any such evidence or depositions and any other evidence or depositions taken in the insolvency shall be admissible and may be used in the insolvency as the case may require saving all just exceptions.

166 Shorthand writer

In any case in which any examination of the insolvent or of witnesses is had before the Court, the Court may on the application of the trustee or any creditor, but at the expense in the first instance of the party making such application, direct the evidence of the insolvent or witnesses or any of them to be taken down by a shorthand writer appointed by the Court who shall be sworn faithfully to report the evidence and in such case a transcript of the shorthand writer's or reporter's notes certified by him or her to be correct shall be admitted to prove the oral evidence of the witnesses in the same manner as depositions signed by them might be admitted.

[s 166 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

167 Death of witnesses

In case of the death of the insolvent or his wife or her husband or of a witness whose evidence has been taken by the Court or an Examining Magistrate in any proceeding under this Act, the deposition of the person so deceased purporting to be sealed with the seal of the Court or to be signed by the Examining Magistrate or a copy of it purporting to be so sealed or to be so signed shall be admitted as evidence of the matters therein deposed to.

[s 167 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

168 Gazette to be evidence

- (1) A copy of the Gazette containing any advertisement by this Act or the general rules directed or authorised to be made therein shall be evidence of any matter therein contained of which notice is so directed or authorised to be given by such advertisement.

[subs (1) am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

- (2) All proceedings or notices so directed or authorised to be inserted in the Gazette other than notices by the trustee shall be marked with the seal of the Court and certified by the Registrar.

MISCELLANEOUS

169 Expenses of Registrar attending meetings, etc

Where a Registrar under the authority of this Act attends at any place for the purpose of presiding at a meeting of creditors or of otherwise acting under this Act his or her travelling and incidental expenses incurred in so doing and those of any Deputy Registrar or officer attending him or her shall after being settled by the Court be paid out of the insolvent's property if sufficient and otherwise shall be deemed part of the expenses of the Court.

[s 169 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

170 Power of assignee to sue

A person to whom anything in action belonging to the insolvent is assigned in pursuance of this Act may bring or defend any action or suit relating to such thing in action in his or her own name.

171 Saving as to joint contracts

Where an insolvent is a contractor in respect of any contract jointly with any other person or persons, such person or persons may sue or be sued in respect of such contract without the joinder of the insolvent.

172 Exemption of deeds from stamp duty

Every deed, conveyance, assignment or other assurance relating solely to freehold or leasehold property or to any mortgage, charge or other incumbrance on or any estate right or interest in any real or personal property which is part of the estate of any insolvent and which after the execution of such deed, conveyance, assignment or other assurance either at law or in equity is or remains the estate of the insolvent or of the trustee under the insolvency and every power of attorney, proxy, paper, writ, order certificate, affidavit, bond or other instrument or writing relating solely to the property of any insolvent or to any proceeding under any insolvency shall be exempt from stamp duty except in respect of fees under this Act.

[s 172 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

173 Limitation of actions

Every action brought against a person for anything done in pursuance of this Act shall be brought within 6 months after the cause of action has arisen and if it shall appear that the matter complained of was done by authority of this Act or that such action was brought after the time limited as aforesaid for bringing the same the verdict shall be given for the defendant.

[s 173 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

AUDIT

174 Trustee's return of accounts to official trustee

Every elected trustee of an insolvent shall from time to time as may be prescribed and not less than once in every 6 months during the insolvency transmit to the official trustee a statement showing the proceedings in such insolvency up to the date of the statement containing the prescribed particulars and made out in the prescribed form and any elected trustee failing to transmit accounts in compliance with this Section shall be deemed guilty of a contempt of court and be punishable accordingly.

175 Duty of official trustee

- (1) The official trustee shall examine the statements transmitted to him or her and shall call the elected trustee to account for any misfeasance, neglect or omission which may appear on such statements and may require such trustee to make good any loss the estate of the insolvent may have sustained by such misfeasance, neglect or omission.
- (2) Where the elected trustee fails to comply with such requisition of the official trustee, the official trustee may report the same to the Court and the Court after hearing the explanation if any of the elected trustee shall make such order in the premises as it thinks just.

176 Powers of official trustee

- (1) The official trustee may at any time require any elected trustee to answer any inquiry made by him or her in relation to any insolvency in which such

elected trustee is engaged and may if he or she think fit apply to the Court to examine on oath such trustee or any other person concerning such insolvency.

- (2) He or she may also direct a local investigation to be made of the books and vouchers of such trustee.

177 Returns of accounts in liquidation to official trustee

The provisions of Sections 174, 175 and 176 shall be read and construed as applying to every trustee appointed under Part 9 as well as to every trustee appointed by the creditors of insolvents.

178 Returns by insolvency officers

- (1) The officers of the Court acting in insolvency shall make to the official trustee such returns of the business of the Court and their offices at such times and in such manner and form as may be prescribed by the rules of court.
- (2) The official trustee shall in manner prescribed by the rules of court frame books which shall be under the regulations of the rules of court open for public information and searches.

RELEASE OF TRUSTEE

179 Release of trustee

- (1) When the insolvency is closed, the trustee shall call a meeting of the creditors to consider an application to be made to the Court for his or her release.
- (2) At the meeting, the trustee shall lay before the assembled creditors an account showing the manner in which the insolvency has been conducted with a list of the unclaimed dividends if any and of the property if any outstanding and shall inform the meeting that he or she proposes to apply to the Court for release.
- (3) A copy of such account shall be transmitted by the trustee to the official trustee at least 14 days before the trustee shall apply to the Court for his or her release.
- (4) The official trustee shall make and present to the Court a report upon such account and such other matters as he or she may think ought to be so reported.
- (5) The creditors assembled at the meeting may express their opinion as to the conduct of the trustee and they or any of them or the official trustee may appear before the Court and oppose the release of the trustee.
- (6) The Court after hearing what if anything can be urged against the release of the trustee shall grant or withhold the release accordingly and if it withhold the release shall make such order as it thinks just charging the trustee with the consequences of any act or default he or she may have done or made contrary to his or her duty and shall suspend his or her release until such charging order has been complied with and the Court thinks just to grant the release of the trustee.

180 Duty of trustee as to unclaimed dividends and outstanding property

- (1) Unclaimed dividends and any other monies arising from the property of the insolvent remaining under the control of the trustee at the close of the insolvency of any insolvent or accruing thereafter shall be accounted for and paid over to such account as may be directed by rules of court and any parties entitled thereto may claim the same in manner directed by such rules.
- (2) The trustee shall deliver a list of any outstanding property of the insolvent to the prescribed persons and the same shall when practicable be got in and applied for the benefit of the creditors in manner prescribed.

181 Effect of release of trustee

The order of the court releasing the trustee of an insolvency shall discharge him or her from all liability in trustee in respect of any act done or default made by him or her in the administration of the affairs of the insolvent or otherwise in relation to his or her conduct as trustee of such insolvent but such order may be revoked by the Court on proof that it was obtained by fraud.

UNCLAIMED DIVIDENDS

182 Forfeiture of dividends after 5 years nonclaim

Where any dividends remain unclaimed for 5 years the same shall be deemed vested in the Republic and shall be paid by the trustee into the Treasury Fund to the credit of the Nauru Revenue Office:

Provided that at any time after such vesting any Judge of the Supreme Court may in the case of the disability or absence beyond seas of the person entitled to the sum so vested or for any other reason appearing to him or her sufficient recommend that the said sum should be repaid out of money provided for that purpose.

[s 182 am GN No 188/1969 O 3, opn 31 Jan 1968]

PART 9 — LIQUIDATION BY ARRANGEMENT

REGULATIONS

183 Regulations as to liquidation by arrangement

The following provisions shall be made with respect to the liquidation by arrangement of the affairs of a debtor:

- (a) a debtor unable to pay his or her debts may summon a general meeting of his or her creditors and such meeting may by a special resolution as defined by this Act declare that the affairs of the debtor are to be liquidated by arrangement and not in insolvency and may at that or some subsequent meeting held at an interval of not more than a week appoint a trustee with or without a committee of inspection;
- (b) all the provisions of this Act relating to a first meeting of creditors and to subsequent meetings of creditors in the case of an insolvency including the description of creditors entitled to vote at such meetings and the debts in respect of which they are entitled to vote shall apply respectively to the first meeting of creditors and to subsequent meetings of creditors for the purposes of this Section subject to the following modifications:
 - (i) that every such meeting shall be presided over by such chairman as the meeting may elect; and
 - (ii) that no creditor shall be entitled to vote until he or she has proved by a statutory declaration a debt provable in insolvency to be due to him or her and the amount of such debt with any prescribed particulars and a person wilfully making a false declaration in relation to such debt shall be guilty of a misdemeanor;
- (c) the debtor unless prevented by sickness or other cause satisfactory to such meeting shall be present at the meeting at which the special resolution is passed and shall answer any inquiries made of him or her and he or she or if he or she is so prevented from being at such meeting someone on his or her behalf shall produce to the meeting a statement showing the whole of his or her assets and debts and the names and addresses of the creditors to whom his or her debts are due;
- (d) the special resolution together with the statement of the assets and debts of the debtor and the name of the trustee appointed and of the members, if any, of the committee of inspection shall be presented to the Registrar and it shall be his or her duty to inquire whether such resolution has been passed in manner directed by this Section but if satisfied that it was so passed and that a trustee has been appointed with or without a committee of inspection he or she shall forthwith register the resolution and the statement of the assets and debts of the debtor and such resolution and statement shall be open for inspection on the prescribed conditions and the liquidation by arrangement shall be deemed to have commenced as from the date of the appointment of the trustee;
- (e) all such property of the debtor as would if he or she were made insolvent be divisible among his or her creditors shall from and after the date of the appointment of a trustee vest in such trustee under a liquidation by arrangement and be divisible amongst the creditors and all such

settlements, conveyances, transfers, charges, payments, obligations and proceedings as would be void against the trustee in the case of an insolvency shall be void against the trustee in the case of liquidation by arrangement;

- (f) the certificate of the Registrar in respect of the appointment of any trustee in the case of a liquidation by arrangement shall be of the same effect as a certificate of the Court to the like effect in the case of an insolvency;
- (g) the trustee under a liquidation shall have the same powers and perform the same duties as a trustee under an insolvency and the property of the debtor shall be distributed in the same manner as in an insolvency and with the modification hereinafter mentioned all the provisions of this Act shall so far as the same are applicable apply to the case of a liquidation by arrangement in the same manner as if the word 'insolvent' included a debtor whose affairs are under liquidation and the word 'insolvency' included liquidation by arrangement and in construing such provisions the appointment of a trustee under a liquidation shall according to circumstances be deemed to be equivalent to and a substitute for the presentation of a petition in insolvency or the service of such petition or an order of adjudication in insolvency;
- (h) the creditors at their first or any general meeting may prescribe the bank into which the trustee is to pay any monies received by him or her and the sum which he or she may retain in his or her hands;
- (i) the provisions of this Act with respect to the close of the insolvency discharge of an insolvent to the release of the trustee shall not apply in the case of a debtor whose affairs are under liquidation by arrangement but the close of the liquidation may be fixed and the discharge of the debtor and the release of the trustee may be granted by a special resolution of the creditors in general meeting:

Provided that no trustee shall be released unless his or her accounts have been audited in the manner provided in paragraph (j);

- (j) the provisions of this Act with respect to the audit of the accounts of trustees elected by creditors in insolvency shall apply to the case of a debtor whose affairs are under liquidation by arrangement under this Part;
- (k) the trustee shall report to the Registrar the discharge of the debtor and a certificate of such discharge given by the Registrar shall have the same effect as a certificate of discharge given to an insolvent under this Act;
- (l) rules of court may be made in relation to proceedings on the occasion of liquidation by arrangement in the same manner and to the same extent and of the same authority as in respect of proceedings in insolvency;
- (m) if it appears to the Court on satisfactory evidence that the liquidation by arrangement cannot in consequence of legal difficulties or of there being no trustee for the time being or for any sufficient cause proceed without injustice or undue delay to the creditors or to the debtor the Court may on the petition of the debtor or of any creditor competent under this Act to present a petition for adjudication adjudge the debtor an insolvent and proceedings may be had accordingly; and
- (n) where no committee of inspection is appointed the trustee may act on his or her own discretion in cases where he or she would otherwise have been bound to refer to such committee.

[s 183 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

184 Registration of resolutions of creditors conclusive in certain cases

The registration by the Registrar of a special resolution of the creditors on the occasion of a liquidation by arrangement under this Part shall in the absence of fraud be conclusive evidence that such resolution was duly passed and all the requisitions of this Act in respect of such resolution complied with but any such registration may nevertheless be discharged by the Court upon the application of any creditor upon sufficient cause shown.

[s 184 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

PART 10 — COMPOSITION WITH CREDITORS

185 Regulations as to composition by creditors

- (1) The creditors of a debtor unable to pay his or her debts may without any proceedings in insolvency by an extraordinary resolution resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor.
- (2) An extraordinary resolution of creditors shall be a resolution which has been passed by a majority in number and three-fourths in value of the creditors of the debtor assembled at a general meeting to be held in the manner prescribed of which notice has been given in the prescribed manner and has been confirmed by a majority in number and value of the creditors assembled at a subsequent general meeting of which notice has been given in the prescribed manner and held at an interval of not less than 7 days nor more than 14 days from the date of the meeting at which such resolution was first passed.
- (3) In calculating a majority for the purposes of a composition under this Section, the value of the debts of secured creditors shall as nearly as circumstances admit be estimated in the same way and the same description of creditors shall be entitled to vote at such general meetings as in insolvency.
- (4) The debtor unless prevented by sickness or other cause satisfactory to such meetings shall be present at both the meetings at which the extraordinary resolution is passed and shall answer any inquiries made of him or her and he or she or if he or she is so prevented from being at such meetings someone on his or her behalf shall produce to the meeting a statement showing the whole of his or her assets and debts and the names and addresses of the creditors to whom such debts respectively are due.
- (5) The extraordinary resolution together with the statement of the debtor as to his or her assets and debts shall be presented to the Registrar and it shall be his or her duty to inquire whether such resolution has been passed in manner directed by this Section and if satisfied that it has been so passed he or she shall forthwith register the resolution and statement of assets and debts but until such registration has taken place, such resolution shall be of no validity and any creditor of the debtor may inspect such statement at prescribed times and on payment of such fee if any as may be prescribed.
- (6) Before any such registration shall be made the debtor shall make oath that he or she has fully and truly to the best of his or her knowledge disclosed all his or her assets and liabilities and the names of his or her creditors and the amount of their debts and that he or she has not granted or promised any payment or security or made or promised any preference of any creditor or entered into any collusive agreement for the purpose of obtaining assent to the resolution and such oath shall be presented to the Registrar and be registered with the resolution.
- (7) The creditors may by an extraordinary resolution add to or vary the provisions of any composition previously accepted by them without prejudice to a persons taking interests under such provisions who do not

assent to such addition or variation and any such extraordinary resolution shall be presented to the Registrar in the same manner and with the same consequences as the extraordinary resolution by which the composition was accepted in the first instance.

- (8) The provisions of a composition accepted by an extraordinary resolution in pursuance of this Section shall be binding on all the creditors whose names and addresses and the amount of the debts due to whom are shown in the statement of the debtor produced to the meetings at which the resolution has passed but shall not affect or prejudice the rights of any other creditors.
- (9) Where a debt arises on a bill of exchange or promissory note if the debtor is ignorant of the holder of any such bill of exchange or promissory note he or she shall be required to state the amount of such bill or note the date on which it falls due the name of the acceptor or person to whom it is payable and any other particulars within his or her knowledge respecting the same and the insertion of such particulars shall be deemed a sufficient description of the creditor of the debtor in respect of such debt and any mistake made inadvertently by a debtor in the statement of his or her debts may be corrected after the prescribed notice has been given with the consent of a general meeting of his or her creditors.
- (10) The provisions of any composition made in pursuance of this Section may be enforced by the Court on a motion made in a summary manner by a person interested and any disobedience of the order of the Court made on such motion shall be deemed to be a contempt of court.
- (11) Rules of court may be made in relation to proceedings on the occasion of the acceptance of a composition by an extraordinary resolution of creditors in the same manner and to the same extent and of the same authority as in respect of proceedings in insolvency.
- (12) Where it appears to the Court on satisfactory evidence that a composition under this Section cannot in consequence of legal difficulties or for any sufficient cause proceed without injustice or undue delay to the creditors or to the debtor the Court may adjudge the debtor an insolvent and proceedings may be had accordingly.

186 Registration of resolution conclusive

The registration by the Registrar of an extraordinary resolution of the creditors under this Part shall in the absence of fraud be conclusive evidence that such resolution was duly passed and all the requisitions of this Act in respect of it complied with but any such registration may nevertheless be set aside or discharged by the Court upon the application of any creditor upon sufficient cause shown.

[s 186 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

PART 11 — OFFENCES

187 Debts incurred by fraud

Where a debtor makes any arrangement or composition with his or her creditors under the provisions of this Act he or she shall remain liable for the unpaid balance of any debt which he or she incurred or increased or whereof before the date of the arrangement or composition he or she obtained forbearance by any fraud provided the defrauded creditor has not assented to the arrangement or composition otherwise than by proving his or her debt and accepting dividends.

[s 187 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

188 Order by Court for prosecution on report of trustee

Where a trustee in any insolvency reports to the Court that in his or her opinion an insolvent has been guilty of any offence under this Act or under any of the provisions of Division 9.3 of the *Crimes Act 2016* or where it is represented to the Court by any creditor or member of the committee of inspection that there is ground to believe that the insolvent has been guilty of any offence under this Act or under any of the said provisions of the *Crimes Act 2016*, the Court shall if it appears to the Court that such report or representation is true and that there is a reasonable probability that the insolvent may be convicted order the trustee to prosecute the insolvent for such offence and may hold the insolvent to bail to appear before a justice of the peace to answer the charge to be preferred against him or her for such offence.

[s 188 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011; Act 18 of 2016 s 287 and Sch 2 items 69, 70, opn 12 May 2016]

189 When prosecution ordered by Court expense to be borne by the Republic; when prosecution not ordered

(1) Where the prosecution of an insolvent under this Act is ordered by the Court or where the insolvent is committed for trial by order of the Court then on the production of the order of such Court all the expenses of the prosecution shall be paid and borne by the Republic.

[subs (1) am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

(2) In other cases, the expenses of the prosecution of an insolvent for an offence under this Act up to the time of his or her commitment for trial shall be paid and borne by the person or persons instituting such prosecution.

[subs (2) am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

190 Punishments under this Act not cumulative

Where a person is liable under any other written law to any punishment or penalty for any offence made punishable by this Act such person may be proceeded against under any other written law or under this Act so that he or she be not punished twice for the same offence.

[s 190 am Act 8 of 2011 s 12 and Sch 1[78], opn 15 Apr 2011]

SCHEDULE

[Section 5]

Acts referred to

| Number of Act referred to | Short Title | Extent of Repeal |
|-------------------------------------|---|------------------|
| 38 Vic. No.5 (Queensland Adopted) | The <i>Insolvency Act of 1871</i> | The whole |
| 40 Vic. No. 12 (Queensland Adopted) | The <i>Insolvency Act Amendment Act of 1876</i> | The whole |
| VIII of 1900 | The <i>Insolvency Act of 1900</i> | The whole |

