

**Drafter's response to Mr. Stevenson's request for a view on whether section 209 of the Bankruptcy (Scotland) Bill would be better placed in Part 7 than in Part 17 of the Bill**

In the course of giving evidence to the Committee on 5th January the drafter was referred by Mr. Stevenson (see column 20 of the Official Report for that day) to a matter which had been put to the Committee by the Institute of Chartered Accountants for Scotland: "that the trustee's powers to challenge credit transactions that have been entered into by a bankrupt debtor [and] are currently in section 209 .....would be better placed in Part 7 [of the current Bill] which is on powers to safeguard the interests of creditors." This was also a matter raised by the Association of Business Recovery Professionals' Technical Committee (R3).

Having now considered the question, the drafter suggests that the existing placing of section 209 is to be preferred to the change proposed.

Sections such as section 98 (gratuitous alienations) and section 99 (unfair preferences) in Part 7 are very clearly directed at a debtor's own improper conduct and at protecting the rights of creditors from the actions of the debtor. Section 209 is directed at avoiding creditors charging exorbitant rates of interest at the expense of other creditors in the bankruptcy <sup>1</sup>but does so by drawing on the model of sections 137 to 139 of the Consumer Credit Act 1974 to discourage those who might seek to exploit the debtor's vulnerability. Though it is conceded that the distinction is a narrow one, section 209 is therefore rather less directly about protecting the rights of all creditors.

In other words, there is considerably more to section 209 than simply protecting those rights.

With regard to the debtor's own conduct (especially in any case where the debtor has not been exploited), it is to be observed that section 209(7) of the current Bill (following section 61(6) of the 1985 Act) provides that the powers in relation to extortionate credit transactions "are exercisable....concurrently with any powers exercisable.....in relation to that transaction as a gratuitous alienation or unfair preference". So both the connections and the distinctions between the two sets of provisions were clearly in the minds of those who, in drafting the 1985 Act, elected not to place the extortionate credit transactions with the provisions relating to gratuitous alienations and unfair preferences.

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<sup>1</sup> See the 1982 Cork Report of the Review Committee on *Insolvency Law and Practice* (Cmnd. 8558), paragraphs 1379 and 1381 (part of the background to the 1985 Act) for the origins of section 61 of that Act.