A Dark and Neglected Subject: Landmarks in the Reform of English Insolvency Law

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In the introduction to a once influential treatise, published in 1831, the author described what he considered to be the nature and purpose of bankruptcy law. The chief aim of every system should be to combine and regulate two great objects. The first is the distribution of the effects of the debtor in the most expeditious, the most equal and the most economical mode. The second object is the liberation of his person from the demands of his creditors when he has made a full surrender of his property.

When viewed from "our present state of refinement and vast mercantile prosperity" the early bankruptcy statutes, the author continued, seem to have been particularly ill adapted to either of those objects. Everything about them had to do with "seizure, penalty, and coercion." The commission of an act of bankruptcy was treated as a crime and the bankrupt as a criminal. Instead of a system of legislation to provide for the equal distribution of the funds, armed with penalties to be inflicted in the event of fraud, it appeared to be the case that punishment was the primary object and the distribution of the property merely secondary and consequential.

One bankrupt who had encountered the full horrors of the system was Moses Pitt. In a long-forgotten little book published in 1691 entitled *The Cry of the Oppressed* he described the experiences of himself and other debtors caught in the net of insolvency law.

At the end of the seventeenth century the centre of London's book trade was located in the vicinity of St. Paul's Churchyard and the surrounding maze of streets. Nearby, at the foot of Ludgate Hill, stood the notorious Fleet prison, home for many insolvent debtors. For several years from about April 1689 it was also Pitt's enforced residence. He had carried on business both as a publisher and a builder, a lethal combination that led to his inevitable downfall.

I. Medieval Merchants

The law governing insolvency and bankruptcy matters in Pitt's day consisted of three separate, but overlapping, strands: imprisonment for debt, bankruptcy proceedings and a statutory remedy for overturning transfers of property made in fraud of creditors.

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The origins of this complex tripartite structure were discussed in the course of argument in *Sturges v. Croninshield* (4Wheaton 122), a cross-border insolvency case heard by the Supreme Court of the United States in 1819. The object of the submissions had been to satisfy the Court that insolvency and bankruptcy laws were quite distinct entities. The presentation of the supporting historical background material was especially well done and provides a useful starting-point for any modern survey of the subject.

In early times bankruptcy and imprisonment for debt played no part in English common law. Life was allegedly primitive, trade undeveloped, and confidence was only extended within the narrow compass of close intimacy and kinship. There were relatively few cases where debts were contracted dishonestly and commercial activity conducted on credit over long distances was rare. There was accordingly no great necessity to protect creditors and consequently in cases of debt no remedy for a debtor's arrest existed. It was considered that one who failed to receive the fruits of his bargain had none to blame but himself for his disappointment in the party with whom he contracted. As a contemporary lawyer remarked, in this way "plaintiffs may learn in a future case to deal more cautiously."

There was however a far greater reason why imprisonment for debt did not exist in civil cases. This had nothing whatsoever to do with any commercial considerations or an enlightened humanitarian philosophy. The explanation is to be found in the requirements of feudal law. It was unwilling to permit any interruption of a vassal's duty to serve his lord by imprisonment at the instance of a mere creditor. The lack of such a remedy against "a common person" is therefore more easily explained. The author of an eighteenth-century treatise on the law of execution disposed of the matter with little difficulty. He remarked: "the party having trusted him only with personal things, his remedy was only on the personal estate, and the king had the Interest in the body of his subject, and the lord in his feudatory, or vassal, to be called out to war or to labour for him."

This strict doctrine had one important and indeed far-reaching qualification. According to feudal theory every freemen was treated as a vassal of the king; if the Crown was the claimant in proceedings against a debtor, it was entitled to have him arrested without destroying the feudal tie binding him to his immediate lord. It accordingly became accepted law that "where the king was plaintiff in any action, whether for debt or damages, he had execution against the defendant both for body, lands and goods."

Gradually, in the second half of the thirteenth century, the remedy of imprisonment for debt was made available to plaintiffs other than the Crown. The Statute of Marlborough in 1267 provided that:

> Bailiffs, who ought to make account to their lords, do withdraw themselves, and have no lands nor tenements whereby they may be distrained; then they shall be attached by their bodies, so that the sheriff, in whose bailiwick they may be found, shall cause them to come to make their account.

Soon afterwards the remedy was extended even further. The background to this significant development is recited in the preamble to a statute of 1283:

> Merchants which heretofore have lent their goods to divers persons, be fallen in poverty because there is no speedy remedy provided whereby they may shortly recover their debts at the day of payment; and for this cause many merchants do refrain to come into the realm with their merchandize, to the damage of such merchants and of the realm.

One of the earliest statutes, if not the first, to deal with fraudulent transfers of property is to be found not, as might be expected, amongst the records of Parliament but in those of the Church. In medieval England and for long afterwards the administration of the estates of deceased insolvent debtors fell within the exclusive jurisdiction of the ecclesiastical courts where canon law prevailed. A "provincial constitution", or statute, made in 1343 and known by its opening words *Cordis dolore*, declared excommunicate those who participated in such fraudulent transfers. To avoid the consequences of excommunication and to merit absolution, transferees were required to return the fruits, i.e., the value they had received without giving adequate consideration, to the decedent's estate. The measure also punished, by denial of Christian burial, a decedent who had alienated his own property in order to deceive his creditors. One example of an exhumation order in such a case has survived; it was made in 1520 in connection with the estate of William Warner who died in the diocese of St Albans.

A few years later, shortly after the epidemic known as the Black Death had ravaged the country, Parliament was obliged to introduce legislation of a similar nature into the general law of insolvency. The Act of 1351 was commendably brief and to the point. By its provisions "Fraudulent Assurances of Land or Goods, to deceive Creditors" were declared to be void:

> Because that divers people inherit of divers tenements, borrowing divers goods in money or in merchandize of divers people of this realm, do give their tenements and chattels to their friends, by collusion thereof to have the profits at their will, and after do flee to the franchise of *Westminster*, of *St. Martin le Grand* of *London*, or other such privileged place, and there do live a great time with an light countenance of another man's goods and profits of the said tenements and chattels, till the said creditors shall be bound to take a small parcel of their debt, and release the remnant; it is ordained and assented, that if it be found that such gifts be so made by collusion, that the said creditors shall have execution of the said tenements and chattels, as if no such gift had been made.

Further statutes dealing with fraudulent transfers were passed in 1379 and yet again in 1486. By then, following many years of turbulence throughout the country, the abuses concerned with places of sanctuary, such as that at Beverly in Yorkshire, had become a matter of great concern for central government. They were of two types: those under ecclesiastical jurisdiction and others whose status depended

upon the grant of an ancient charter, though the supporting documentation in such cases was often extremely suspect.

The ease with which an insolvent trader might defy creditors by escaping to a safe-haven in company with traitors and criminals was generally regarded as a public scandal. The Crown, in conjunction with the papal authorities, accordingly made determined efforts to curb this immunity from process. As a contemporary judge ominously observed:

> No franchise can be made without a grant from the king, because none can grant such franchise—that anyone can have such a place of safety—except the king himself... the Pope can do nothing within this realm, for the pardon or dispensation of treason belongs absolutely to the king.

II. The Issues

By the beginning of the sixteenth century English law possessed two of the distinctive features with which Moses Pitt would have been familiar 200 years later. The remedy of imprisonment for debt had gradually been expanded to cover a wider range of monetary obligations and the law relating to the avoidance of fraudulent transfers had been recently reviewed by Parliament. As yet, however, there was no sign of any legislation specifically concerned with bankruptcy. Indeed the term "bankrupt" and the concept behind it had still to make its first appearance in this country.

It would nonetheless be extremely misleading to imply that until the Tudor age no machinery had been available under the common law for handling complex commercial and financial insolvency cases. The administration of the London branch of the Scali bank which collapsed in 1326 could never have been conducted with such a high degree of professional skill and competence unless somewhere within the executive arm of government, the judiciary or the merchant community the necessary practical expertise was available. The appropriate knowledge and techniques required for dealing so confidently with large-scale insolvency matters may well have been derived from experience with similar situations governed by other legal systems.

Insolvency in the commercial sense of inability to pay debts as they fell due was a matter of everyday occurrence in medieval England. There are numerous examples of cases where an individual creditor levied execution against a debtor's goods, a process that was normally followed by an appraisal preliminary to a sale. It is, however, much less easy to discover illustrations of collective insolvency proceedings when several creditors were involved. The available evidence, which save in one respect is very limited, strongly suggests that such proceedings were by no means uncommon. The *Liber Albus*, a compilation completed in 1419 during the mayoralty of Sir Richard "Dick" Whittington, provides not only material about business practices in the City of London since the twelfth century but also contains information about insolvency matters. Knowledge relating to the nature of insolvency law was undoubtedly also acquired by many merchants and lawyers on their frequent

travels abroad through contact with the law merchant and attendance at the great European fairs.

The most immediate source of knowledge, however, about insolvency law and the equitable distribution of a debtor's assets amongst his creditors was much closer to home. It would have been frequently encountered in the work of the church courts relating to the administration of the insolvent estates of deceased persons. The business of these courts was generally in the hands of lawyers trained in canon law. Many of them, such as Cardinal Morton, Lord Chancellor for most of Henry VII's reign and in whose household Sir Thomas More served as a young man, attended the school of canon law at Oxford.

It is quite clear from the voluminous archival material connected with these courts that their practitioners had a firm grasp of the basic principles of insolvency law. Executors were at risk of being held personally liable for the debts of the individual whose estate they administered. When they became aware of an excess of claims over available assets the safest course seems to have been to refuse the office. So, for example, in 1473 a nominated executor "refused to take upon himself the burden of execution of this testament out of fear of the creditors, because the goods were insufficient for payment of the debts." This type of plea could be overcome with little difficulty and the sequestration of the deceased's assets was routinely ordered for insolvent estates. If the proceeds were large enough, then the creditors would receive a dividend.

At the dawn of the Tudor age an insolvent debtor was usually encouraged as a matter of commercial policy to come to terms with his or her creditors if at all possible on a voluntary basis and was provided with ample opportunity to do so. To achieve this end a well-connected debtor might be advised to obtain "protection" from the Crown. This would give him immunity from legal process for a limited period on the grounds that he must not be harassed whilst in the service of the monarch. The device was much abused and the cause of great resentment. It was originally almost certainly an aspect of the Crown's feudal rights over its subject. However, in the hands of successive lord chancellors, presiding over the Court of Chancery and no doubt influenced by their knowledge of canon law principles, the concept was extended well beyond its original purpose. In this way the grant of a "protection" came to be used by debtors as a means of procuring an automatic judicial stay of execution. The aim was to provide him with sufficient time in which to come to an amicable arrangement with creditors.

A debtor who, despite such inducements, was absolutely determined to defy his creditors had several options. He might lock himself in his house, relying on the old maxim that an Englishman's home is his castle and so resist the bailiffs. Alternatively he might seek refuge in a sanctuary of which there were about 40 in the country from which to choose. Finally he might vanish from his local community and disappear "to part unknown" or leave the realm and go abroad. Many continental insolvency systems, particularly amongst the independent republics in Italy, such as Florence and Venice, had developed the sophisticated device of "safe-conducts" designed to persuade an absconding debtor to return without fear of imprisonment.

The concept seems to have been known in England since a book of precedents published in about 1543 contains a form for such a document.

The first indication that bankruptcy legislation was under active consideration appears in 1532. In that year a "bill of bankrupt" reached a second reading in the House of Commons but failed to make any further progress. The exact nature of the bill's provisions is still a mystery. The likelihood is that it originated in the City of London and that it was solely concerned with the need to provide a collective remedy for the benefit of creditors in cases where a merchant or trader had absconded. It is also possible the bill's supporters wished to have it considered as part of a broader programme to reform the administration of civil justice. This included legislation designed to speed up the recovery of debts by individual creditors. The reform project was probably initiated by Sir Thomas More, the Lord Chancellor between 1529 and 1531 and carried on by his successor, Lord Audley, until his death in 1544.

Before Parliament considered bankruptcy legislation again the sanctuary system had been drastically curtailed. Furthermore proposals were also in the pipeline for the relaxation of the controversial usury laws by permitting the recovery of interest though not beyond a statutory maximum level.

In 1542 a bill was introduced into the House of Lords against "Merchants that run away with other men's goods." It made no progress but was replaced the following year by a bill that became law. The Act of 1543 is entitled "An Act against such persons as do make Bankrupt" who are described in the preamble as "chiefly obtaining into their hands great substance of other men's goods, do suddenly fly to parts unknown or keep their houses."

It is extremely doubtful whether the Act was ever successfully invoked in practice. The main defect was that the collective remedy it gave to creditors was not backed up with any or any effective machinery for its implementation.

III. Tudor Scandals

There was no shortage of large high-profile insolvency cases during the Tudor period. One of the most spectacular concerned the firm of Johnson and Johnson; it collapsed in March 1553 with huge liabilities to 80 or so creditors. The cast of characters involved is memorable by any stance. The senior partner was a flamboyant, over-ambitious London merchant with the obligatory house in the country. When he knew the business was already insolvent and disregarding advice to curtail its activities, he had rashly undertaken several speculative and in the event ruinous overseas deals. Amongst his close family was a Protestant Marty and a member of the bar who became a judge in the Court of Common Pleas. One of the creditors was Sir William Cecil, adviser to the future Queen Elizabeth, who received secret information that enabled him to obtain a preferential payment in respect of a substantial trade debt owing to his late father's estate.

Another creditor pursued lengthy litigation in the High Court of Admiralty about the ownership of a valuable cargo of merchandise on board a ship in the

Thames estuary. The claim that the goods belonged to the firm was ultimately unsuccessful and allegations that it had deliberately maintained two sets of books to deceive creditors were rejected at the same time.

There was also a large supporting cast consisting of prominent City merchants who gave evidence in those proceedings and no doubt were responsible for negotiating the terms of a composition with creditors which finally brought the case to a close in 1558.

Five years later a financial crash occurred which was sufficiently serious to threaten the stability of credit on which the City of London depended. On this occasion the debtor was no less a personage than Sir Thomas Lodge, the Lord Mayor in 1562–3. It has been described as an event with long-drawn-out reverberations, indeed a major episode in the financial history of the City.

Lodge was a striking and popular figure, a merchant adventurer shipping cloths to the Netherlands; he had other commercial interests ranging from Guinea and Barbary to Muscovy. At home he had been a promoter of mining and smelting of iron, lead, copper and silver. Even before the expiry of his term of office he was lamenting his inability to meet all his obligations and there had been a sympathetic response in many quarters. The Queen herself was sufficiently alarmed by the representations of her leading councillors to grant him a loan of £4,000 and efforts were subsequently made, with influential backing, to raise subscriptions for his rescue from the leading livery companies of the City. His own company, the Grocers, loyally stood by him.

Lodge made proposals to pay off all the creditors on condition that he was allowed six years' grace, but this failed to satisfy them. He was stripped of all his dignities within the City, lost his positions and went into a debtor's prison. His eventual downfall had been delayed for a while by the grant of a "protection" from the Court of Chancery, as had also previously happened in the Johnson case.

Although this device failed to save either the Johnsons or Lodge it probably proved effective in rescuing Richard Springham who was in severe financial difficulties in 1568. He was a merchant with interests particularly in northern Europe and the Baltic region. He secured his protection on the grounds that he owed the Crown a large amount, payable in a limited period, and that in the absence of such immunity many of his creditors would proceed against him and thereby attempt to forestall the Exchequer.

These three cases were symptomatic of the serious problems facing the government at the end of the 1560s caused by the increasing number of financial failures throughout the country. The Privy Council in London received frequent reports from its informants about such cases with their implications for poor law relief and the possibility of local disturbances. The government was also directly affected by the large-scale misappropriation of Treasury funds by its own officials and, furthermore, by its difficulties in recovering monetary penalties imposed on Catholics who had sought asylum abroad to avoid religious persecution. Yet another issue to be addressed was the extent to which the prohibition on the charging of interest on loans should be relaxed. The usury laws had been partially eased by Parliament in

1543 but a complete ban was restored in 1552. The subject had recently given rise to fierce public debate, closely followed by the government.

IV. Bankruptcy Bureaucracy

The time had now arrived when the need to find solutions for so many problems directly or indirectly connected with insolvency law could no longer be postponed. The purpose of the bankruptcy legislation passed in the spring of 1571 was to introduce a new "state-of-the-art" system framed exclusively for commercial insolvency cases. The statute was entitled "An Act for the better Relief of the Creditors against such as shall become bankrupt."

The Act was, however, accompanied by several other measures expressly designed to modernise the antiquated law relating to the fraudulent transfer and concealment of property. They were of a general nature and as such applicable in all types of cases. Several other pressing insolvency issues of the day were addressed during the same session. Parliament also repealed the Act of 1552 prohibiting usury so that the law in this respect reverted to the position under the Act of 1543 with a permitted annual rate of interest fixed at no more than 10%.

The two principal statutes of 1571 relating to bankruptcy and fraudulent conveyances respectively proved to be extremely robust and durable displaying craftsmanship of the highest quality. The policy adopted by the draftsman was to identify the devices commonly used by debtors to delay, defeat or obstruct their creditors and to transform each one of them into a specific "act of bankruptcy". A good example of such a statutory signpost of insolvency is the mention in an otherwise predictable list of the taking of sanctuary. The failure to include the issue of a protection turned out to be a serious oversight.

In the light of the long-term development of bankruptcy law it is significant that the main mistake of 1543 was not repeated. The jurisdiction in bankruptcy matters was specifically given to the Lord Chancellor who was authorised to appoint commissioners to assist in the administration of individual cases. So it was that the foundations were laid for what rapidly grew into a new bureaucratic machine with vested interests of its own and a propensity for corruption. This typically Tudor institution was solid enough to survive, despite immense criticism and hostility, more or less unchanged until it was finally swept away by Parliament in 1831.

The initial decision to reform insolvency law had in fact been taken 12 years before the task was accomplished in 1571. Soon after the accession of the Queen in November 1558 a committee was set up to see what needed to be done. It was probably accustomed to meet from time to time in the afternoon at the Temple Church, though how long it actually remained in existence is obscure. In any event it seems to have provided the government with a nucleus of talent capable of planning, drafting and driving through Parliament a complex reform programme. The windows of opportunity for achieving this objective were extremely limited since in those days the legislative body was summoned at irregular intervals and its sessions

usually lasted for no more than eight weeks between Easter and Whitsuntide. Between 1559 and 1571 Parliament only met on five occasions.

The chief architect of the insolvency legislation and the leader of the planning group can now be identified with reasonable certainty in the light of recent research as Sir James Dyer. At the beginning of Elizabeth's reign he had been made Chief Justice of the Common Pleas, the court with exclusive jurisdiction over civil disputes not involving the Crown. As a result of his extensive experience of insolvency cases at the bar and on the bench his grasp of the policy issues at stake made him an ideal choice to devise measures for insolvency reform. At one time or another Dyer was helped by a senior judge and representatives from the City.

The bankruptcy statute of 1571 was concerned with commercial insolvency. Its provisions were carefully drafted to apply only to merchants and those engaged in wholesale or retail trade, without any distinction between the sexes. The legislation did nothing to provide any comparable collective remedy for the creditors of the large numbers of debtors, at all levels of society, who did not come within the ambit of the new law.

These debtors were constantly at risk of having their assets taken in execution at the suit of an individual, sometimes vindictive, creditor. Additionally, as was all too often the case, they could await imprisonment alongside the bankrupts and trust that friends, relations or business associates might do something to procure their release. Very occasionally a windfall such as an inheritance might fortuitously appear. This is how the father of Charles Dickens was able to leave Southwark's Marshalsea prison in 1824.

In the last quarter of the sixteenth century there was an unprecedented influx of debtors into the various London prisons giving rise to inevitable problems of overcrowding. The Fleet lost its traditional gentlemanly ways, while its inmates had increased five-fold by the end of the Queen's reign in 1603. The situation became so serious that the Privy Council was compelled to take action from a variety of motives. After all, if the issue of a protection could rescue some merchant from the brink of insolvency and imprisonment, might not some debtor actually in prison be liberated by just a little forbearance and foresight on the part of his creditors?

A petition from the inmates of the King's Bench prison, where in less than 15 years the number of debtors had risen from the 13 of 1561 to over 160 by 1576, had the desired effect. The Privy Council set up a commission of inquiry with instructions to sift from the prisoners for debt in that prison those whose creditors would be better served by release than "by keeping them unmercifully in prison" and to secure the necessary consents. The members of the commission included the Bishop of London, the judges and law officers together with leading merchants in the City. Since the quorum was fixed at no more than three it was evidently intended that the commissioners should operate in panels and so with speed.

However all did not proceed as planned. Some 40 commissioners duly assembled at Southwark almost immediately. Meetings of prisoners and creditors were promptly arranged. But they had reckoned without the prison warden who was presumably concerned for the fees and profits of his office. He challenged the

commissioners' powers and refused to produce any prisoners for examination. His argument was upheld in the Court of King's Bench.

The commissioners were therefore obliged to ask the Privy Council to confirm and strengthen their authority. This all took time during which the prisoners were "drowned in a sea of deep despair". Nonetheless by mid-June 1576 the commissioners had managed to achieve the discharge of quite a few debtors with the consent of their creditors.

V. An Explanatory Statement

In the early part of James I's reign insolvency law was in crisis once more. The substantial upsurge in financial failures since 1571 had exposed serious weaknesses in the system. As one observer remarked in 1612, protections and bankruptcies had become "marvellous hindrances to all manner of commerce."

Some minor alterations were made to the bankruptcy statute in 1604 and a decade later a private member's bill was submitted to the House of Commons but quickly disappeared. Further reform could not be delayed indefinitely. A severe economic depression in the 1620s finally brought matters to a head. The situation had also been exacerbated by the efforts of Sir Francis Bacon, the Lord Chancellor, to extend the issue of protections almost to breaking point. He was prepared to assist a debtor faced with the impossibility of obtaining a voluntary arrangement due to opposition from a single dissenting creditor. An order would be made, without any prior notice to him, for his imprisonment on account of his obduracy. Protests from the common law bar soon produced a royal proclamation forbidding such a bizarre practice. The petitions seeking such orders were known as "bills of conformity".

The nature of the bankruptcy legislation of 1624 can be followed in remarkable detail. Many contemporary diaries, records and other material relating to the lengthy debates in Parliament over several years have survived. By far the most important and interesting document is "A Brief of the Bill exhibited against Bankrupts".[1] Its object was to provide a justification for each and every proposed change in the law. The version issued in March 1624 had first been drafted at least three years before in connection with a bill for bankruptcy reform under discussion in 1621.

The intention was, for example, to enlarge the description of a bankrupt by adding to the former law such persons "as shall obtain or seek protection against creditors except only in time of Parliament", together with anyone seeking a bill of conformity. These particular changes were needed, it was explained, since experience had shown that petitions of this nature were simply used by unscrupulous debtors to "hinder" creditors, the object being to compel them to take less than their just debts or to procure longer dates of payment.

1. See Appendix to this paper below.

A few further examples will help to give the flavour of this remarkable explanatory statement. It was necessary, for the removal of doubt, to confer express power upon bankruptcy commissioners or their appointed agents "to break open the bankrupt's shop, house, or warehouses" with intent to seize his body, goods and estate.

A valiant attempt was made to explain the rationale behind the entirely new "reputed ownership" clause. In the case where "the lands, goods, or chattels" of the bankrupt have been "assigned over upon good consideration, yet the same remain in the possession, order and disposition of the bankrupt after such grant or gift", this type of possession is "a badge of fraud". The grant, being secret and lying "in the desk many years thus concealed", was therefore made with improper motive of enabling the bankrupt to obtain "great trust and credit."

A further aim of the legislation was to inflict corporal punishment upon a bankrupt "by standing on the pillory" for two hours. In more serious cases the bankrupt was to lose an ear. The government also proposed that in extreme cases the bankrupt should be treated as a felon and as such be put to death. The explanatory statement remarked at this point that "Bankrupts increase and trade decreases; the best remedy will be fear of corporal punishment . . . The trade of bankrupting is the worm that eateth out the heart of all commerce and trade. Without casual loss, it is a wilful wrong." Parliament was unimpressed by the next assertion that the introduction of the death penalty was more "in terror . . . than likely to be prosecuted by creditors." The proposal did not find favour with Parliament at this stage but it would reappear 80 years later in the reign of Queen Anne.

The policymakers in the 1620s were well aware that misconduct was not always confined to the bankrupt. It was therefore expressly contemplated that "for the better distribution of the bankrupt's estate," the commissioners might examine creditors "upon the certainty of their just debts." Any penalties stipulated for in the instrument creating the debt were to be ignored for the purposes of proof. The aim was to clarify rather than alter existing law since the new provisions were considered to be within "the intent and equity" of the 1571 statute and in any event reflected existing practice. However, "the not expressing thereof, doth breed many times much question, and sometimes suits in law."

The boom in bankruptcy had one particularly important consequence; it led to an expansion in the study and teaching of insolvency law and the publication of books about it. Between 1585 and 1670 there were over 20 readings or series of lectures given in the Inns of Court dealing with insolvency-related subjects such as fraudulent conveyances, bankruptcy and usury. A summary of one series delivered at Gray's Inn in 1656 and attributed to John Stone, possibly a member of the Inn, was published a year or so later. The student was, for example, asked to consider whether an innkeeper could be made bankrupt. Likewise, he was asked whether a debtor might commit an act of bankruptcy by "keeping house" in "a castle" or by "departing" to the Isle of Man. Another question concerned the difficult and topical issue as to the power of commissioners to claim land in Ireland owned by a bankrupt.

VI. Discharge and Defoe

With the end of the Commonwealth period and the restoration of Charles II insolvency law was again under attack. The preamble to an Act of 1661 recites a long catalogue of abuses relating to imprisonment for debt. The basic complaint was that debtors were frequently imprisoned in proceedings where the plaintiff's claim was flimsy or there was no actual plaintiff name in the writ. The device was used by "malicious persons" in order "to vex and oppress" debtors and by such evil practices "to force from them unreasonable and unjust compositions to obtain their liberty."

From the standpoint of countless future generations of insolvent debtors Pitt's time in the Fleet was employed to good effect. He decided to expose the horrendous conditions prevailing there and, according to his informants, also existed in similar institutions elsewhere. The result was the publication in 1691 of *The Cry of the Oppressed.* Unable to resolve his own extremely confused financial situaation, he remained in a debtor's prison until his death in 1696.

The following year another bankrupt took up the campaign for insolvency law reform. On this occasion it was none other than Daniel Defoe, later to achieve fame as a journalist, pamphleteer and the author of *Robinson Crusoe* and *Moll Flanders.* He had first been ruined in 1692 when a tile manufacturing venture in Kent collapsed and at about the same time through further losses sustained on the marine insurance market caused by the seizure and sinking of large numbers of vessels by French privateers. However, unlike Pitt, Defoe was astute enough to obtain a reasonably prompt release from prison.

In January 1697 Defoe published *An Essay upon Projects.* The first chapter of this work entitled "Of Fools" contains proposals for the improvement of the law relating to individuals who though "in a full state of health and strength" were nonetheless "deprived of reason to act for themselves." The next chapter is concerned with a suggestion for the establishments of a "charity-lottery" for the benefit of the poor. Defoe then proceeds in a lengthy chapter simply called "Of Bankrupts" to set out his thoughts about the modernisation of bankruptcy law.

Defoe prefaced his remarks by observing that this essay had some right to stand next to that concerned with fools for "besides the common acceptance of late, which makes every unfortunate man a fool, I think no man so much made a fool of as a bankrupt." There then follows what can best be described as a statements of the philosophy which was destined to play a substantial role in the developments of Anglo-American insolvency jurisprudence. Defoe wrote:

> If I may be allowed so much liberty with our laws, which are generally good, and above all things are tempered with mercy, lenity, and freedom, this has something in it of barbarity; it gives a loose to the malice and revenge of the creditor, as well as a power to right himself, while it leaves the debtor no way to show himself honest: it contrives all the ways possible to drive the debtor to despair, and encourages no new industry, for it makes him perfectly incapable of anything but starving.

In the course of the essay Defoe identifies four types of debtor but has to concede that the problem is how to distinguish between them. First comes the honest debtor who fails by visible necessity, losses, sickness, decay of trade, or the like. Secondly there is the knavish, designing, or idle, extravagant debtor, who fails because either he has run his estate in excesses, or on purpose to cheat and abuse his creditors. Thirdly there is the debtor exposed to a moderate creditor who seeks but his own, but will omit no lawful means to gain it, and yet will entertain reasonable and just arguments and proposals. Finally there comes the debtor who is compelled to face the rigorous severe creditor who values not whether the debtor be an honest man or knave, able, or unable, but will have his debt, whether owing or not, without mercy and compassion but full of ill language, passion and revenge.

Defoe's detailed blueprint for a new kind of bankruptcy system was primarily designed for bankruptcies occurring within the boundaries of the City of London, although it was in fact capable of being adopted on a national scale. His approach, consistent with the principles he had set out at the beginning of the essay, was by any standards remarkably radical. He envisaged that once a bankrupt had made a just and fair surrender of all his estate and effects, *bona fide* according to the true intent and meaning of the applicable legislation, to the representatives of the creditors, he would be entitled to claim back a 5% share for himself. This he could take either in cash or from a section of his stock. In addition he would also be entitled to "a full and free discharge from all his creditors."

The combined efforts of Pitt, Defoe and others campaigners finally bore fruit in 1705. That year Parliament, in the teeth of considerable opposition, granted a bankrupt for the first time in English law the right to obtain from the court, albeit in complicated proceedings involving consultation with the creditors, a certificate of discharge. The creditable instincts that prompted this far-reaching innovation were, however, offset by a less humane provision introduced at the same time. In certain circumstances bankrupts could henceforward face the death penalty.

Several years before Pitt and Defoe were advocating some relaxation of bankruptcy laws in favour of debtors, various proposals had been submitted to Parliament to achieve a somewhat similar result by a slightly different route. In 1679 a bill had been drawn up "to prevent the smaller number of the creditors of a bankrupt from obstructing the composition of the greater number." After several further unsuccessful attempts a statute was finally passed in 1696 on the subject. The measure applied to bankrupts as well as to all other insolvent debtors. The statute, however, had a very short life and was repealed the following year on the following grounds:

> Notwithstanding the provisions in the said act for preventing frauds in the making of such compositions, many fraudulent practices have been committed, by making pretended agreements with persons who were not real creditors, and for greater advantages than were expressed in such compositions.

By the early part of the eighteenth century there was thus in place a solid tripartite structure of insolvency law. The fate of the large population of insolvent debtors

was largely in the hands of the judiciary supported by an army, frequently corrupt, of prison wardens and their staff. Commercial insolvency had its own bankruptcy code. Both regimes had support from the law specifically concerned with fraudulent transfers of property. Soon afterwards Parliament attempted, in extremely controversial circumstances, to create a fourth hybrid element of a legislative and quasi-judicial nature.

VII. Decline and Fall

In the summer of 1720 the darling of the Stock Exchange was the South Sea Company. A recent spectacular rise in its share price had within a few months been followed by a catastrophic plunge. The heavy losses sustained as a result were widespread especially amongst the aristocracy and prominent merchants. As one observer, referring to events in the late 1660s, put it,"the fire of London or the plague ruin'd not the number that are now undone."

The company had obtained its charter in 1711 with a view to the exploitation of commercial opportunities in the south Atlantic region which it was hoped would arise once the expected peace negotiations with Spain were finalised. The company was in fact largely transformed into a financial corporation specialising in schemes designed to relieve central government of portions of its public debt. The latest such scheme had proved particularly attractive since it enabled the holders of government annuities to convert them into stock in the company. Whatever merits it may have possessed in principle were hopelessly damaged from the start by virtue of the corrupt manner in which the necessary parliamentary sanction had been obtained. To this end substantial bribes were given to the most influential politicians in the form of bogus or "fictitious" shares in the company itself.

Once the enormity of the situation was appreciated Parliament moved into action without delay setting up several committees of inquiry. A bill was also brought in for restraining the company's directors, governor, treasurer, cashier and clerks from leaving the realm for 12 months and for discovering their estates and effects. They were also specifically prevented from transporting or alienating their assets or any part thereof. Despite these injunctions the treasurer, the repository of "all the secrets of the dishonest directives", managed to pack up the whole of his papers and documents, escaping in disguise abroad. The repeated attempts to have him extradited were successfully resisted. Five of the directors, including Edward Gibbon, the grandfather of the great historian, were promptly taken into custody and lodged in the Tower.

In February 1721 the report of the "Committee of Secrecy" was submitted to the House of Commons. It had a shocking story to tell. The House was informed that the inquiry had been attended with numerous difficulties and embarrassments; everyone the Committee examined had endeavoured, as far as in him lay, to defeat the ends of justice. In some of the books that were produced the Committee discovered that false and fictitious entries had been made; in others, there were entries of money with blanks for the name of the stockholders. There were frequent erasures

and alterations, and in some of the books leaves had been torn out. It was also found that some books of great importance had been destroyed altogether, and that others had been taken away and secreted.

In due course the House, after considering the culpability of the directors in turn, ordered them to pay compensation as appropriate. The total amount so raised exceeded £2 million. Each defendant was, however, permitted to retain a certain residue of his assets in proportion to his conduct and circumstances "with which he might begin the world anew." In Gibbon's case the allowance was £10,000 out of £106,000. Compared with most of the other 30 or so culprits his treatment was relatively lenient. Many years later the grandson, whilst conceding that he was not entirely impartial, described the whole affair as a travesty of fairness and equity, condemning the proceedings as violent, arbitrary and a disgrace to the cause of justice.

VIII. **The Wind of Change**

By Gibbon's day bankruptcy law was in a dismal condition. There were about 70 commissioners, mostly barristers serving part-time, who were divided into more than a dozen independent panels spread across the country. The opportunities for malpractice were immense and the professionals such as attorneys and jobbers did not hesitate to exploit them to their own advantage. A variety of collusive devices and an exorbitant fee structure meant that there was seldom anything available for creditors. The system was widely and justly criticised as an engine of fraud.

Meanwhile the situation with regard to imprisonment for debt had gone from bad to worse. Conditions in the Fleet were no better than when Pitt was there. A parliamentary inquiry in 1729, at the beginning of George II's reign, had found the warden guilty of the most notorious breaches of trust, "of great extortions, and the highest crimes and misdemeanours" in the execution of his office. He had "arbitrarily and unlawfully loaded with irons, put into dungeons, and destroyed prisoners for debt, under his charge, treating them in the most barbarous manner . . . " A special act was needed to dismiss him and new rules were introduced to prevent any further abuses. They were of little avail. In 1792 a committee of the House of Commons inspected the prison but its recommendations for new regulations were ignored.

Reform was once again very much in the air at the beginning of the nineteenth century. The main catalysts were provided by the impact of the Industrial Revolution on commercial life, the fresh humanitarian ideas associated with the age of enlargement as well as the inevitable crop of well publicised financial scandals recorded in the daily press.

The first major scholarly attempt to analyse the defects of the insolvency system with a view to its reform was written by James Bland Burges. He was a member of Lincoln's Inn and, of course, a bankruptcy commissioner. His *Considerations on the Law of Insolvency*, a work of nearly 400 pages, was published in 1783. It contains an extremely detailed, if rather tedious, historical survey in which the defects of the existing system are meticulously described, followed by "A Proposal for a Reform".

In his introductory remarks Burges suggested that an understanding of the historical background was necessary before the legislature could embark on reform of what he described as "a dark and neglected subject".

Not long after completing his masterpiece Burges went into Parliament and lost no time in bringing forward a modest measure for reform that made no progress. After a stint as a junior minister in the Foreign Office he retired from public life and turned his hand to writing plays, several of which were performed professionally. He died in 1823 presumably unaware that his work had four years previously been extensively referred to before the Supreme Court in *Sturges v. Croninshield.*

The cause of insolvency law reform did not receive a powerful champion until 1806 when Sir Samuel Romilly became solicitor general. Romilly was one of the most outstanding lawyers of his generation with a large bankruptcy practice at the bar. A disciple of Jeremy Bentham and known publicly as a fierce opponent of the slave trade he entered government committed to modernise insolvency law. His plans were, however, thwarted by vested interests and obstruction in Parliament. Although the defeat was a great personal disappointment, he had paved the way for two significant achievements. The first was the establishment of a new court for the relief of insolvent debtors that sat alongside the bankruptcy court. The second was the initiation of the first tentative steps to end the Crown's prerogative, a relic of feudal days, not to be bound by bankruptcy proceedings.

Romilly was also the inspiration for a golden age in the literature of insolvency law. In 1810 *A Letter on a Revision of the Bankrupt Laws*, addressed to Romilly, was published by William Evans. A former solicitor, he was a barrister on the northern circuit and an expert in French law. His proposals, though at first received with little enthusiasm, eventually became very influential. He boldly suggested the idea of voluntary bankruptcy at a time when anything that smacked of "friendly" proceedings was universally still regarded as "a badge of fraud". In 1811 Basil Montagu, a bankruptcy commissioner, produced *Enquires respecting the Administration of Bankrupts' Estates by Assignees.* He was not only a prolific writer on insolvency law but also became one of the foremost campaigners for its reform.

The widespread dissatisfaction in the commercial community with bankruptcy law compelled the House of Commons in 1817 to appoint a Committee to investigate what should be done about it. All the principal bankruptcy practitioners of the day were examined as well as "the most intelligent merchants". The first tangible results of the Committee's labour appeared with the enactment in 1825 of what was essentially a consolidation measure. Many of the existing statutes contained mere repetitions with small variations, some repealing parts of others and all encumbered with prolixity and redundancies. It did, however, contain one important innovation following a recent experiment in Scotland. It provided for a limited form of voluntary bankruptcy.

These developments were closely watched in the United States. One contemporary observer reported that the new provisions would often enable a debtor by resuming his business to manage his property to greater advantage than any assignees could do and at the same time relieve it from many expenses. It was also

said to be advantageous to creditors in quite a few cases by giving them negotiable paper with good names which would be immediately available in the money market, instead of an uncertain claim against a bankrupt estate from which nothing might be realised for a long period.

In 1831 Parliament at last begin the daunting process of modernising insolvency law. The task was not to be completed for another 50 years. During that time the legislative pendulum oscillated from one theory to another, as the imperfections of each were experienced in succession. The stability finally attained in 1883 lasted for almost a hundred years.

However in 1929 a development took place that had a long-term impact on the reputation of insolvency law. In that year the procedure that permitted solvent companies to be liquidated on a voluntary basis was extended to insolvent companies. The decision to do so with no adequate machinery for dealing with malpractice and misconduct on the part of officeholders was arguably imprudent. The chickens finally came home to roost in the late 1960s when, as the new embryonic insolvency profession was taking shape, the voluntary liquidation procedure was grossly abused by a handful of practitioners.

IX. A Silent Revolution

Before the publication in 1982 of the Cork Committee's Report on *Insolvency Law and Practice* (Cmnd. 8558) information about the origins and development of insolvency law was not easy to find. The most accessible source was the brief historical survey in Chalmers and Hough's commentary on the Bankruptcy Act of 1883. Chalmers, best known for his Sale of Goods Act 1892, had helped to draft the earlier Act and at the time Hough was Inspector General at the Board of Trade.

The other work often consulted and referred to in the Cork Report was Edward Christian's *The Origin, Progress, and Present Practice of the Bankrupts Law* (1813). However it is not always entirely reliable. A bankruptcy commissioner and professor of law at Cambridge, Christian was poorly regarded in the University in part as a result of a disastrous investment it made on his advice. He died in 1823 the object of some, perhaps undeserved, ridicule.

During the decade prior to Cork, although unknown to English insolvency practitioners at the time, the study of the history of their subject had been transformed by the appearance, in 1974, of a work of immense scholarship and endless fascination. This was Peter J. Coleman's *Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607–1900* (The State Historical Society of Wisconsin, Madison). In the general part of the book Coleman provides references to about 50 books, articles and other material relating to the history of Anglo-American insolvency law. The reminder of the work examines the attitude adopted within each State, how the approach varied between them and the extent to which they adhered to or departed from insolvency practice in the mother country.

The pre-Coleman material mainly used in this essay can be briefly summarised. They include: Louis Levinthal's "The Early History of English Bankruptcy," in the

University of Pennsylvania Law Review 67; 1–20 (1919); Abraham Freedman's "Imprisonment for Debt," in *Temple Law Quarterly* 2; 330–365 (1928); Israel Treiman's "Acts of Bankruptcy: a Medieval Concept in Modern Law," in *Harvard Law Review* 52; 187–215 (1938); Garrard Glenn's "Essentials of Bankruptcy: Prevention of Fraud, and Control of Debtor," in *Virginia Law Review* 23; 373–388 (1937); and Treiman's "Majority Control in Compositions: its Historical Origins and Development," in *Virginia Law Review* 24; 507–527 (1938).

The volume of material that has appeared since Coleman is immense and can conveniently be divided into articles and material produced by legal (overwhelmingly American) scholars, works on the history of Parliament, the social and economic background and biographical material.

The legal articles and monographs post-Coleman consists mainly of the following: W. J. Jones's "The Foundation of English Bankruptcy: Statutes and Commissions in the Early Modern Period," in *Transactions of the American Philosophical Society* 69; 1–63 (1979). Douglass Boshkoff's "Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings," in *University of Pennsylvania Law Review* 131; 69–126 (1982); R. H. Helmolz's "Bankruptcy and Probate Jurisdiction before 1571" in *Missouri Law Review* 48; 415–429 (1983); Robert Weisberg's "Character, and the History of the Voidable Preference," in *Stanford Law Review* 39; 1–137 (1986). J. H. Baker's *Reports from the Lost Notebooks of Sir James Dyer*, published by the Selden Society in two volumes in 1993 and 1994 respectively; Baker's *Readers and Readings in the Inns* of *Court*, also published by the Selden Society as volume 13 in its Supplementary Series in 2000. A copy of Stone's lecture notes at Gray's Inn is held in the library of the Law School, University of Pennsylvania.

Burges's *Considerations on the Law of Insolvency* in 1783; there is a copy in Lincoln's Inn Library. The third edition of Eden's *Digest of the› Bankrupt Law: with an Appendix of Precedents* appeared in 1832 and was framed with reference to the new Bankruptcy Act of the previous year. The development of insolvency law during this period is the subject of V. Markham Lester's *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-up in Nineteenth-Century England* (Oxford, 1995).

A wealth of detailed information about the barristers who helped to shape modern insolvency law is available in the old *Dictionary of National Biography*. The entry for Basil Montagu is particularly revealing. His contribution to the literature of the subject over an exceptionally long career is truly phenomenal and deserves greater consideration than is here possible.

X. An Embarrassment of Riches

Tudor parliamentary history has been extensively covered during the last 30 years or so. In 1970 the Cambridge University Press published S. E. Lehmberg's *The Reformation Parliament*, followed in 1977 by his *The Later Parliaments of Henry VIII 1536–1547*. Geoffrey Elton's *Reform and Renewal: Thomas Cromwell and the Common Weal* (Cambridge, 1973), at page 149, is the important source for "the bill of bankrupt" of 1532. The complex story behind the insolvency legislation of 1571 is described by

Elton in a lengthy footnote in "The material of parliamentary history," published in volume 3 of *Studies in Tudor and Stuart Politics and Government: Papers and Reviews 1973–1981* (Cambridge, 1983), at page 146. *The Parliament of England 1559–1581* (Cambridge, 1986), also by Elton, is absolutely indispensable for an understanding of the legislative background during the period. The controversial usury debates in the late 1560s are well covered by Norman Jones's *God and the Moneylender: Usury and the Law in Early Modern England* (Blackwell, 1989).

A considerable amount of material such as contemporary diaries and journals has survived relating to the parliamentary debates in the 1620s about bankruptcy. Much of this can be found in Wallace Notestein's *Commons Debates for 1621* (seven volumes, Yale, 1935). The explanatory statement of 1624 is printed in volume 7, at pages 104–108.

This growth in the history of Parliament has been matched by a similar phenomenal increase of research in the parallel field of economic, social and financial history. It is only possible here to mention a small handful of this rich harvest of material.

The *Liber Albus*, the *White Book of the City of London*, is a compilation of material about business life prepared by John Carpenter in the early fifteenth century. A translation from the original Latin and Anglo-Norman by Henry Riley was published in 1861. A very useful description of the medieval procedure for levying execution against the goods of a debtor is contained in Martha Carlin's *London and Southwark Inventors 1316–1650: a Handlist of Extents for Debts* (Centre for Metropolitan History, Institute of Historical Research, University of London, 1997). According to Christopher Dyer's *Making a Living in the Middle Ages: The People of Britain 850–1520* (Yale, 2002), there were about 4,000 shops, stalls and other points of sale in London by the end of the thirteenth century. The collapse of the Scali bank in 1326 is referred to in my "The Insolvent Italian Banks of Medieval London," in *International Insolvency Review*, 9; 147–156 and 213–231 (2000).

A vast amount of information relating to the activities of unscrupulous moneylenders in Tudor and Stuart times, the financing techniques they adopted and their disastrous impact on borrowers is contained in Lawrence Stone's *The Crisis of the Aristocracy 1558–1641* (Oxford, 1965). The insolvency of the Johnson firm was dealt with at length by Barbara Winchester in *Tudor Family Portrait* (Cape, 1955). Further details about the affair, in the light of recently published documents, are given in my "'Shakespeare in Debt'? English and International Insolvency in Tudor England," *Insolvency Intelligence*, 13; 36–37 and 44–46 (2000).

The commercial life of Tudor England including the frequent misfortunes of prominent merchants has been the subject of several articles by George Ramsay, a fellow of St. Edmund Hall, Oxford. I am especially grateful to the Hall's librarian for making two of them in particular available to me.

The first entitled "A Saint in the City: Thomas More at Mercers" Hall appeared in the April 1982 issue of the *English Historical Review*, at pages 269–288. The second article "Debts and Debtors in Shakespeare's London: Neither a Borrower Nor a Lender Be *Hamlet*, act 1, sc.iii" was published in 1978 by Giannini Editore in volume

IV of *Studi in Memoria di Federigo Melis*, a celebrated Italian economic historian. Without this and several other books and articles by Ramsay it would not have been possible to appreciate the important role played by the issue of protections in the late Tudor and early Stuart periods.

Pitt's career is the subject of a paper by Michael Harris entitled "Moses Pitt and Insolvency in the London booktrade in the late Seventeenth Century". It was printed in *Economics of the British Booktrade 1605–1939*, published in 1985 by Chadwyck-Healey. This collection of articles is referred to in Adrian Johns's delightful *The Nature of the Book: Print and Knowledge in the Making* (University of Chicago Press, 1998). The appalling conditions in the City's prisons are described in the *Encyclopaedia of London* (Macmillan, 1983).

Defoe's observations on bankruptcy form part of "An Essay upon Projects" which is available in *The True-Born Englishman and other Writings*, published as a Penguin Classic in 1997. There have been several biographies of Defoe in recent years; the latest Maximillian Novak's *Daniel Defoe; Master of Fiction* (Oxford, 2001).

The circumstances of the South-Sea Bubble scandal are described in W. A. Speck's *Stability and Strife: England 1714–1760* (Edward Arnold, 1977). An extremely vivid, informative and readable account of the affair can be found in Charles Mackay's *Extraordinary Popular Delusions and the Madness of Crowds* (reprinted in the Wordsworth Reference series, 1995). It is as relevant today as it was when first published a century and a half ago, just before railway mania gripped the investing public.

The pursuit of the merchant debtor and the bankrupt from earliest times to the 18th century was the subject of a London University Doctoral Thesis by Fransis Cadwallader in 1965; a work of immense scholarship in two lengthy volumes, it has never been published. A copy of the Thesis is lodged in the Senate House Library of London University.

No study of American insolvency law can be undertaken without Charles Warren's *Bankruptcy in United States History*. Originally published in 1935 it has recently been reissued as a "bankruptcy classic" (BeardBooks, Washington, D.C., 1999). Coleman's 1974 book merits similar treatment. The remarks of the contemporary observer about the new procedure under the 1825 statute are taken from Warren, citing an article in *American Jurist* 1 (1829), at page 35.

The 1999 annual meeting of the Association of American Law Schools held a symposium on "100 Years of Bankruptcy: Looking Forward By Looking Back". The proceedings were printed in *Bankruptcy Developments Journal* 15; 253–381 (1999). They include a paper by David Skeel, Professor of Law in the University of Pennsylvania, entitled "The Genius of the 1898 Bankruptcy Act" which picks up recent material on the history of English insolvency law. Professor Skeel has since expanded his contribution in *Debt's Dominion: a History of Bankruptcy* (Princeton, 2001).

Finally there is the Cork Committee itself. In *Rescuing Business: The Making of Corporate Bankruptcy Law in England and the United States* (Oxford, 1998) Bruce Carruthers and Terence Halliday have presented a detailed account of the Committee work as well as providing delightful vignettes of some of the members. The authors are

respectively a social scientist and a socio-legal scholar. They studied the political and social dynamics of corporate bankruptcy law by comparing the reforms of the 1978 United States Bankruptcy Code and the English Insolvency Act 1986.

This, then, is the background to what was said at the conclusion of the Cork Report, in paragraph 1982. The aim of the Committee had been "to restore respect for the law of insolvency and to ensure that the solutions which it is called on to provide are as fair and equitable as can reasonably be achieved in the interests of justice. We believe that the need for reform is urgent and imperative."

The present paper is dedicated to the memory of Sir Kenneth Cork, Lord Mayor of London in 1979 and between 1977 and 1982 the distinguished Chairman of the Insolvency Law Review Committee.

Appendix: Parliamentary Paper Concerning the Bankruptcy Legislation of 1623

[Alford papers, Harl. 7608, ff.40v–41][2]

A Briefe of the Bill exhibited against Bankrupts

The Bill extendeth onely to make such Bankrupts as seeke their living by buying and selling, as the former acts did, onely it maketh a Scrivener, receiving other mens monyes into his trust or custody, lyable to the same, and an alien. It further describeth a Bankrupt, and provideth that the remedies appointed by the former acts of 13 Eliza. and 1 Jac. shall be extended to such as are described by this act to be Bankrupt. It enlargeth the remedies in some cases, not suffiently provided for by the former lawes, and in speciall cases inflicteth corporall punishment.

It enlargeth the description of a Bankerupt, and addeth to the former Lawes.

1, Such as shall obtaine or seeke protections against Creditors, unlesse onely in time of Parliament. 2, Such as shall prefer or exhibit into any his Maiesties Courts, any bill or bils, or to his Maiesty any petition, or petitions of conformity, to compell Creditors take lesse, then their just debts, or to procure longer daies of paiment.

Reasons: 1, Experience sheweth, that this is done onely to delay and hinder Creditors; 2, That they spend, and consume their estates in the meane time; 3, The money spent in this course, and given to undertakers, may helpe pay his just debts; 4, This is by pretence of a course of Law, to hinder Law; 5, This is to compell charity, which should be free.

3, Such as owing an hundred pound or more, shall not pay or compound for the same, within sixe moneths after the same shall grow due, and be demanded.

Reason: 1, Many men avoyd the acts which make a Bankrupt, but make no conscience by delayes to defraud men of their just debts.

4, Such as being arrested for debt, shall lye in prison sixe moneths, or being arrested for two hundred pound just debt, or more, shall get forth by putting in common or hyred bayle, in which case the party is to be a Bankrupt, from the time of the arrest.

2. This is the same as S.P. 14/160:74, calendared under March 13, 1624. The same breviate may well have been used in both parliaments. Another copy is Guildhall Library, Broadsides, 24:44.

Reasons: 1, Not being a Bankrupt til six moneths, incourageth Bankrupts, in which time they provide for their allies and friends at pleasure; 2, They pay whom they list, they learne much ill and craft; 3, The common and hyred bayle, is a tricke meerely to defraud Creditors, and a great abuse; 4, After such bayle, they keepe their persons privat, and yet spend their estates.

The Bill relieveth Creditors in some cases, not sufficiently, or expresly provided for by the former lawes.

1, That the Bankrupts wife, after he is proved a Bankrupt, shall and may be examined, onely for the discovery of his estate, conveyed or concealed by her, and being in her privity.

Reason: For want of this, the former lawes are of small use for the Bankrupt, knowing the wives are not to be examined, convay their goods by their wives helpe to persons unknowne to themselves, or any others then their wives.

2, That the Commissioners, or others by their warrant or appoyntment, may breake open the Bankrupts shop, house, or warehouse, to the intent to seaze his body, goods, and estate.

Reason: This is doubted, whether sufficiently provided for by the former lawes, whereupon some fearefull Commissioners, making scruple, the Bankrupt in the meane time convaieth away himselfe, and his goods at pleasure.

3, That for the better distributing of the Bankrupts estate, the Commissioners may examine Creditors, upon the certainty of their just debts, and that they be relieved for no more then their meere debt, whatsoever security they have, by judgement, statute, recognisance, or bond forfeited, without respect to the penalties in such securities.

Reason: This is not expresly provided for by the former lawes, but is within the intent and equity, and is so done *de facto*, by Commissioners; but the not expressing thereof, doth breed many times much question, and sometimes suits in law, some Creditors requiring reliefe for penalties and forfeitures.

4, That in case of any lands, goods, chattels, etc. of the Bankrupts, made over to any person, upon condition of redemption at a day, not due at the time of his being a Bankrupt, the Commissioners may assigne power to any persons to pay the meere debt; upon tender or payment whereof, the Commissioners may devide the surplusage of the benefit of the said lands, goods, etc.

Reasons: 1, It hath been conceived, the Commissioners have not power by the law, to assigne persons to performe the condition, whereupon the Creditors are forced to long and tedious suits, in Courts of equity; 2, It seemeth very reasonable and equall to be so.

5, That in case of extents upon any the Bankrupts lands, goods, and chattels, by any accomptant to his Maiesty, the Commissioners may examine such accomptant upon oath, whether the debt were originally due to himselfe, or transferred to him in trust for the use and benefit of the party, whose debt it was; and if it were, that the same be made subject to the Commission.

Reason: It hath beene a usuall course of late yeeres, to transferre debts to accomptants, and to extend for his Majesty, the accomptants being onely used for

other men, and yet the accomptants refuse to answere upon oath, to any such interrogatory, because it seemeth to be the Kings case.

6, That where lands, goods, or chattels, of any Bankrupt, be assigned over upon good consideration, yet the same remaining in the possession, order and disposition of the Bankrupt, after such grant or gift make to receive the rents, and take the profits; That such lands, goods, and chattels be made subject to the Commission.

Reasons: This possession of the Bankrupt, the grant being concealed, was the motive of the Bankrupts great trust and credit. This possession of the Bankrupt, is a badge of fraud, and lyeth in the desck many yeeres thus concealed.

The Bill inflicteth corporall punishment, by standing on the Pillory in the Country, etc., two houres, and losing one eare by course of indictment in cases.

1, Where the Bankrupt doth fraudulently, and deceitfully convey away his goods, or chattels, to the value of five pound, and shall not upon his oath discover, and (if it be in his power,) deliver unto the Commissioners all that estate, goods, and chattels so by him or his meanes kept from the Commissioners. 2, Where hee cannot make it appeare unto the Commissioners, that he hath sustayned some casuall losse, after the buying, and taking up of such wares, monyes and commodities, whereby he is become unable to pay his just debts.

Reasons: 1, Bankrupts increase, and trade decreaseth; the best remedy will be feare of corporall punishment. 2, this corporall punishment is onely in case of wilfull fraud and deceit, and where that fraud and deceit doth continue after monition and warning by the Commissioners. 3, The trade of Bankrupting, is the worme that eateth out the heart of all commerce and trade. 4, Without casuall losse it is a wilfull wrong.

The Bill appointeth the Bankrupt to be pursued, and taken as a Felon, and to suffer death as in case of felony, without corruption of blood, or forfeiture of lands, or goods in case.

The Bankrupt shall flee away, and will not appeare before the Commissioners, upon or before the fift proclamation to be made according to the forme of the aforesaid statutes, and after three summons first made in writing, under the Commissioners hands, and left at the house, or shop, of the Bankrupts last abode or dwelling.

Reasons: 1, This wilfull deceit is worse then burglary, or robbing by the high-way, which may be prevented, this cannot; 2, The time limited is very sufficient for such to come in and avoyd this punishment; 3, This is more in terror to them, then likely to be prosecuted by the Creditors.