

P A R T I I I

BANKRUPTCY: 1542 - 1732

CHAPTER 15THE FIRST BANKRUPT

England with its need and desire for the wealth of the newly discovered countries, and its wish that its merchants should go out and build a traders empire required something more than machinery which had served the merchants of the Staple for almost two hundred years. Europe had already seen the introduction of laws to deal with the merchant who failed in his business, laws which differing in their severity nevertheless struck basically at a common enemy, the fraudulent trader. No one country at this period saw the failure of its merchants as being the natural outcome of the hazards of trade, in a period when perils of the sea meant a great deal more than the stereotyped words in small print as they appear in the average charterparty of today.

The merchant who failed was fraudulent until proved bona fide; innocence of connivance in his failure was the last characteristic the average creditor would admit the debtor.

Flight and Forcible Entry

With the enactment of 34. 35 Hen. VIII, c.4,<sup>(1)</sup> England

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(1) 1542-3.

receives her first Statute of Bankrupts, but its explanation that it is to deal with "suche persones as doo make Bankrupte" is somewhat misleading. It is in reality rather more an attempt to bring up to date the statutes concerning persons who, being in debt, give their possessions to others to hold for them and then abscond.<sup>(2)</sup> It is still dealing with the fraudulent debtor, the fugitive. To the legislature there is no accident in failure, men make themselves bankrupt, they are attempting to rob their creditors of their rightful money.

This attitude is not wholly wrong, the earlier bankruptcy laws of the continent were dedicated to the fugitive<sup>(3)</sup> only later does the term *banca rotta* come into use. This attitude stems from the fact that the generally accepted way of proving that a man was bankrupt lay in showing that he had withdrawn from his usual abode or had fled from the market place.<sup>(4)</sup> The early Spanish bankruptcy law

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(2) See pp. 82, 237 Probably the earliest bill before the Lords concerned with this problem is called a "Bill for Merchants that run away with other Men's Goods". - Lords Jo. 1, p. 208 (19 Feb. 1542) A later bill however, is called a "billa pro Bankrupts". - Lords Jo. 1, p. 211 (28 Feb. 1542).

(3) Lattes (A.) 'Il Diritto Commerciale Nella Legislazione Statutaria' (1884) p. 309.

(4) Lattes, p. 333.

of 1480 was directed only against debtors who fled with their goods,<sup>(5)</sup> it was to be another sixty years before they included the man who had ceased to pay his debts,<sup>(6)</sup> similarly the first Dutch Bankruptcy enactment in 1540 is levelled largely against the 'fugitiven'.<sup>(7)</sup>

The term banca-rotti or bankrupt, however, slowly made its way to England, and its usage is always to disparage, and no doubt frequently to curse.<sup>(8)</sup> More, writing in 1533, speaks of "Suche bancke ruptes which whan they have wasted and myse spent theyr owne wolde than be very faine... robbe spirituall and temporall",<sup>(9)</sup> and a Rome correspondent reporting in 1539 speaks of the 'danger to make banke rota'.<sup>(10)</sup>

Conduct is the guide to a man's insolvency, it is only on particular actions that a man may be made bankrupt, at first his intention is to some extent relevant, later the legislature removes this necessity where such intention might be difficult to prove.<sup>(11)</sup>

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(5) Codigos Antiguos de Espana (Edited by Alcubilla) Vol. II, Lib. xi, Tit. xxxii, ley 1 (1480) and ibid ley 2 (1502)

(6) Ibid ley 5 (1548)

(7) Groot (H.) 'Placaat Boek' I, p. 311.

(8) Such cursing should, however, be kept for those who were not traders, see p.436.

(9) More (T.) 'Apologye' (E.E.T.S.) c. XXI, p. 85.

(10) S.P. Hen. VIII, 1, p. 609

(11) See pp. 468, 488.



Thus it comes that a man's action or inaction will suffice to carry him into the semi-criminal class, although his failure may be due to circumstances which he could not hope to control. When Adam Smith stated that 'bankruptcies are most frequent in the most hazardous trade',<sup>(12)</sup> he may have been stating what today would seem self-evident, but even in 1776 this fact of failure as a camp-follower to overseas trading was being only grudgingly conceded by men who understood its difficulties.

Certainly in the sixteenth and seventeenth century few were going to treat the bankrupt any other than severely, the creditor who sought to 'cut the forfeiture from that bankrout there',<sup>(13)</sup> would have been untroubled had that bankrupt raised his voice with Guzman De Alfarache and cried: "In what Consistory (I pray) ... hath Bankrupture been determined and condemned a sinne?" The answer was only too simple, going bankrupt was nothing less than a fraud on one's creditors, and fraud was surely a sin.

If the fleeing foreign debtor had only slowly been able to overcome the Englishman's natural reluctance to run, it was not due to any divine presence restraining the average Anglo-Saxon

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(12) Adam Smith 'The Wealth of Nations', Vol. I, pt. I, c. 10, p. 136 (4th edn. 1776)

(13) Shakespeare (W.) 'The Merchant of Venice' IV.1. 122.

(14) Aleman (M.) 'The Rogue or the Life of Guzman de Alfarache' (translated by Mabbe (J.) - Tudor Translations 2nd Series 1924 -), p. 50

from such a practice, the truth was that there had come into being a home product which served much better. Running away from home was always a hazardous business, to lock oneself in one's own home was much simpler, and keeping house, as it was known, was by the reign of Henry VIII a going concern.

Keeping house seems to some extent to have grown with the legislative programme against forcible entries and as a means of circumventing the difficulties caused by the enactments against fraudulent conveyances. The uncertainties brought about by civil strife had led to enactments forbidding persons to forcibly enter the domain of another:

"AND also the King defendeth, That none from henceforth make any Entry into any Lands and Tenements, but in case where Entry is given by the Law; and in such case not with strong Hand, nor with Multitude of People, but only in (peaceable) and easy Manner. And if any Man from henceforth do to the contrary, and thereof be duly convict, he shall be punished by Imprisonment of his Body, and thereof ransomed at the king's will."<sup>(15)</sup>

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(15) 5 Ric.II, St. 1, c. 7 (1381)

This statute of 1381 was followed by others which all sought to restrain the strong and armed from taking lands, goods and chattels save by due process of law.<sup>(16)</sup> In 1402 steps are taken to prevent the almost daily occurrence of violent disseisins and seizure of chattels by virtue of which persons are being so completely ruined that they do not possess sufficient even to bring actions to recover their lands and goods.<sup>(17)</sup> In 1429 the position was reviewed and a more definite machinery introduced to deal with the problem, now apparently aggravated by the failure of the justices of the peace to carry out the provisions of the former statutes.<sup>(18)</sup> By a proviso, however:

"... they which keep their Possessions with force in any Lands and Tenements, whereof they or their Ancestors, or they whose estate they have in such Lands and Tenements, have continued

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- (16) The above statute was confirmed by 15 Ric. II, c.2(1391). In London in 1365 we find a defendant charged with trespass in that he broke down the doors of the plaintiff and carried away two quarters of wheat the value of which is set at 14s. 2d. The defendant is found guilty of the act and sent to prison until he pays 30/- damages. C.P.M.R. p. 47 (1365)
- (17) 4 Hen. IV, c.8. In Ricarts Kalender (C.S.) p. xx we are told of an old London custom whereby a justice of the peace might take action in cases of forcible entry.
- (18) 8 Hen. VI, c.9. The party ousted is to be restored to possession whether it be vacant or full and there is to be a precept to the sheriff to return a jury to inquire regarding the forcible entry. A failure of the sheriff to carry out his duty renders him liable to forfeit £20 to the king and to make fine and ransom. It is also ordered that the chief officers of the cities and etc., may execute proceedings under this Act.

"their Possessions in the same by Three years or more, be not endamaged by Force of this Statute."<sup>(19)</sup>

Any disseisor that puts out or keeps out the true owner is to pay treble damages to the owner and also to make find and ransom to the king, the damage being, by its very nature, both civil and criminal.<sup>(20)</sup>

#### The Englishman's Home

This sanctity of a man's house although not a specific feature of continental law was a part of the civil law,<sup>(1)</sup> though this is hardly likely to have influenced the boroughs in which we find rules regulating the right to enter a man's house from an early period.<sup>(2)</sup> In many cases the rules took the form of restraining

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(19) This provision was affirmed by 31 Eliz. I, c. 11 (1588-9), see also 21 Jac. I, c. 15, (1623-4) and Bl. Comm. III, p. 179; IV, p. 148.

(20) See F.N.B. 248 H; 249 A. The Star Chamber dealt with many cases of forcible entry and riot. For example see Jackson v. Erneley and a London Jury, Sel.Cas. Counc. Hen. VII (S.S.) pp. 68-9; and Dyer v. Clinton, ibid, pp. cxii-cxiv, 111-117. See further Hudson, p. 85.

(1) Digest 50, 17, 103.

(2) These custumals are somewhat similar to the later statutes against forcible entry; designed generally to regulate the right of seizure of a man's lands and goods only after due process of law. Indeed a 15th century custumal of Sandwich forbade attachment within the liberty for debt even though the debtor be bound by statute merchant. - Bor. Cust. 1, p. 132.

the bailiff from entering a house to distrain until everything outside the house had been seized.<sup>(3)</sup> At Waterford loss of privileges followed keeping house as well as arrest:

"If ony freman or citsaine of the said citie or suburbes be fugitif and absent and kepe him within his house to shonne attachment or areste for all actions that [are] atte suit of the party, the serjaunt shall sompne ony suche att his house, whedre he be within or noo... if he appere not the thirde day [i.e. the third court day] in courte, then he shall forfeite his francheis and liberte and after be arestid within his house."<sup>(4)</sup>

Similarly in Hereford the fact that damages had been recovered before all the court was sufficient to allow the goods and chattels of the debtor to be seized regardless of whether they were within the house of the debtor or not, and also allowed them to be seized from anyone else into whose hands they had fallen.<sup>(5)</sup>

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(3) Bor. Cust. I, p. 11. Bury, c. 20 (1327)

(4) Ibid. p. 105. Waterford Acts and Statutes, c. 18 (1449); c. 82 (1471-2).

(5) Ibid. p. 139.

In the King's Court, however, the right of the sheriff to enter a man's house to execute a fieri facias or capias ad satisfaciendum was wittled away<sup>(6)</sup> and in 1478 it is stated that a writ of trespass will lie against the sheriff who breaks into a house to make execution on a writ of fieri facias.<sup>(7)</sup> This is by no means the foundation of the rule, for nearly twenty-five years earlier Sir John Fastolf in a letter to Sir Thomas Howys warns him of the likelihood of arrest and bids him 'kepe ye close and sure.. in all maner wyse for your oun welfare..... beware that ye com not owt'.<sup>(8)</sup>

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(6) See V Co.Rep. 92b, 93a, that a sheriff may not, having made request and been denied, break into the defendant's house to execute process at the suit of a subject. This privilege was confined to a dwelling-house or outhouse adjoining it. See also Lee v. Gansel (1774) 1 Cowp. 1. The privilege did not extend to the house of another, but the sheriff must first make request for the debtor or demand for the goods and only on denial may he force entry - Co. Rep. V 93a. The problem of the right to arrest a debtor in the house of third party, where the door was closed but not locked, came before the Court of Appeal in 1963 when Lord Denning, M.R., summed up the position thus: "It seems to me that the law now is that, where a landlord enters under a right given by the law to levy a distress or a sheriff's officer enters by virtue of his warrant to effect civil process, he may not break the door, in the sense that he may not break it physically. If it is locked, bolted or barred, he must not open it; he is forbidden to do so. But if it is open and ajar, or if it is closed and can be opened by the peaceable means of lifting the latch or turning the knob or just by gently pushing, in those circumstances he can lawfully enter because there he is not breaking." Southam v. Smout [1963] 3 All E.R. 104 at pp. 108-9.

(7) Y.B. 18 Edw. IV Pasch. No. 19.

(8) Paston Letters - [Ed. Gairdner, Introduction pp. 52-3]

The first signs of the growth of the rule in the common law probably stem from as early as Edward II when it is stated that there is an exception in the case of process involving the king's interests for no door is strong enough to withstand the interests of the king.<sup>(9)</sup>

34. 35 Henry VIII, c.4

It is therefore against the practice of fleeing the Realm and of keeping house that the statute of 34. 35 Hen. VIII, c. 4 is levelled, an enactment to deal with cases:

"WHERE divers and sundry Persons, craftily obtaining into their Hands great Substance of other Mens Goods, do suddenly flee to Parts unknown, or keep their Houses, not minding to pay or restore to any their Creditors, their Debts and Duties, but at their own Wills and Pleasures consume the Substance obtained by Credit of other Men, for their own Pleasure and delicate Living, against all Reason Equity and good Conscience;."<sup>(10)</sup>

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(9) Fitz. Abr. Execution pl. 152. A custumal of Northampton of about 1190 states as follows: "No bailiff can take distress in the house of a prud' homme or on his stalls, for any kind of plea or debt except for the King's debt and except by a judgment which concerns the lord King's crown." - Bor. Cust. I, p. 103, Northampton I, c. 19, s. 1. Obligations made to the king were, by virtue of 33 Hen. VIII, c.39 (1541-2)s.36 to have the same force, and the same remedies for recovery as those given for statute staple. see Bl. Comm. III, 420.

(10) Preamble - (1542-3)

The power to deal with such cases is given to 'the Lord Chancellor of England, or Keeper of the Great Seal, Lord Treasurer, Lord President, Lord Privy Seal, and other the King's most honourable Privy Council, the Chief Justices of either Bench for the time being, or three of them at least', so long as one of the named lords be one of the three. These three, upon complaint in writing, may take the body, lands and goods of the offender, and by having the lands and goods viewed and appraised may then sell the said lands, goods, etc.,

"for true Satisfaction and Payment of the said Creditors:

That is to say, to every of the said Creditors a Portion

Rate and Rate alike, according to the quantity of their Debts."

Such action taken by the authorised lords is to have effect in law as if carried out by the offender himself and the writing evidencing the transaction is to be inrolled in any of the King's Courts of Record. (11)

On the suspicion of a grieved party that the debtor has managed to find a home for some of his goods with other persons or that debts are owing to the debtor by such other persons, then on such suspicions

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(11) 34. 35 Hen. VIII, c. 4, s. 1



being made known to the 'lords' they are empowered to call such suspected persons before them and examine them "and every of them as well by their Oaths as otherwise by such Ways and Means, as the said Lords by their Discretions shall think meet and convenient".<sup>(12)</sup> Upon failure of the suspects to show plainly the true state of things in relation to the offenders property then they are to forfeit double the value of all 'such Goods, Chattels, wares, Merchandises and Debts by them or any of them so concealed and not wholly declared and shewed', and the forfeiture is to go towards the repayment of the creditors claiming against the estate.<sup>(13)</sup>

Provision is made to guard against persons trying fraudulently to claim debts or larger debts than were actually owing to them, and such persons found to be so claiming are to lose double the

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(12) 34. 35 Hen. VIII, c. 4, s.2

(13) Ibid. Such powers were not new, and were used by the Privy Council in cases of fraudulent conveyances. On 28 December, 1542 we find that: "Whereas one ... Reyde of the Countye of Norfolk, gentleman, hadde made apon certeyne conditions to .... Wythipowle a playne sale off all his goodes and landes, forasmoche as itt appered to the Cownsell the sayde bargayne to have been made onely to defraude his creditoures, itt was declared the same to be off none effect, and the sayde credytoures to be atte libertie to sew theyre debt, the sayde bargeyne notwithstanding." - A.P.C. I, p. 69.

amount so claimed and the amount so forfeited is to be paid to the creditors.<sup>(14)</sup> Where the offender causes other persons to recover goods, debts, chattels or merchandizes without just cause so as to delay other bona fide creditors then such recoveries are not to have any effect against the true claims against the estate and no execution shall be had on goods, chattels, lands or tenements of the offender until the true debts against the estate are satisfied, save when such proper debts have been fully satisfied then the body of the offender, his lands, tenements goods and chattels shall be available to the execution of the purported recoveries.<sup>(15)</sup>

To deal with the necessity of giving the offender who has fled to foreign lands a chance to appear proclamations were to be made in such places as the 'lords' should think necessary calling upon the offender to return. The offender is given three months after he has notice of the proclamation in which to appear before the 'lords', 'or as soon after as he conveniently may', although the three month period seems to have been read as three months after

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(14) 34. 35 Hen. VIII, c. 4, s. 3

(15) Ibid. s. 4.

proclamation without much notice being taken of the provision for the offender having notice of such proclamation. Failure to comply resulted in the king's protection being withdrawn from the offender and his estates, goods and chattels being distributed amongst his creditors pro rata. Any person aiding the offender to remove his goods, etc., out of the realm is to be imprisoned or is to pay such fine to the king as the lords shall think right in the circumstances.<sup>(16)</sup>

To round off this first attempt to produce a more fair system of paying a man's creditors where he has failed it is provided:

"That if the Creditors of any such Offender or Offenders, which shall keep his or their House or Houses, or which shall absent or withdraw themselves into Places unknown, for the Causes aforesaid, be not fully satisfied and payed, or otherwise contented for their Debts and Duties, by the Ways and Means afore specified and declared, that then the said Creditor and Creditors, and every of them, shall and may have their Remedy for the Recovery and levying of the Residue of the same Debts and Duties, whereof they shall not be fully satis-

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(16) 34. 35 Hen. VIII, c. 4, s.5. This provision and the provision against keeping house are still part of the law, thus the Bankruptcy Act, 1914 (4.5 Geo. V, c. 59) s. 1(1)(d) states that it shall be considered an act of bankruptcy on the part of the debtor: "If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being out of England remains out of England or departs from his dwelling-house, or otherwise absents himself, or begins to keep house;".

"fied and payed, Or otherwise contented in Form aforesaid, against the said Offender or Offenders, in like Manner and Form as they should or might have had before the making of this Act."

Only to the extent that such creditors had been satisfied through the bankruptcy procedure were they barred in recovering from the offender.<sup>(17)</sup> This was no statutory enactment with pity for the debtor, under the commission all he had would be taken from him, then if this was not enough he could be thrown into prison on the normal execution process for debt.

Of the enforcement of this enactment in the twenty-nine years separating it from the more workmanlike statute of Elizabeth I,<sup>(18)</sup> curiously few facts are known, certainly it had little to recommend it to the erring debtor. Indeed to some extent it might be said to encourage the man who was failing to pack up his goods and flee, for no joy can be found in being stripped of all one's goods and then flung into prison for the remainder of debts outstanding.

There is no definite provision against preferring one creditor

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(17) 34. 35 Hen. VIII, c.4, s.6. It is not until 1705 (4.5. Anne, c.4, s.8) that provision is made for the discharge of the bankrupt from debts owing at the time of the bankruptcy and of freedom from future arrest in respect of those debts. See pp.637-649.

(18) 13 Eliz. I, c.7 (1571)

to another, and the problem of preventing fraudulent conveyances is not really attempted. Such criticism as this, however, is merely to be wise many years afterwards. It was the first statute to grapple with the problem of the merchant debtor with many creditors all of whom could not possibly be satisfied. It brought into use machinery that had worked fairly successfully in other fields, the use of the members of the Privy Council and the heads of the various courts.

Although the act dealt with the position of the debtor who fled, in that it allowed his goods to be taken for the benefit of his creditors, whereas previously an outlaw's goods were forfeit to the Crown and only on petition to the king could they sometimes be obtained for the benefit of the creditors;<sup>(19)</sup> yet any provision to deal with the situation of the offender who stayed in his house is strangely absent. There is no provision allowing the house to be broken into nor does the Act say that the offender may be taken from it. Read strictly, the provision for proclamation to be made refers only to cases where the offender has fled the king's dominions.<sup>(20)</sup>

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(19) Parlt. Paper 1829, ii, pp. 91-2 [Comd. 46] and see C.C.R. (1396-9) p.338. See pp. 213, 284.

(20) 34. 35 Hen. VIII, c.4, s.5

This does not mean to say that in fact the 'lords' did not possess the power to have the offender's house broken open, for all the provisions of the Act state that they may exercise their powers as they in their wisdom and discretion shall think necessary.<sup>(1)</sup>

### Enforcement and The Privy Council

Despite the wealth of power bestowed upon the 'lords' there is evidence to show there was a general hesitancy on their part to force open the door so carefully locked against them. In 1564 there is made to Charles IX of France a plea from certain French merchants who have been forced to return to France because of the despicable habits of 'le marchand anglois'.<sup>(2)</sup>

"Item The English merchant burger of London has this privilege that when he has bought some merchandize from a French merchant, or any other, and intends to declare himself bankrupt, that when he is seised of the goods and merchandize, he can retreat into his house, or into an inner court, or into a room, shutting himself therein by divers ways; or he may retreat even into his shop, provided that a door or simple barrier is shut with a

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(1) On the 29th August, 1552 there is directed: "A lettre to the Mayour of Excester to cause the Statute of Bankrupt to be executed against John Stroudbridge of Excester, who is indebted to William Knapman in [£84] and now kepeth his house." No other directions are given. A.P.C. IV, p. 116.

(2) Pigeonneau ( H. ) 'Histoire du Commerce de la France' Vol. II, appx. p. 476. The prison referred to is probably Ludgate, the account is no doubt slightly coloured nevertheless the difficulties facing a foreign creditor were very real. Provision for such aliens wishing to come in to prove in a bankruptcy was not made until 1623-4 under s. 14 of 21 Jac. I, c.19. The original text of the above complaint is given in Appx. at pp. 783-4.

"latch, and so that the sergeant cannot touch him with his mace; and then one cannot disturb him either by asking for any account for the aforementioned merchandize, nor even arrest him, nor address him to his person, notwithstanding that the poor Frenchman, who has been destroyed and ruined, can see in the shop of the said bankrupt Englishman, his wife, his factors and his servants who are openly selling the said merchandize before the very Frenchman who had sold them, without the said French merchant being able to have the said merchandize or all the movable or immovable goods of the merchant seized. And if by chance, the said English Bankrupt is arrested outside his house and taken prisoner, there is a certain prison in particular for the said bankrupt burghers, where they are free with permission for each to go about their business throughout the whole said town, at their will, taking a servant from the said prison, for the salary of whom they give the jailer a Tours penny, a sovereign per day, and yet one cannot lay hold to their goods, nor even to their sold merchandize."

It is probably only in the proceedings of the Privy Council that we can find evidence of the workings of the machinery of this first bankruptcy enactment. Although in fact the Council continued to exercise its power after the statute of Elizabeth<sup>(3)</sup> its open interference was bound to diminish with the introduction of the Commissioners of Bankrupts<sup>(4)</sup> and by the end of the sixteenth century the Council was left to interfere mainly in the affairs of the debtor who did not come within the legal definition of a trader. This later distinction was by no means a striking revision of the first Act and there is nothing which openly states that it shall apply only to those engaged in trade.<sup>(5)</sup>

There is no immediate rush on the part of creditors to have their debtors made bankrupt, the vagueness of the entire provision probably left them in doubt as to its usefulness together with the fact that they had to become accustomed to the new idea of sharing

(3) 13 Eliz. I, c.7 (1571)

(4) Ibid. s. 2. The appointing of person to hear suits under a commission was not new. In order to lessen the burden on the king and council it had become the practice to refer such matters to groups of four to decide upon, see 'Egerton Papers' (C.S.) p. 24.

(5) Thus the preamble of 13 Eliz. I, c.7 speaks of the need for a "plain declaration to be made and set forth, who is and ought to be taken and deemed for a Bankrupt". It was a distinction that caused a great deal of time and trouble to the courts, see pp. 424-438.



such spoils as could be wrung from their unwilling offender.

In 1552 there is a letter to the Mayor of Exeter that he cause the 'Statute of Bankrupt to be executed' against one who 'now kepeth his house' and owes £84 to a creditor.<sup>(6)</sup> But it does not appear that there was any great enthusiasm to put the statute into use by the 'lords' if other methods will suffice. On the 28th August, 1556 we find:

"A lettre to the Maiour of London, with a Supplicacion enclosed, exhibited here by oone Massey and Benson, who complayne that John Lewes of London came and boought certaine clothes of them at this laste Faire, and promising them payment for the same, fourthwith he kepthe his house as bankrupte, which kinde of deceipte he is willed to examyne, and if he shall finde it true than to repaire to the house of the said Lewes, and ether to cause the clothes to be delyvered agayne unto them or to take ordre

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(6) A.P.C. IV p. 116. There was no minimum amount laid down as needing to be owed before a debtor might be made bankrupt under this enactment. Only in 6 Anne c. 22, s.7 (1706-7) are regulations made for the minimum debt to be owing to the petitioning creditor or creditors. See p.526.

"&c." (7)

The Council was not afraid to act in cases where money owing to a debtor could be attached for his creditors, even where the debtor's debtor is the Queen, although restraining payment to the debtor was probably easier in such a case. (8)

There is, however, no suggestion that the Council is acting under the Statute of Bankrupts and is more probably continuing its task of answering petitions. There is also no suggestion at this point that aliens should be dealt with differently or are outside the enforcement procedure, even if that procedure on one occasion was somewhat strange: (9)

"A letter to the Mayour of London to cause one Anthonye Tuck to be secretly apprehendid and kept in some honest merchauntes howse till upon advertisements he shold be otherwise directed, for that it was informed that, being an

(7) A.P.C. V, p. 344. A similar case appears earlier that year when a direction is given to Sir John Baker that he restore to their rightful owners goods taken by one Bell, who having taken the goods refuses now to pay for them. Sir John is instructed to "signifie to morrowe to the Lorde Chancelour what the lawe will for the punishing of the saide deceipte". There is more concern with the punishment than any thoughts of bankruptcy. - A.P.C. V, p. 230. Sir John Baker was the Speaker of the House of Commons.

(8) A.P.C. VII, p. 47 (1558-9) "A letter to Sir Richard Sowewell, Master of tharmory and Ordynance, and to suche other of the same offycers to whome it shall apperteyne, to staye such sommes of money as doth remayne due to Christopher Myllyner by the Quenes Majestie, to thuse of Walter Marler of London, to whome the sayd Myllyner oweth [£124], and presently kepeth his howse of purpose to defraude his sayd credytour and others."

(9) The statute of 13 Eliz. c.7, s. 1 firmly states after setting out those persons who might be made bankrupts "and being subject born of this realm, or any of the Queen's dominions, or denizen."

"inhabitant of Roane, [Rouen] he had there broken for grete  
sommes of money."<sup>(10)</sup>

A further letter in the same case illustrates the ability of the  
Council to intervene on behalf of an alien who was not able to  
prove with other creditors for his debt:

"A letter to Sir Rowland Heyward and Sir John Ryvers, Aldermen  
of London, that where upon the breaking of one Anthonye  
Tuck, merchant of Roane, certaine goodes of his to the value  
of [£1,764] remayninge in the handes of one Richard Smithe,  
merchaunt of London, weare arrested for the satisfieng of  
his creditours in this Realme, and yf his creditours being  
paied, there remayned any thinge, they shall take order to  
see one Richard Maiour, a Frenchman, to be satisfied of the  
some of [£65] sterlinge of the said goodes, so as there be  
so muche remaininge, the said Mayour being sufficiently  
assigned to receve the same by bills of the said Tuck."<sup>(11)</sup>

Later the Chancellor alone intervened on behalf of foreign creditors,<sup>(12)</sup>  
even to the extent of granting aid where both the bankrupt and the

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(10) A.P.C. VIII, p. 301 - 15th October, 1574.

(11) A.P.C. VIII, p. 375 - 9th May, 1575.

(12) Sere and Eland v. Colley (1610-11) Tothill 68-69.

creditor were out of England.<sup>(13)</sup>

This concern of the Council is not aroused only in the case of large sums of money or particularly for aliens whose position required it, they were able to lend their weight equally to the small creditor even to the extent of bending the statute slightly so as to do justice according 'to equitie and conscience'.<sup>(14)</sup>

"A letter to the Maiour, Bailifes and Recorder of Sarum that where one Swythin Child and .... Croppe of Romesey mad sale unto one William Merisall of Sarum of certaine kersy<sup>(15)</sup> clothes to the som of [~~£~~44. 2s.] to be paied within thre weekes, which daie being by him broken and he thereuppon becoming banck rouverte, fledd oute of the town, and leftte the said kersys with other goodes and merchandize behinde him, which after his departure were staid for the satisfieng of his creditours; forasmuche as the said Croppe and Childe have ben humble suters to their Lordships that since their goodes were founde to remaine in nature as they were solde that they maie be restored unto them again by their Lordships' order, they are required to examine the mater and if they shall fynde the informacion to be true to certifie their Lordships thereof, together with their opinions howe according to lawe

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(13) Wild v. Middleton (1632) Tothill 75

(14) A.P.C. X, p. 37 - 27th September, 1577.

(15) A kind of coarse narrow cloth, woven from long wool and usually ribbed.

"the poore men maie be holpen therein, and in the meane while to continew the staie made untill they shalbe in that behalfe furder directed from their Lordships."

This first letter was followed a month later by another, this time to the Earle of Pembroke in an attempt to salvage something for the petitioners:

"A letter to the Earle of Penbrook that where one William Merisall of Sarum, latelie become banckroupte, is since his breaking knowne to be farre in debte to diverse persones, and particularlie to Swithin Childe and Robert Croppe of Romsey in the some of [£40] for certen kerseies hadd of them before the tyme of his breaking, and where their Lordships wrote their letters to the Maiour of Salisburie and others for the distributing of the said Merisall's goods unto his creditours, who cannot (as their Lordships are informed) deale therein for that there is a Commission directed unto him and others; their Lordships tendering the equitie of the cause of the said Childe and Croppe, who by losse of the [£40] aforesaid, being poore men, are utterlie to be undone, have thought good earnestlie to desier his Lordship to take some favourable consideracion thereof and yf their kerseies shalbe founde to be in nature (as they reporte), that in

"distributing of the goods of the said Merisall unto his creditours he wille deale withe the said Childe and Croppe according to equitie and conscience."<sup>(16)</sup>

Thus at least during the reign of Henry VIII and without too much competition during the reign of Elizabeth I the Council was still able to interfere in the workings of the bankruptcy machinery, machinery which, following the pattern set by the statutes against merchant debtors, was comparatively mild at its inception.<sup>(17)</sup> It lies now to look at the manner in which the bankruptcy laws were enforced from 13 Eliz. I, c.7<sup>(18)</sup> and its introduction of the Commissioners of Bankrupts<sup>(19)</sup> through to the enacting of 5 George II, c. 30<sup>(20)</sup> and its dramatic retention in permanent form of the provision that the fraudulent bankrupt should suffer the most severe penalty known to the law, namely death.<sup>(1)</sup>

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(16) A.P.C. X, p. 66 - 21st October, 1577.

(17) Iulid at least if examined alongside some other punishments of the time. After all, imprisonment for debt after nearly two hundred years was almost respectable.

(18) 1571

(19) 13 Eliz. I, c. 7, s.2

(20) 1731-2. The text of this Act is given in the Appx. see p. 816.

(1) 5 Geo. II, c.30, s. 1. The provision was first enacted in 6 Anne, c.22 s, 1 (1706-7) and re-enacted in 5 Geo. I, c.24, s. 1 (1718-19). This provision remained on the statute book until 1820 (1 Geo. IV, c.115) but as we shall see it was hardly ever enforced, see pp.686-695.

CHAPTER 16ESTABLISHING A TRADERDefinition by Statute

In 1571 the legislature set out the qualifications necessary for a person to become a bankrupt and gives the reasons for such a step plainly enough:

"FORASMUCH as notwithstanding the Statute made against Bankrupts in the 34th year of the reign of our late Sovereign Lord King Henry the eight, those kind of persons have and do still increase into great and excessive numbers, and are like more to do, if some better provision be not made for the repression of them; and for a plain declaration to be made and set forth who is and ought to be taken and deemed for a Bankrupt: THEREFORE be it enacted and established by the authority of this present Parliament, That if any merchant or other person using or exercising the trade of merchandize by way of bargaining exchange rechange bartry chevisance or otherwise in gross or by retail, or seeking his or her trade or living by buying and selling, and being subject born of this realm or of any the Queen's dominions

"or denizen, since the first day of this present Parliament,  
[does one of the acts next mentioned] .... shall be re-  
puted deemed and taken for a Bankrupt."<sup>(1)</sup>

In this way was set the distinction between those who might  
be made bankrupts and those who could only be attacked through  
the system of distraint, arrest and imprisonment. A trader<sup>(2)</sup>  
alone is capable of being made a bankrupt, but in giving this defini-  
tion the legislature thrust many knotty problems on the courts.<sup>(3)</sup>  
This list was amended in 1623-4<sup>(4)</sup> to include those who use the trade  
or profession of a scrivener, receiving other mens monies or

- (1) 13 Eliz. I, c.7 - Preamble and s. 1. Coke says that "... the intent of the makers of the said act, expressed in plain words, was to relieve the creditors of the bankrupt equally, and that there should be an equal and rateable proportion observed in the distribution of the bankrupt's goods amongst the creditors, having regard to the quantity of their several debts; so that one should not prevent the other, but all should be in aequali juri." - II Co. Rep. 25 b.
- (2) See Poste - (1875) - Gaius III. 342, Roman law never established this distinction between the trader and non-trader, that is to say between bankruptcy and insolvency.
- (3) These references as to whether a certain livelihood came within the ambit of the bankruptcy enactments was frequently decided in the Court of the King's Bench on a reference to it by the Lord Chancellor.
- (4) 21 Jac. I, c. 19, s. 2 - this section was partially repealed by 10 Anne c. 25, s. 1(1711) in so far as it related to certain acts of bankruptcy. See p. 488.



or estates into their trust.<sup>(5)</sup> By the same enactment it is provided:

"That this Act, and all other Acts of Parliament heretobefore made against Bankrupts, shall extend to Strangers borne as well Aliens as Denizens, as effectually as to natural born Subjects, both to make them subject to the Laws as Bankrupts, as also to make them capable of the benefit or contribution as Creditors by those Laws."<sup>(6)</sup>

This provision cleared up a number of difficulties which had arisen. Stone in his Readings on the Statute of Elizabeth was of the opinion that a person born in the Isle of Man could not be a bankrupt since there was no judgment to say whether in fact the Isle of Man was within the realm and dominions.<sup>(7)</sup> Stone also contended that in relation to an alien it did not matter whether an husband be an alien and the wife a subject or the wife an alien and the husband a subject, as they were both within the statute, though the lands of the alien will be forfeit to the king.<sup>(8)</sup> Goodinge, writing

(5) Bankers, brokers and factors were added to the list of potential bankrupts by 5 Geo. I, c.24, s.27 (1718-19) later 5 Geo. II, c.30, s.39 (1731-2). The act of 5 Geo. I, c.24 was superseded by 5 Geo. II, c.30, the former lapsing for lack of a continuation act. 5 Geo. II, c.30 itself, after a number of continuation acts was eventually made perpetual by 37 Geo. III, c.124 in 1797.

(6) 21 Jac. I, c. 19, s. 14.

(7) Stone, 'Readings', 43

(8) A process which does little for the creditors where the alien was the husband.

later contested this:

"Yet I cannot conceive, that if an Alien marry a Subject Woman of great Fortune, that he can be within the Statute, for he is no subject nor Denizen; and in such Case I never heard of Naturalization by an Apron string."<sup>(9)</sup>

### The Gentleman Trader

Any matter which caused considerable worry to the courts was the position of gentlemen who invested money in the growing trading ventures only to lose their family fortunes. Could noblemen and gentlemen really be bankrupts? The Court had this problem to consider in the case of Sir John Wolstenholme, a gentleman of large estate, stockholder in the East India Company and member of the board of that Company.<sup>(10)</sup> Sir John came within the rules for such bankrupts in that he obtained some of his living by the buying and selling of the goods of the company in that he received the profits from such ventures even if he did not obtain the greater part of his living in such a manner. The Court held that he was within the statutes since it was not the quality of his person, or the greatness

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(9) Goodinge (T.) 'The Law Against Bankrupts' (1713) pp. 34-35.

(10) Wolstenholme's (Sir John) Case (1653) Vin. Abr. Creditor & Bankrupt 'A' No. 4, p.55.

of his estate, which protected him from the law, for his buying and selling rendered him liable to be a bankrupt. This ruling did not long remain and in 1662 it was enacted that the decision was 'contrary to law', and is therefore reversed and declared null and void;<sup>(11)</sup> although such distribution of the estate as had been made by the commissioners or any claiming under them by virtue of such distribution was stated to remain good and not to be 'impeached, or frustrated, but that the same be enjoyed for and toward satisfaction of the debts, for which the same have been disposed'.<sup>(12)</sup>

This same Act also clarified the position in relation to persons of position having money in the very large companies:

"WHEREAS divers noblemen, gentlemen, and person of quality, no ways bred up to trade or merchandize, do oftentimes put in great stocks of money into the East India Company, or Guinea Company, and the fishing trade, and such other public societies, and receive the procede of those stocks sometimes in ready monies, sometimes in commodities, which they usually sell for money, or exchange again, by which means the trade of those companies is much encouraged, fishing and navigation increased,

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(11) 14 Car. II, c. 24, s.3

(12) Ibid. s. 4

"and the public good of those companies is much advanced."<sup>(13)</sup>

It is therefore stated that in order that such persons may not be discouraged from such 'honourable endeavours' the investing in the East India Company, the Guinea Company or the Royal Fishing Trade shall not render a person liable to the bankruptcy statutes;<sup>(14)</sup> but if a person 'trade, traffic, or merchandize in any other way or manner', than in the above mentioned companies, then this Act to have no application to him whatsoever.<sup>(15)</sup>

#### Infants and the Feme Sole

Infants could not be made bankrupt on attaining their majority for debts which had become due during the period of infancy since

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(13) Ibid. Preamble

(14) Ibid s. 1. It became usual to exempt investors in the big stock companies from the perils of the bankruptcy Acts where he was otherwise outside the latter, see for example 9. Will. III, c.44, s.64 (1697-8)

(15) 14 Car. II, c.24, s.2. This was true of all the later statutory enactments granting freedom from the bankruptcy laws. They applied only in relation the profession set out, and if a man came within the ambit of 'a trader' because of some other part of his livelihood he could be made bankrupt. Yet the position of a nobleman was still respected. In holding that a part owner in a ship could not be a bankrupt the Lord Chancellor said, "As a ship-owner merely, a man can never be subject to the Bankrupt laws. Persons of the highest rank in the country have shares in East India ships. If this is to prevail, half the house of lords, including the bishops would be liable." - Ex parte Bowes (1798) 4 Ves. Jun. 168 at p. 171.

it was held that no one could be made bankrupt for a debt he is not obliged to pay.<sup>(16)</sup> The problem arose in a slightly different form in *Whitlock's Case*<sup>(17)</sup> where an infant bought goods, and having attained the age of twenty-one, committed an act of bankruptcy. Lord Chancellor Macclesfield was hesitant in doubting whether he could be made bankrupt, but the Chancellor Lord King was of the firm opinion that he could not.

Married women were also generally excepted from the Acts,<sup>(18)</sup> although in certain cases, where custom could be shown, a feme covert, trading as a feme sole, might be made bankrupt. To qualify as a feme sole it was necessary for the woman to trade entirely independent of her husband; in the case of *Langham v. Bewett*<sup>(19)</sup> the query arose whether the action should be against the wife only or should the husband be joined, the proceedings were as follows:

"The custom of London was read,

'That a feme sole merchant is where a feme trade by

(16) *R. v. Cole* (1700) 1 *Ld. Raym.* 443.

(17) *Sel. Cas. in Ch.* 40 (1725)

(18) *Stone* p. 7 says that the feme covert merchant might be made a bankrupt but that so also will her husband "for it shall be accounted his folly to suffer his wife to trade as such, and the outlawry of the Husband for the wife's debt shall make him a bankrupt."

(19) *Cro. Car.* 68 (1628) and see the Case of *Mary Dennis* (1741) *Davies*, pp. 23-4.

"' herself in one trade, with which her husband does not meddle, and buys and sells in that trade,' there the feme shall be sued, and the husband named only for conformity; and if judgment be given against him, the execution shall be only against the feme."<sup>(20)</sup>

Those persons who "live on the manual labour only, as Husbandmen, Labourers, bare handicrafts men &c are not within the statute; but such as buy wares & turn them into saleable commodities & so get their living by buying and selling may be bankrupts."<sup>(1)</sup> A person trading under partial restraints<sup>(2)</sup> or for particular purposes only was not included in the statute.<sup>(3)</sup>

### Buying and Selling

It was by the test of buying and selling that the court

- (20) The wife in such a case also had the right to be tried in London and where the case was tried elsewhere a writ of procedendo might be obtained so that the case be removed to London - Soan v. Mace (1688) Davies, p. 24.
- (1) Crump v. Barne (1626) Cro. Car. 31
- (2) Thus a person engaged in buying victuals for the fleet was not within the statutes - Gibson v. Thompson (1675) 3 Keb. 451 [Otherwise known as Sir Thomas Littleton's Case - Vent. 270]
- (3) An innkeeper buying goods merely to sell to his guests was not trading nor was a schoolmaster taking boarders buying provisions for them, nor the mine-owner buying candles to sell to his underground workers; see per Lord Holt in Newton v. Trigg (1690) 3 Mod. 327, The Comptroller of Customs could not be made a bankrupt - Hawards p. 98 but "Though a man be a public officer, as an exciseman &c yet if he will trade he makes himself subject to the statutes of bankrupts". - Per Lord Hardwicke in Highmore v. Molloy (1737) 1 Atk. 206.

mainly decided which persons came within the ambit of the definition of a trader. Such action must include both buying and selling, not merely one or the other;<sup>(4)</sup> also it must be the buying and selling of personal things not land.<sup>(5)</sup> The fact that a man did not obtain the entire of his living from such trading did not prevent him from becoming bankrupt although opinion seems to have required that a substantial part of his living be derived from it.<sup>(6)</sup> In

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- (4) *Emerson v. Fairfax* (1666) 1 Sid. 299. In *Hankey v. Jones* (1778) Cowp. 745 at p. 750 Lord Mansfield said: "The facts necessary to shew what was the nature of the business carried on by the party, being laid before the Court, whether they come within any of the descriptions enumerated in the statutes, is a question of law, upon the construction of the statutes themselves. It is not using an act of merchandize. Every man does that; every man buys; but that does not bring a man within the description of a person liable to become a Bankrupt. He must use the trade of merchandize. He must therefore sell as well as buy; nor will every act of selling do; for there are various species of selling, which are no trading within the meaning of the acts; as where a farmer buys in sheep and sells them again."
- (5) *Crisp v. Pratt* (1639) Cro. Car. 549. See also *Port v. Turton* (1763) 2 Wils. 169.
- (6) This disappeared later and the intention of the party to profit became the important point. In *Patman v. Vaughan* (1787) 1 T.R. 572 at p. 573 Ashurst, J. said: "I do not consider the question of law to be governed by the quantum of the trading, but I take the rule to be this, that where it is a man's common or ordinary mode of dealing, or where, if any stranger who applies, may be supplied with the commodity in which the other professes to deal, and it is not sold as a favour; any particular person so selling is subject to the Bankrupt laws."

Mayhoe v. Archer,<sup>(7)</sup> one Baxter had rented a farm for £300 a year and planted potatoes on part of the farm, he also bought large quantities of potatoes from other people for further sale and planting and in order to deal with such trade, he hired warehouses in which to store his goods until such time as he could sell them at the markets. Two of the judges in the case were of the opinion that even if a farmer carried on his normal occupation he might still be within the bankruptcy statutes if he carries on trade in goods, even if it is not shown to be the foremost manner in which he obtains his living. The other two judges were of the opinion that it must be shown that the jury found that the farmer made the principal part of his living from such buying and selling before he could be declared a bankrupt.

One act of buying and selling would not suffice<sup>(8)</sup> and the trading had to be in some form connected with England, though this requirement was easily satisfied for the trader need never have been resident inside England as long as he came occasionally and had

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(7) 8 Mod. Cas. 46 (1722)

(8) Thus a schoolmaster buying books to re-sell to his pupils would not fall within the acts - Newton v. Trigg (1690) 3 Mod. 327 at 330.



committed an act of bankruptcy.<sup>(9)</sup> In *Dodsworth v. Anderson*<sup>(10)</sup> one Grice was shown to get his living by buying and selling in that he traded as a merchant to Dublin, coming frequently to England to buy goods and then selling them in Ireland, by virtue of which he became indebted to a number of persons for over £100. Grice was also shown to have once sold in England a parcel of neats,<sup>(11)</sup> tongues and also to have sold in Ireland a parcel of Tallow which was delivered in Chester according to instructions. Grice then came to England and refused to pay his creditors. The Court held that the fact that Grice had only bought and sold once in England was largely irrelevant, as many merchants bought only overseas and sold in England or vice versa, and it was trading that made a man capable of being a bankrupt. This being the case Grice could be proceeded against as a bankrupt, he having plainly traded in England.

Difficulties arose in many cases. There were traders having ceased trading, who were proceeded against with the intent of rendering them bankrupts.<sup>(12)</sup> The rules came to be settled in that a trader

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(9) *Bird v. Sedgwick* (1693) 1 Salk 110

(10) *Jones (T.)* 141 (1680) - the decision is of interest having regard to the attention paid by the court to effect on public policy of their decision. In reaching the decision it was said that if the court found the case not to be "within the statutes, all the intercourse between the kingdoms would be much interrupted if not destroyed", at 142.

(11) (Ox tongues) - O.E.D.

(12) *Cotton v. Daintrey* (1669) 1 Ventr. 29 (otherwise *Sir Anthony Bateman's Case* - Mod. Rep. 76.)

who gave up trading could be made bankrupt for such debts as he had before he retired, but not for those debts incurred afterwards.<sup>(13)</sup> Inn-keepers,<sup>(14)</sup> pawnbrokers,<sup>(15)</sup> butchers,<sup>(16)</sup> bakers,<sup>(17)</sup> candlestick makers<sup>(18)</sup> even smugglers,<sup>(19)</sup> all caused the courts to sit long and ponder hard as to whether such person could be drawn within the bankruptcy machinery.

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(13) Heylor v. Hall (1622) Palm. 325 and see also Bateman v. Harvey (1661) 1 Lev. 17.

(14) Meggot v. Mills (1698) 1 Ld. Raym. at 287. The general position was that without other business an innkeeper was not within the statutes. In Luton v. Bigg (1691) Skin. 276, 291, it was found that Bigg, a freeman of London, kept an inn in London and that he carried on his living through the inn, it was also found that he had built a ship and held stock in her to the value of £50. On the question of whether he was a trader, the court held that he was not.

(15) Highmore v. Molloy (1737) 1 Atk. 206 - Lord Hardwicke based his decision that a pawnbroker was within the acts by reference to s. 39 of 5 Geo. II, c.30 (1731-2), which makes bankers, brokers and factors liable to bankruptcy. "For", he said, "though pawnbrokers are not expressly named, yet the general word brokers is the genus, and all other kind of brokerage the species."

(16) Dally v. Smith (1768) 4 Burr. 2148

(17) Newton v. Trigg (1690) 3 Mod. 327 at 330

(18) Stracy v. Hulse (1780) 2 Dougl. 411.

(19) Ex parte Meymot (1747) 1 Atk. 196 at 199 - "... a person who has dealt merely in smuggling and running goods; though this is an offence, and contrary to an act of parliament, yet still it will be trading within the meaning of the bankrupt acts, and such trader is liable to a commission." - per Lord Hardwicke.

Defamation

There was, however, another source of cases, other than the direct decisions as to whether or not a commission might issue, from which we get judgment as to those traders who might be bankrupts. An action on the case lay for falsely accusing of bankruptcy a person whose calling brought him within the definition of a trader and who was thus capable of being a bankrupt. The semi-criminal position of the bankrupt was such that a person had to be made to realize that it was no 'slight Matter to stab the Reputation of his Neighbour'.<sup>(20)</sup> It is from these cases that the absurdity of the false distinction between bankrupts and insolvents fully emerges.<sup>(1)</sup> To say of a farmer that he was an 'Whoreson Bankrupt Rogue' was not actionable, it not appearing that he got his living from buying and selling;<sup>(2)</sup> yet to call a shoemaker a 'bankrupt rogue'<sup>(3)</sup> was to take the risk

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(20) Goodinge p. 167

(1) Squire v. Johns (1621) Cro. Jac. 585

(2) Philips v. Philips (1654) Styles, 420.

(3) Crump v. Barne (1626) Cro. Car. 31. For "a shoemaker is such a person as is within the statute of bankrupts; for he lives by his credit in buying leather, and selling it again in shoes, &c. and not upon his manual labour only, as labourers and husbandmen do."

of having to pay substantial damages,<sup>(4)</sup> for a shoemaker was held to be a trader in that he lived by his credit in buying leather and selling it again in the form of shoes. Once within the classification innuendo would suffice, thus to say of a merchant, 'He hath eaten a Spider, with an averment what the meaning is, that is to say he is ready to burst, is actionable'.<sup>(5)</sup>

Parliament added to the Companies whose members were free from the threat of bankruptcy, as long as their failure only came from their interest in the companies.<sup>(6)</sup> Members of, the Bank of England,<sup>(7)</sup> the South Sea Company,<sup>(8)</sup> the Royal Exchange and London Insurances.<sup>(9)</sup> Persons circulating Exchequer Bills,<sup>(10)</sup>

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(4) The question of damages was to be left to the jury; *Hawkins v. Sciety* (1622) Palm. 314.

(5) *Annison v. Blofield* (1670) Carter Rep. 214. So also, after the admittance of the alien to the bankruptcy proceedings by s. 14 of 21 Jac. I c.19, to say of an alien merchant that he was bankrupt and had fled beyond the seas for money was actionable - *Tuerloot v. Morrison* (1611) Yelv. 198.

(6) Persons having investments in the East India Company, the Guiney Company or the Royal Fishing Trade were excepted from the bankruptcy enactments by s. 1 of 14 Car. II, c.24 (1662), see p. 427.

(7) 8.9 Will. III, c.20, s.47 (1696-7).

(8) 9 Anne c.15, s.45 (1710) see also 3 Geo. I, c.9 (1716-7) and 5 Geo. I, c.19 (1718-9).

(9) See 6 Geo. I, c.18 (1719-20) and s. 10 of that Act. Similar exception was later created for members of the English Linen Company - 4 Geo. III c.37, s.13 (1763-64)

(10) See 6 Geo. I, c.4 (1719-20) and 8 Geo. I, c.20 (1721-2)

farmers, graziers, drovers of cattle or any one who is or has been a Receiver General of Taxes granted by Parliament<sup>(11)</sup> are also excepted.

In 1711<sup>(12)</sup> some slight changes were made in the acts which would render a person bankrupt, and although the Act says that the description contained in 21 Jac. I, c. 19<sup>(13)</sup> and other Acts so far as they relate to the description of a bankrupt shall be repealed and void, it seems to have had no effect save in relation to the acts of bankruptcy it repeals.<sup>(14)</sup>

(11) 6 Anne, c. 22, s. 8 (1706-7). By 7 Anne, c.12 (1708) special protection was given to ambassadors and public ministers of foreign states. S. 5 of that Act, however, specifically excludes from such protection merchants or traders otherwise liable to the bankruptcy acts who placed themselves in the service of such ambassadors or ministers; see p.497. As to the limited protection afforded to members of parliament see p.490. 6 Anne, c.22, s.8 is later s.40 of 5 Geo. II, c.30.

(12) 10 Anne, c. 25, s. 1 (1711).

(13) S. 2 which makes specific reference to the "trade or profession of a scrivener".

(14) The position of a scrivener came before Lord Hardwicke in 1742 in *Ex pte. Burchall* - 1 Atk. 141 -. The Lord Chancellor considered the provisions of 21 Jac. I, c. 19, s.2 and said he doubted "whether the 10th of Queen Anne intended any more than to repeal some part of the statute of 21 Jac. I, which constitutes an act of bankruptcy; and not the description of the trade or occupation of the person against whom a commission issues" - *ibid.* at 142. Counsel persisted that the descriptive part of the section had also been repealed. The Lord Chancellor extricated himself from the difficulties involved by examining s. 39 of 5 Geo. II, c.30, which brought bankers, brokers and factors within the range of bankruptcy, and "upon considering the clause, declared he was clearly of the opinion a scrivener was within the meaning thereof, and comprehended in the words, bankers, brokers and factors". *Ibid.* at 143.

CHAPTER 17ELIZABETHAN 'ACTS OF BANKRUPTCY'

The acts of bankruptcy set out in the reign of Henry VIII attacked what the legislature of the time saw as the basic evils.<sup>(1)</sup> Within the almost thirty years separating this first statute from the more comprehensive statute of Elizabeth<sup>(2)</sup> however, the full import of the problem came much more to be appreciated, and it became obvious that additions must be made in order to successfully combat the growing menace of the bankrupt.

The acts of departing the realm or staying securely at home and denying oneself to creditors are retained, but flight from one's home with the intent that creditors should be delayed is added for the merchant who did not wish to leave the country.

Sanctuary seeking, although presumed a lost art, is brought back as a reason for making a person a bankrupt, and to this are added two tried favourites of the classical age of debtors,

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(1) 34. 35 Hen. VIII, c.4

(2) 13 Eliz. I, c.7.

yielding to prison, and suffering oneself to be outlawed.

All the acts of bankruptcy set out in the statute of Elizabeth had to be done by the merchant "the intent or purpose to defraud or hinder any of his or her creditors",<sup>(3)</sup> which words in themselves caused more trouble to the courts than the acts to which they related.

#### Departing the Realm

This particular means of avoiding the creditor, was, by the very nature of our island, not really favourable to the British bankrupt. To flee the realm meant generally having to go to distinctly foreign parts away from the mother tongue,<sup>(4)</sup>

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(3) Ibid s. 1

(4) Travel, at least to France, might not be too bad. In 1763 the London Chronicle carried details of the difficulties in extracting one Rice, a forger, from Cambray. The difficulties are caused by "a Remonstrance presented to the French King by the Archbishop, the officers of Justice and of Police, of Cambray, setting forth, that their city had always been a place of refuge for bankrupts, thieves, and fugitives for debt, tho' not for murderers and traitors of their Prince;.." London Chronicle, March 3-5, 1763, p. 224 a.

although no doubt the slow procuring of colonies became advantageous to the bankrupt with a desire to travel.<sup>(5)</sup> An attempt to prevent such persons finding the means of escape too easy is found in 1633 where an order in Council is made for the suppression of all taverns having signs and stairs to the water, "having regard that loose persons, bankrupts, and such as are otherwise obnoxious, may privately resort thither, and likewise shift away, and withdraw themselves from the justice of the realm."<sup>(6)</sup>

The intention to delay a creditor by departure overseas was not always apparent. Where one Woodier, a mercer, fled overseas after having murdered his wife, and by virtue of his

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(5) It is interesting to note that the State of Georgia in the New World, was primarily founded by James Oglethorpe as a refuge for debtors and bankrupts. Oglethorpe brought about this settling, after he had witnessed the hellish conditions existing in the Fleet Prison, and obtained a grant of £10,000 from Parliament in order to do so. Although a grant which could have freed so many is in itself ironic, Parliament saw it as the curative for two ills. It rid the country of so much flotsam and at the same time gave Britain a base from which she might safeguard her southern frontier and British Carolina from the Spanish. See the Dictionary of National Biography, vol. 14, pp. 937 - 941; and Chambers Encyclopedia, vol. 6, p. 253. The 'Anne' sailed for Georgia in 1732, the year in which the provision making fraudulent bankruptcy punishable by death became permanent.

(6) Remembrancia, p. 547, VII, 99.



non-return his creditors were delayed, this was accounted an act of bankruptcy.<sup>(7)</sup> Stone stated that if a merchant not in debt departed the realm to trade and afterwards runs into debt, if he delay his return in order to avoid arrests, that this was the same as departing the realm to avoid creditors and that such merchant should be adjudged bankrupt.<sup>(8)</sup> Where one Hervey left England with a young lady, whose chastity he solicited, because she refused to live with him as his mistress in England, it was held that the fact that creditors were delayed was sufficient to render this an act of bankruptcy.<sup>(9)</sup>

Despite the fact that judicial opinion changed somewhat in relation to intention at a later date,<sup>(10)</sup> yet both the last case and *Woodier's Case* were in fact upheld. Lord Kenyon, C.J. said in 1798:<sup>(11)</sup>

"I do not wish to impeach the authority of Woodier's Case, or that of Raikes v. Poireau, because in both the parties went abroad under circumstances that rendered it highly

(7) Bull N.P. 39 (1739)

(8) Stone p. 133. [1656 edn.]

(9) *Raikes v. Poireau* (1786) Succ. Dig. 21

(10) The courts required a greater degree of proof as to intention in case of departing the dwelling house, see pp. 443-448

(11) *Fowler v. Padgett* (1798) 7 T.R. 509 at 514.

"probable that they would not return to this country;  
one had committed murder, and the other was amenable  
to the laws of this country for a different offence."

In 1813 it was held that although there was a departure  
from the realm and consequential delay to the creditors, yet  
this was not an act of bankruptcy in itself without proof or  
necessary inference of such an intention to delay creditors  
at the time of the departure.<sup>(12)</sup>

#### Keeping House

The common debtor might keep his house against all save  
the king;<sup>(13)</sup> to the bankrupt no such privilege was afforded;  
to remain closeted from the questing creditor was to invite the  
commissioners of bankrupts to enter.<sup>(14)</sup>

'House' itself was given a fairly liberal interpretation,  
it applied to a church if the churchwarden refused to come out,<sup>(15)</sup>

(12) Ex parte Osborne (1813) 2 Ves. & B. 177 per Lord Eldon at 179.

(13) Semayne's Case (1604) Co. Rep. V, 91 b.

(14) Any doubts held as to the right of the commissioners to force an  
entry were swept aside by s. 7 of 21 Jac. I, c.19.

(15) Succ. Dig. 23, this might also be a case of seeking sanctuary, see  
p. 453

to the miller in his mill,<sup>(16)</sup> to the house of another or aboard ship if the trader stayed there,<sup>(17)</sup> even the Tower lieutenant might keep house within the walls of his Tower.<sup>(18)</sup>

The act of keeping his house was brought about largely by the debtor denying himself to the creditor when the creditor called upon him, but such denial was only prima facie evidence of an intention to keep house.<sup>(19)</sup> If a debtor stayed in his house for a long period this of itself did not immediately make him a bankrupt;<sup>(20)</sup> yet concealment for only one hour in order to delay or defraud creditors was sufficient.<sup>(1)</sup> For the denial to stand up in court the request giving rise to it must have been reasonably made, it would not suffice if the request was made when

(16) Stone 10, 174.

(17) Commissioner, p. 27.

(18) Vin. Abr. 'Creditor and Bankrupt' 'B' (1) note p. 60. Later it was held that the closing of the shutters or doors of a bank, was 'beginning to keep house' even though the debtor did not reside at the bank:- Cumming v. Baily (1830) 6 Bing. 363.

(19) Field v. Bellamy (1742) Bull. N.P. 39

(20) Anon (1583) Cro. Eliz. 13.

(1) Heylor v. Hall (1622) Palm. 325 "Que si un luy conteyne in son meason (pour) long temps, ceo mainten(an)t ne fait luy bankrupt; mes si luy conceale in son meason (pour) un heur, on jour (pour) delayer ou defrauder ses creditors, ceo fait bankrupt deins le stat'." Ibid.

the debtor was sick in bed, or engaged in company,<sup>(2)</sup> nor was it denial if made to someone who came in place of the creditor.<sup>(3)</sup> In Ex parte Hall<sup>(4)</sup> creditors called on their debtor after 11 o'clock at night. The debtor not wishing to get up sent his wife to the window to inquire of them; the wife not receiving answer when requesting their names told them to return the next day. The commissioners held this sufficient to constitute a denial; the Lord Chancellor took a very different view when the matter came before him:

"There is no pretence to say that Hall has committed an act of bankruptcy, for eleven o'clock at night is a very improper hour for creditors to call, nor can a man's denying himself at such an hour, be said to be done 'with an intent to defraud his creditors,' which is the ingredient the acts of parliament require to make a man a bankrupt."<sup>(5)</sup>

Whether a mere refusal to a creditor constituted a denial came to depend on whether or not it was a clear and unequivocal

(2) Field v. Bellamy (1742) Bull. N.P. 39

(3) Jackmar v. Nightingale (1740) Bull. N.P. 40. "Though a man with intent to delay his creditors order himself to be denied, yet unless in fact he be denied to a creditor it will be no act of bankruptcy; therefore it is necessary to prove the person denied was a creditor." Per Lee, C.J. *ibid.*

(4) 1 Atk. 201 (1753)

(5) *Ibid.* The Lord Chancellor stated that should a similar case occur before him again, he would commit the attorney who was responsible for suing out the commission, *ibid* at 202. In Ex parte Preston (1813) 2 V. & B. it was held that denial on a Sunday was not an act of bankruptcy. at 311.

denial made with a view to delaying a creditor. In Colkett v. Freeman<sup>(6)</sup> the payer on a bill due the next day, being in difficult circumstances, instructed his clerk to say he was not at home should the holder present it the next day, this the clerk duly did on the bill being presented for payment early the next morning. During the course of the day for payment the payer managed to obtain funds and sent for and paid the bill. It was shown that by custom of the City of London a payer of a bill had until 5 p.m. on the day on which a bill became due in which to meet it. It was held that as a clear denial had been made this was an act of bankruptcy.

Ashurst, J., said:<sup>(7)</sup>

"I have always understood the general rule to be, that where a trader commits an unequivocal act of bankruptcy, nothing that passes afterwards can explain it away. Where indeed the act done is in itself equivocal, there it may be explained by subsequent acts, as by the Bankrupt's afterwards appearing in public, or the like ..... It is true, that if the payer of a bill of exchange discharge

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(6) 2 T.R. 59 (1787)

(7) Ibid at 60, 61

"it before five o'clock, on the day when it becomes due, that will be a sufficient payment in law in order to prevent a protest: but that is not the question here; what we are now to consider is, whether the denial to a creditor with a view to delay him was a complete act of bankruptcy at the time? I am of the opinion that it was, ..."

Buller, J., who had previously tried the case with a jury, and now referred the matter to the court said:<sup>(8)</sup>

"Here the case turned on ..... whether a denial of a creditor, with a view to delay him, though but for an hour, was not an act of bankruptcy. For though the words of the Act [ 13 Eliz. I, c.7] are 'begin to keep house,' yet on the construction of them it has always been held that a denial to a creditor with intent to delay him was an act of bankruptcy. .... A clear act of bankruptcy can in no case be explained."

Evidence that such a denial was made to creditors might be given by a witness, even where the witness was not altogether sure whether the persons going to the house were in fact

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(8) Ibid at 61-2. By s. 22 of 5 Geo. II, c.30, a creditor with a debt payable at a future date might make a petition for a commission to issue, although his debt had not yet become due. But if the act of bankruptcy was founded on a denial, such denial must have been to a creditor whose debt was already due, otherwise it would be no act of bankruptcy. - Ex parte Levi (1733) 2 Eq. Cas. Abr. 96.

creditors;<sup>(9)</sup> but the intent to delay creditors was not of itself sufficient unless he committed the necessary act. So that where a debtor, being arrested for debt, was allowed to go free on his stating he would put in bail after which he kept his house, the court accepted his statement that he did so in order to avoid the consequences of his former arrest and held it to be an act of bankruptcy.<sup>(10)</sup>

#### Flight from Home

The moonlight flit, if the most popular of the bankrupt's ploys presented numerous difficulties. Being away when the creditor called might be purely fortuitous or the result of a careful study of the creditor's habits. The length of absence

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(9) *Jameson v. Eamer* 1 Esp. 381 (1795) - where "Lord Kenyon said, there was no doubt that the denial must be to a creditor; but that; from all the circumstances taken together, he was of opinion there was evidence to go to the jury, to say whether the persons who called were of that description or not." at 381-2.

(10) *Dickinson v. Foord* (1759) Barnes 160 - The court "thought this a plain act of bankruptcy. The intent to defraud his creditors would not have been sufficient to make this man a bankrupt without doing the act, i.e. keeping at home; but he kept house, and declared with what intent; the intent need not be put in execution, the question is *quo animo* he kept house, he himself did the overt act, and declared his intent." at 160.

was immaterial,<sup>(11)</sup> but the absence must be voluntary.<sup>(12)</sup> The question of intention was far more important here than in cases of departing the realm, where the knowledge that creditors might be delayed could be more easily implied but the temptation to follow this line of reasoning was finally rejected.<sup>(13)</sup> It was decided that the words relating to departing applied only to the case of a person absconding in order to avoid payment of a just debt,<sup>(14)</sup> although if a person abscond to avoid

(11) Heylor v. Hall (1622) Palm. 325.

(12) That is to say not by arrest or force. Not having a regular residence did not matter, absence from a usual place of abode would suffice. - 2 Com. Dig. p. 5. In *Judine v. Da Costen* (1805) 1 Bos. & P. 234, a trader had a counting-house in the town, and a dwelling-house in the country. It was held that he committed an act of bankruptcy when he left the former, to which he never returned, taking his books with him and although he stayed at his dwelling-house a few nights before leaving that also.

(13) Absence if coupled with delay to creditors could be prima facie evidence of intent to delay creditors, but even where the debtor left his house "circumstances might shew, it was not to abscond." Per Lord Mansfield, in *Worsley v. De Mattos* (1758) 1 Burr. 467 at 484. In *Ex parte Osborne* (1813) 2 Ves. & B. 177, Lord Eldon said that "if a Man is pressed with Debts at the time of his Departure, that is strong Evidence of an Intention to delay Creditors:...". Ibid at 179.

(14) In *Lingood v. Eade* (1747) 1 Atk. 196, the question arose as to whether a person might be made a bankrupt where he absconded in order to avoid attachment for non-delivery of goods pursuant to an award. The Lord Chancellor, agreeing with an earlier opinion, held it not to be an act of bankruptcy "because it is not within the words of the statute of 1 Jac. I, ch. 15, which makes it an act of bankruptcy in a person to keep out of the way, or depart from his dwelling-house in order to avoid the payment of a just and true debt only, and not the delivery of goods, for that is a duty only:." Ibid at 196.



arrest on the last day of a law term in order to force a new writ to be taken out, this would be an act of bankruptcy for the action was clearly "within [1 Jac. I, c.15] which speaks of departing from his house with intent, and<sup>(15)</sup> whereby his creditors may be defeated or delayed from recovering their just debts."<sup>(16)</sup>

The chance to review the position of the bankrupt's intention arose in the case of *Fowler v. Padgett*.<sup>(17)</sup> One Fowler, a Manchester trader, had left his home to go to London in order to make arrangement with a failing debtor, and as a result of such arranging he was absent for some ten days. During the course of these ten days Fowler's business was left to look after itself and creditors calling with bills which had become due found no one to supply them with any information. Two of the delayed creditors took out a commission against Fowler, but on trial of the matter, the jury found for Fowler in "that they thought the intent of the plaintiff in going to London was laudable; that he had no intent to defraud or delay his creditors; but that

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(15) The wording in 13 Eliz. I, c.7, s. 1 was departing 'to the intent or purpose to defraud or hinder'; in 1 Jac. I, c.15, s. 1 the wording is departing 'to the intent or whereby' his creditors may be defeated or delayed.

(16) *Maylin v. Eyloe* (1729) 2 Stra. 809 at 809.

(17) 7 T.R. 509 (1798)

delay did actually happen to some creditors."<sup>(18)</sup> On application for the case to be retried the matter was heard by four judges in the King's Bench and extracts from some of the judgments are set out below:

Per Lord Kenyon Chief Justice:<sup>(19)</sup>

"This is a question of infinite importance, .... Bankruptcy is considered a crime, and the bankrupt in the old laws is called an offender: but it is a principle of natural justice, and of our law, that 'actus non facit reum nisi mens sit rea'. The intent and the Act must both concur to constitute the crime, and by reading the word "and" for "or" in the statute of 1 Jac. 1, c.15 which is frequently done in the construction of legal instruments where the sense requires it, all difficulty will be removed... If the words of the statute are to be taken in their literal sense, any person who happens to go from home only for an hour, during which time any creditor calls for payment, and is for that hour delayed, may become a Bankrupt; and it would be no answer to such an argument (as was supposed at the Bar) to say that the trader left word where he was

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(18) Ibid at 509

(19) Ibid at 514

"gone because a creditor may have taken out a writ against him in one county, and if he were gone on the borders of the next county, such Creditor would in fact be delayed... The legislature never could have meant to extend criminality to a person who leaves his house only for the purpose of transacting his legal concerns. I would adopt any construction of the statute that the words will bear, in order to avoid such monstrous consequences as would manifestly ensue from the construction contended for by the defendant."

Per Grose, J.<sup>(20)</sup>

"In deciding this case we ought to consider the spirit as well as the letter of the Act of parliament, on which this question arises. ... To say that this was an act of bankruptcy, merely because some of the plaintiff's creditors were unintentionally delayed by an act intended for their benefit, would be a most severe determination, especially in a case where we are called upon to grant a new trial against the justice of the case. I do not mean to say that this is not a point of some difficulty, and certainly it is a question of great consequence; but as these parties are not equal to the expence of a special verdict, I am

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(20) Ibid at 515-516.

"not disposed to grant a new trial, particularly when we consider that the question will probably come back again here in the same shape on a motion for a new trial."

So by the use of common sense the court defeated the more ludicrous, yet probably the more correct in law, result which would otherwise have arisen. Lord Kenyon's method of interpreting statutes came in for some criticism later however in *Robertson v. Liddell*,<sup>(1)</sup> where it was held that the intention to delay was sufficient if the bankrupt departed his dwellinghouse, and the fact that no creditors were thereby delayed was irrevelant.<sup>(2)</sup>

#### Seeking Sanctuary

This offence of seeking sanctuary, makes a somewhat strange re-appearance at a time when, as we have seen, sanctuary itself, at least theoretically, should have been of no consequence,<sup>(3)</sup>

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(1) 9 East, 487 (1808) at 493.

(2) As to the interpretations offered by Lord Ellenborough, C.J., see *ibid* at 495.

(3) See pp. 249-253.

though so called 'privileged places' did exist.<sup>(4)</sup> Green defines it as follows:

"Taking Sanctuary is when a Person takes Refuge in any Place in which the Law cannot be so readily executed upon him, and to delay the Payment of his Debts to his Creditors, viz. within the verge of the Court, or in any other particular Place of Refuge."<sup>(5)</sup>

Goodinge writing in 1713 says "These were Privileged Places formerly, but now the King's Officers may go into any Place."<sup>(6)</sup> Perhaps it is only the churchwarden shivering in his church who might be said to come truly within this head.<sup>(7)</sup> That some 'Privileged Places' had in fact remained and flourished

(4) Notice of this is made in 1 Jac. I, c.15, s.4 which gave power to the commissioners to have the bankrupt arrested if he failed to appear after five proclamations made in a public place. The provision states that the offender is to be taken wherever he may be found, "in place privileged or not". By s. 7 of 1 Jac. I, c.25 (1603-4) all statutes relating to sanctuary prior to 35 Eliz. I, are repealed. This provision caused difficulties, and in 1623-4, by 21 Jac. I, c.28, all those parts of statutes which took away the right to sanctuary are revived - s. 6; and no sanctuary or privilege to sanctuary is thereafter to be admitted or allowed - s. 7.

(5) Green (E.) 'The Spirit of the Bankrupt Laws' (1767) p. 45.

(6) Goodinge pp. 22-23.

(7) Succ. Dig. p. 23.

in the reign of Elizabeth I is true and presumably their close proximity was sufficient to bring them to the notice of Parliament.<sup>(8)</sup> A short extract from a play of 1688 will serve to show the nature of the 'privilege'.<sup>(9)</sup>

"Cheatly. So long as you forbear all Violence, you are safe; but, if you strike here, we command the Fryers; and will raise the Posse.....

(A noise of tumult without, and blowing a Horn)

Cheatly. What is this I hear?

Shamwell. They are up in the Friers; Pray Heav'n the Sheriff's Officers be not come.

Cheatly. 'Slife, 'tis so! 'Squire let me conduct you - This is your wicked Father with Officers.

(Cry without, the Tip-staff! an Arrest, an Arrest! and the Horn Blows.) (Enter Sir William Belfond, and a Tip-Staff, with the Constable and his Watchmen; and

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(8) In s. 15 of 8.9 Will. III, c.27 (1696-7) such privileged places are listed as follows: White Friars, Savoy, Salisbury Court, Ram Alley, Mitre Court, Fuller's Rents, Baldwin's Gardens, Montague Close, or the Minorities, Mint, Clink or Deadman's Place.

(9) Shadwell (T.) 'The Squire of Alsatia' (1688) Act IV, scene 1. ('Works edited by Summers (W.) (1927) vol. IV, pp. 263, 266).

"against them, the Posse of the Friers drawn up,  
Bankrupts hurrying to escape.)

Sir Will. Are you mad to resist the Tip-Staff, the King's  
Authority? (They cry out, An Arrest! several flock  
to 'em with all sorts of Weapons, Women with Fire-  
Forks, Spits, Paring-Shovels, &c.) ....

Tip-Staff. I charge you, in the King's Name, all to assist me.

Rabble. Fall on.

(Rabble beat the Constable and the rest into the  
Temple. Tip-Staff runs away.)"

There is no exaggeration in Shadwell's description, a  
look at the various reports made to Parliament on the disorders  
which took place in such privileged places will prove this.<sup>(10)</sup>

By 8.9 Will. III, c.27, s. 15<sup>(11)</sup> it was provided that a

(10) See Jo. H.C. vol. 11, pp. 641, 675 (1696); Ibid vol. 15, p. 169 (1705-6  
ibid vol. 20, p. 155 (1722-3))

(11) 1696-7. In his diary Evelyn notes that on the 25th Mar., 1687 a man  
entered the Church with his sword drawn followed by others likewise  
armed; and that "it appear'd to be one who fled to sanctuary, being  
pursued by bailiffs." - Evelyn's Diary - edited by William Bray  
(3rd edition 1827) vol. III, p. 227.

a sheriff might raise the posse comitatus in order to make arrests in the so called privileged places, in the cities of London, Westminster and Borough of Southwark in the County of Surrey, such arrests were to be made whether on mesne process, extent or execution in order to prevent the "many notorious and scandalous practices" in these places. In order to execute such process the sheriff was given the right to break down doors, and for the sheriff who neglected his duties there was a penalty of £100.

This Act was a failure,<sup>(12)</sup> and it was not until 9 Geo. I, c.28<sup>(13)</sup> that the 'pretended privileged Place in the Parish of St. George in the County of Surrey, commonly called the Mint' is finally dealt with. But although the Act gave relief in the cases of poor debtors, the inmate against whom a commission of bankruptcy had issued and who had not gained his certificate of discharge, was not to be entitled to any discharge by virtue of this Act nor to receive any of the benefits given under it.<sup>(14)</sup>

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(12) See the report to the House of Commons in Jo. H.C. vol. 20, p. 155, where the committee reporting state that in the Mint, the people have a general and have set up judges and beaules and messengers. The inmates also claimed that four particular streets, covering an area of more than half a mile, should be considered a privileged place.

(13) 1722-3.

(14) S. 20.



Yielding to Prison

This head could easily be allied, at least in spirit, with another in the same Act, that of suffering arrest for a debt not yet due. Both were recited in 1 Jac. I, c.15, s. 1 which added also willingly or fraudulently procuring self arrest.<sup>(15)</sup> The line between the three is somewhat slender.<sup>(16)</sup>

To yield to prison on a true debt when able to pay was not itself an act of bankruptcy under this provision,<sup>(17)</sup> if the debtor refused to pay with intent to delay his creditors this would be sufficient.<sup>(18)</sup> If the debt did not exist at all this clearly came within the head of arrests for debts not due. Yet

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(15) The fact that a person was arrested was not sufficient to bring the debtor within the provisions, for as Lord Mansfield said: "... the mere being arrested is no presumption of insolvency." *Rose v. Green* (1758) 1 Burr. 437 at 439.

(16) Neither the courts nor creditors seem to have been very happy with these provisions, the latter being almost entirely disregarded.

(17) But under a further provision of 1 Jac. I, c.15, s. 1 relating to lying in prison, it might be. See pp. 468-476.

(18) *Ex parte Barton* (1734) 2 Eq. Cas. Abr. 96.

it might have been thought that the provision of 1 Jac. I, c. 15, s. 2 would in fact cover both under "or willingly or fraudulently hath or shall procure him or herself to be arrested," it would indeed seem capable of dealing with those cases where the person contrived to be arrested for some matter other than debt in order to avoid his creditors.<sup>(19)</sup> Certainly there was nothing novel about this practice, a report of one such case appears in Dyer,<sup>(20)</sup> where it appears that one Verney otherwise Joyner, a gentleman of London, being in the Fleet for large sums of money, fraudulently procured himself to be indicted for felony so that he might be able to claim benefit of clergy "to the intent to be out of the temporal laws," and afterwards by payment make his purgation and thus depart clear of soul and creditors; unfortunately someone appears to have told the King and Verney's judges were ordered not to proceed.

Intent was the stumbling block in such cases, after all a man might simply prefer to go to prison, without even bothering himself as to the delay caused to his creditors. In *Ex parte*

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(19) For in the case of lying in prison, it was thought that the prior arrest ought to have been for debt. See p. 474.

(20) Verney's (otherwise Joyner's) Case (1565) Dyer 245 b.

Barton,<sup>(1)</sup> the debtor chose to go to prison rather than pay his creditors, but in this case he was kind enough to state that his sole intention in doing so was to force a composition upon his creditors and thus pay less. By virtue of this confession the court was able to find him bankrupt within the provision for yielding to prison, but the Lord Chancellor found that merely yielding to prison was otherwise no sin, unless the whole action were a sham, in which case he would be caught by arrest for debts not due.<sup>(2)</sup>

#### Suffering Outlawry

As with arrest this was no more than an attempt to prevent the bankrupt trying out the old methods of evading the creditor already well known to the courts; so that where a debtor, having had judgment given against him for debt, permitted himself to be outlawed<sup>(3)</sup> in order that he might later purchase a pardon and

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(1) Ex parte Barton (1734) 2 Eq. Cas. Abr. 96.

(2) Under the provisions of 13 Eliz. I, c.7, s.1, see p.458. It was much more simple for a creditor to show that the debtor had in fact lain in prison for the requisite period, and it is under this head that such cases were generally considered. See pp 468-476.

(3) Thus forfeiting his goods and chattels to the Crown, see p. 213.

and obtain restitution of his chattels, the court would allow the creditor to sue out execution on the chattels on the ground of the debtor's manifest fraud.<sup>(4)</sup>

The question of intent never became settled as in the more definite cases to be found under the other heads of bankruptcy. It was generally accepted that it was necessary for the outlawry to have been suffered in order that the creditors might be delayed and a statement to this effect was made by counsel in *Radford v. Blidworth*<sup>(5)</sup> upon which the court offered no comment.

Where a bankrupt permitted himself to be outlawed after having committed an act of bankruptcy, such outlawry did not divest the creditors of any interest they acquired in the estate by virtue of such act.<sup>(6)</sup>

By virtue of the oddity attending the pleading of a court record, if a man suffered himself to be outlawed in Ireland this would not bring him within the provision, but if he were outlawed

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(4) See for example *Beverly's Case* (1588) *Dyer* 245 note 65.

(5) 2 Sid. 176 (1659) at 177 per Serjeant Mainard: "Car utlary ne fist un bankrupt ne aler ouster le mere ne fist un bankrupt, si no come l'estat dit, soit ove intent pour deceive les creditors."

(6) See *Paine v. Teap* (1691) 1 Salk. 108.

in the county palatinate of Durham then he would be, for in the former case the record might not be pleaded here.<sup>(7)</sup> If in fact the outlawry was reversed for want of proclamations then all that had been done by the commissioners was void.<sup>(8)</sup>

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(7) Commissioner, p. 36.

(8) Vin. Abr. Creditor and Bankrupt 'B' p. 61, (10).

CHAPTER 18THE LATER 'ACTS OF BANKRUPTCY'

With the legislature making the more simple processes, whereby a debtor might escape his creditors, acts of bankruptcy; the debtor had of necessity to revive older habits. These too, however, were destined to fail, for the legislature was now too firmly embarked on bankruptcy as a means of curing merchant debtors. It could not, it did not, allow the ingenuity of countless ages of debtors to defeat it.

In the first year of his reign, James the First saw added a further four acts, of which, if the debtor were guilty, he might be adjudicated a bankrupt.

Willingly or fraudulently procuring oneself to be arrested, differing little from yielding to prison; or wilfully or fraudulently procuring one's goods to be attached, brought a commission upon the merchant. In order to prevent the general malpractices of debtors, who preferred lounging in prison at their ease to meeting their trading commitments, lying in prison for a period of six months was sufficient to enable a creditor to sue out a commission. This period was later cut to two months, and it seems

to have had the general effect of rendering sterile the provisions for yielding to prison and procuring self arrest. Strangely enough, it is only at this point that the making of a fraudulent conveyance is made an act of bankruptcy; though this might be connected with the fact that two acts of Elizabeth had provided remedies in such cases, but these were of general application not specifically applicable to merchants.

For a further twenty years these actions served the nation, whilst the debtor turned grimly to his last remaining weapons.

Escape after flight, since prevention is better than cure, is probably the oldest of the debtor's remedies. But the merchant debtor who escaped his gaolers after arrest and imprisonment for a debt of £100 or over had illustrated sufficiently his intention not to pay, and he might be accounted bankrupt.

Privilege and protections, which had served so well in the pre-bankruptcy days, now failed the trader. The former was strictly regulated, the latter abolished.

Only one act of bankruptcy, other than regulating proceedings against members of parliament, is added in the next two hundred years. This is the only somewhat original idea to come from the merchant in his effort to avoid distributing his lot amongst his creditors. A sophisticated by-product of the bankruptcy legislation.

Where the debtor paid his creditor money, after the creditor had taken out a commission but before he had executed it, in order that the creditor would allow the commission to lapse, such payment was void and the action itself was an act of bankruptcy, upon which another creditor might obtain a commission.

Only one of these actions by the bankrupt was in fact an involuntary action, that of lying in prison, for if arrested and imprisoned and without means to pay, then he must move willingly or unwillingly towards the commissioners.

From these somewhat simple statements the court, given time, produced a sometimes complicated formula whereby it might be decided whether a man were bankrupt or no.

#### Goods Fraudulently Attached

The provision whereby the trader who secured himself to be arrested might be made a bankrupt has already been discussed.<sup>(1)</sup>  
A similar fate was enacted for any merchant:

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(1) See p.458.



"Willingly or fraudulently having procured or procuring goods, money or chattels to be attached or sequestered, to the intent, or whereby his creditors shall or may be defeated or delayed".

This provision suffered much the same fate of its partner relating to arrest in that it was overshadowed by a more powerful provision in the same Act.<sup>(2)</sup> Yet like its partner it could have been used successfully had not its use not been almost totally destroyed by what appears to have been a confusion of this head with the further provision relating to fraudulent grants and conveyances. In *Clavey v. Hayley*,<sup>(3)</sup> as the result of a fraudulent action for debt, the debtor had execution levied upon his goods by virtue of the judgment. On a question as to whether this was an act of bankruptcy the court held that a fraudulent judgment and execution although void against the creditors was not itself an act of bankruptcy within the above. Lord Mansfield in an early part of the judgment prevented counsel from trying to show a fraudulent conveyance, saying, "A fraudulent conveyance that constitutes an act of bankruptcy must be by deed",<sup>(4)</sup> after which counsel attempted to show that execution was easily within the intention and wording of the Act, but to no avail. In giving judgment Lord Mansfield stated that an earlier case of *Harman v. Spotswood*<sup>(5)</sup> decided that sequestration

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(2) See p. 476. The effect of the provision was to render void all fraudulent grants and conveyances.

(3) 2 Cowp. 427 (1776)

(4) Ibid at 427

(5) Ibid at 428

and attachment do not include execution. This is an unfortunate reading of a case in which his was the leading judgment. In that case the jury found that there was a bona fide debt upon which execution was obtained and that the debtor's agreements in relation to it arose later, which itself removes it from the above provision. Lord Mansfield's thoughts at the time as to whether execution could be brought within attachment and sequestration were decidedly unsettled:

"I did at first think attachment and sequestration did not include executions. On a second trial, I expressed myself as if attachment and sequestration did include executions. But I was desirous to have it settled; and afterwards, upon argument, the whole Court held it not to be an act of bankruptcy."<sup>(6)</sup>

It was to the question of attachment and sequestration as known in London and several other large cities that Lord Mansfield returned in the present case and by relating this to a specific mention of the custom of attachment in the City of London in 21 Jac. I, c.19, s. 8<sup>(7)</sup> since "All the bankrupt acts being in pari materia, must be taken altogether"<sup>(8)</sup> he goes on to say:

"..we adhere to the opinion given in Harman v. Spotswood, that a fraudulent execution, though it will not stand in the way of creditors, being void as against them, yet does not of itself

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(6) Ibid at 428

(7) Under this provision any execution or extent must have been served and executed before the act of bankruptcy. See p. 550.

(8) 2 Cowp. 427.

"constitute an act of bankruptcy."<sup>(1)</sup>

What might have dealt quite effectively with cases of fraudulent executions was, for most practical purposes, completely wiped out by this judgment.

### Lying in Prison

This was the one involuntary act of bankruptcy over which the debtor might have no control, for if he was arrested for debt and could not pay, he necessarily had to remain in prison. The actual provision reads:

"Or being arrested for debt, shall, after his or her arrest, lie in prison for six months or more upon that arrest, or upon another arrest or detention in prison for debt, and lie in prison six months upon such arrest or detention, shall be accounted and adjudged a bankrupt TO ALL INTENTS AND PURPOSES."

Any pretence as to the intention of the debtor is done away with and we have the first introduction of what has remained with us to the present day, that mere insolvency itself was all that was required,<sup>(2)</sup> as long as the requisite prison period was

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(1) Ibid at 428

(2) See 4.5 Geo. V, c.59, s.1(1)(f), (g), (h), (1914)

served, a period which was reduced to two months by 21 Jac. I, c.19 s.2.<sup>(3)</sup> For some reason it was another 139 years before the creditor of a non-trading debtor could call upon him to deliver up a schedule of his effects,<sup>(4)</sup> upon deciding which fact<sup>(5)</sup> the Lord Chancellor had this to say:

"It is a most just clause, and almost a reproach to former acts of parliament,<sup>(6)</sup> that it was not inserted in them; before this, a debtor would lie in gaol four or five years, and waste his substance, and if his conscience would digest it, by his oath get discharged under an act for relief of

(3) S. 2

(4) 16 Geo. II, c.17, s.37(1742-3). By virtue of this section where the debtor chose to remain in prison rather than deliver up his estate and obtain his discharge, the creditor might request that the debtor make oath as to, and deliver up a schedule of his estate and effects before the justices at Quarter Sessions. "And if any such prisoner, so brought up as aforesaid, shall neglect or refuse to deliver in, and subscribe such schedule within sixty days, he, she, or they, so neglecting or refusing, shall upon conviction thereof be adjudged guilty of felony, and shall suffer death as a felon without benefit of clergy..". Ibid.

(5) Smith v. Cooke (1746) 3 Atk. 378. The question in this case was whether a creditor might call on the debtor to deliver up a schedule of his effects under the section. The debtor claimed it was the right of the debtor only to make such schedule if he so wished and then to call on the Justice of the Peace for discharge.

(6) That is to say, the earlier Insolvent Debtor Relief Acts, which allowed debtors with debts under a certain amount to make oath as to their estate and procure their release, although their future acquired estate remained liable to the creditor.

"insolvent debtors.

The creditor had no remedy, could not go to a justice of peace and desire the debtor might deliver up his effects, and let him be discharged for so doing."<sup>(7)</sup>

Although the problem of intent was absent here the provision did not prove as simple to operate as might be thought. The question regarding the debtor, who, being arrested, put up bail to procure his release and later surrendered himself in discharge of his bail, after which lying in prison the specified period; was he to be considered a bankrupt from the time of his first arrest or only from the time when he surrendered himself in discharge of his bail?

In *Duncomb v. Walter*,<sup>(8)</sup> it is stated by one reporter that the court gave judgment that a person should only be accounted bankrupt from the time of rendering himself in discharge of his bail to prison. "For that the best man upon the exchange may be arrested and put in bail, and afterwards become poor, and so be forced to surrender himself to save his bail, and it will be hard to construe him a bankrupt from the first arrest when he was able."<sup>(9)</sup>

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(7) 3 Atk. at 379

(8) 2 Show. 253 (1684)

(9) Ibid at 254

The case, however, was concerned with a number of other points which somewhat weakens the authority.<sup>(10)</sup> In *Cane v. Coleman*<sup>(11)</sup> the court was of the opinion that the act of bankruptcy:

"must be taken from the time of the first arrest, upon which he lies in prison, not where he puts in sufficient bail, for that might be infinitely prejudicial and mischievous, and no man could ever safely pay or receive from a tradesman."<sup>(12)</sup>

The position was to some extent clouded for a time by an obita of Holt, C.J. in *Smith v. Stracy*<sup>(13)</sup> in which he made the proposition that if H is arrested at the suit of A and puts in bail, and, that pending, is arrested at the suit of B and goes to prison and lies there two months, he is by act of parliament, bankrupt, from the time of his first arrest by A.<sup>(14)</sup>

The opinion that it was only on the actual lying in prison that bankruptcy commenced was upheld in *Hill v. Shish*,<sup>(15)</sup> although

(10) The case dealt mainly with the right of an executor to issue a writ for the arrest of a debtor on a debt due to the deceased, before the executor had in fact gained probate of the will.

(11) 1 Salk. 109 (1690)

(12) Ibid at 109. The paying of money to a bankrupt in good faith and without notice of an act of bankruptcy was given protection by 1 Jac. I, c.15, s.9.

(13) 1 Salk. 110 (1703)

(14) This suggestion seems to conflict with a statement made by Holt, C.J. earlier in *Hopkins v. Grey* (1703) 7 Mod. 139, where he said that though a man be arrested hourly by his creditors, yet if he would give bail as often as he was arrested, then until he committed some act of bankruptcy, he might prefer any one creditor to another.

(15) 2 Show. 512 (1687)

the case was actually concerned with another provision of 21 Jac. I, c.19, s.2 which made it an act of bankruptcy not to pay or compound with a creditor having a debt of £100 or more which had become due and upon which the debtor had been arrested. It was held that if the trader was arrested on several actions and gave bail for all, that his not paying the debts within the six months did not make him a bankrupt until after the expiration of the six months, since the provision did not relate to the time of the arrest. The effects of these cases were argued by counsel in *Tribe v. Webber*<sup>(16)</sup> in which the court now firmly adhered to bankruptcy only commencing from the actual incarceration.

This, however, was not the end of the matter, for the problem projected earlier by Holt, C.J. in *Smith v. Stracy*<sup>(17)</sup> came before the court in *Coppendale v. Bridgen*,<sup>(18)</sup> in a slightly altered form. One Debonaire was arrested at the suit of the plaintiff on the 2nd May, 1757, on the 4th of May another writ was issued against him by one Solomon and he was committed to the Fleet prison on that day.

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(16) Willes 464 (1744). A full report of this case is to be found in Davies, (T.) 'The Laws Relating to Bankrupts' (1744) pp. 376-382. A copy of this latter report is given in the appx. pp. 785-792.

(17) 1 Salk. 110 (1703), see p. 471.

(18) 2 Burr. 814 (1759)

He was discharged from custody on the first arrest on the 2nd of July,<sup>(19)</sup> but continued in prison on the second arrest until the 6th of July. A question therefore arose as to whether Debonaire was bankrupt as from the 2nd of May or only from the 4th. Lord Mansfield stated the position as follows:<sup>(20)</sup>

"This man was arrested on the 2d of May, and on the 4th of May was charged in custody, with that and another action: and it is admitted 'that he did lie two months in prison,' viz. till the 6th of July, at Solomon's suit; and until the 2d of July, before he was discharged at the plaintiff's suit.

The lying two months in prison is a strong presumption that the person was insolvent at the time of the arrest. And the Act says that 'if he lies in prison two months upon that, or any other arrest, he shall be adjudged a bankrupt from the time of the first arrest'. So that here is plainly an act of bankruptcy on the 4th of May; whatever dispute may be made

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(19) It was held that where time was to be computed from the doing of an act that this included the day on which the act was done. Thus the period of lying in prison two lunar months after an arrest included the day of the arrest: *Glassington v. Rawlins* (1803) 3 East 407.

(20) 2 Burr. at 818.



"about there being one upon the 2d."<sup>(1)</sup>

The wording of the section seems necessarily to indicate that the remaining in prison must be as a result of arrest and commitment on a writ of debt only.<sup>(2)</sup> The courts seem largely to have accepted this as so, although there is some indecision as to the position of the debtor in prison on some other account when a writ of debt issued against him. Could the debtor be said to be lying in prison for debt when in fact he was restrained from obtaining his liberty by circumstances other than his own insolvency? In *Greenwood v. Knipe*,<sup>(3)</sup> an attempt was made to

- (1) In the course of giving his judgment in this case *Wilmot, J.* said: "The Act is positive, in making the bankruptcy to commence from the time of the first arrest; wherever the trader shall lie in prison two months upon that or any other arrest. And the reason why it should be so, is very obvious; viz. because it is a presumption of his insolvency at the time of the arrest: for a man in trade must be very low, both in point of fortune and credit, who lies two months in prison, without being able either to pay his debt or to procure bail." *Ibid* at 819.
- (2) The provision reads: "Or being arrested for debt, shall, after his or her arrest, lie in prison for six months or more upon that (arrest or (upon) any other arrest or detention in prison for debt, (and lie in prison six months upon such arrest or detention)." The words in brackets do not appear in s. 2 of 21 Jac. I, c.19, under which provision the period of lying in prison was reduced to two months.
- (3) *Nott. Ch. Cas. (S.S.)* I, p. cxvi-cxvii; II pp. 570-1, No. 754. (1677)

show an act of bankruptcy where a prisoner had been "lying in prison in Windsor Castle, where he was no prisoner of debt, but for loyalty."<sup>(4)</sup> Lord Nottingham felt this was unjust and said that:

"the imprisonment for loyalty was very unjustly made use of to be strained to an act of bankruptcy."<sup>(5)</sup>

In *Ex parte Bowes*,<sup>(6)</sup> the original commitment of the debtor was by reason of sentence in criminal proceedings, during the term of the sentence the prisoner was charged with the debt. Although it was not necessary to the decision Lord Chancellor Loughborough was of the opinion that lying in prison should probably be for debt and not a criminal action:<sup>(7)</sup>

"I have very considerable doubt also, whether upon the construction of the Bankrupt Laws it is not of essential necessity, that the lying in prison should be upon a case of imprisonment founded in debt and nothing else, for it

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(4) Ibid at p. cxvi.

(5) Ibid at pp. cxvi-cxvii.

(6) 4 Ves. Jun. 168 (1798)

(7) Ibid at 176.

"is obvious, the reason that induced the legislature to constitute that specific act of bankruptcy, was the presumption of insolvency; that the affairs of the man were in such confusion, that the best method of settling them would be that summary proceeding. But it appears to me, the legislature meant it to be a case of imprisonment for debt; and the legislature could not I think, have expressed itself more clearly."

In order to prove the period during which the debtor had been in prison, the prison books might be produced so as to show the period of commitment and discharge if such had taken place. Such prison books, however, were not admissible to prove the cause of the commitment.<sup>(8)</sup>

#### Fraudulent Conveyances

Although belatedly added to the list, this provision soon grew in stature, and from within it the doctrine of fraudulent preference was to develop. It provided that the perils of bankruptcy would attend upon any merchant:

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(8) *Salte v. Thomas* (1802) 3 Box. & Pul. 189

Making any fraudulent grant or conveyance of lands, tenements, goods or chattels to the intent or whereby creditors may be defeated.

In this form the legislature made into an act of bankruptcy the one thing which had been constant in the debtor's armoury, and which had been the subject of legislation from the time of Henry III, the fraudulent conveyance.<sup>(9)</sup> The form of the provision and its subsequent interpretation by the courts led to some extraordinary complications.

One major fact emerged from the decisions, to be within the provision it was necessary for the assignment to be by a deed<sup>(10)</sup> made in contemplation of bankruptcy.<sup>(11)</sup> There was indecision as to the amount of property which might be assigned on the eve of bankruptcy before it might be said to be an act in fraud of the creditors. Where the trader assigned his entire estate there

(9) See pp. 82, 237.

(10) *Martin v. Pewtress* (1769) 4 Burr. 2477, per Lord Mansfield at 2478. Where the assignment was not by deed, it might nevertheless be void as being in fraud of creditors, see pp. 614-629.

(11) The question of relevant intention came to be of secondary importance where the assignment was made on the eve of the bankruptcy. In *Worsley v. De Mattos*, (1758) 1 Burr. 467. Lord Mansfield said: "But, if a bankrupt may, just before he orders himself to be denied, convey all, to pay the debts of his favourites; the worst and the most dangerous priority would prevail, depending merely upon the unjust or corrupt partiality of the bankrupt." Ibid at 477.

was obviously little difficulty, but what of cases where the trader reserved certain parts of his property? Slowly a fairly workable rule emerged to the effect that if the trader assigned so much of his estate that he no longer had the ability to carry on business, this would bring him within the enactment.<sup>(12)</sup> Attempts by traders to colour their assignments by specifically excepting certain parts of their estate met with little success.<sup>(13)</sup>

In *Law v. Skinner*,<sup>(14)</sup> the debtor assigned to his creditor

(12) In *Small v. Oudley*, (1727) 2 P.Wms. 427, where an assignment by a goldsmith of two-thirds of the stock held by him in the wine trade, and two leases was held good. Yet the Master of the Rolls was of the opinion that had the assignment been of all the goldsmith's goods and effects, or of all his estate, or all his stock-in-trade as a goldsmith, then the assignment could not have stood. See *ibid* at 431.

(13) See for example *Compton v. Bedford* (1762) 1 Black W. 362. Where the bankrupt, on making over his effects to certain creditors, excepted a few items to the value of about £100.

(14) 2 Black W. 996 (1775). In the course of judgment De Grey, C.J., said: "It is an assignment of all his stock in trade, without which he can carry on no business. It is of all his substance, except his household goods and debts, which alone were insufficient to discharge his incumbrances, and therefore made him insolvent." *Ibid* at 997. Lord Mansfield in *Hassells v. Simpson* (1781) Doug. 89 in *notis*, said that *Law v. Skinner* was in fact inaccurately reported, for mere insolvency did not make a man a bankrupt. "... a man may be insolvent, without being a bankrupt; and a man may become a bankrupt, and yet be able to pay 25s. in the pound. The reason why a man becomes a bankrupt, who conveys away all his property, is, that he thereby becomes totally incapable of trading." *Ibid* at 92.

two leasehold messuages and all his stock in trade, but did not include his household goods and debts which were of little value. This was held to be an act of bankruptcy. Similarly where an assignment was made of all the estate save for household goods, plate, bills of exchange, inland bills, promissory notes and cash in hand together with a large parcel of ginger it was held to be an act of bankruptcy.<sup>(15)</sup> Where the debtor, having made an assignment with or without some exceptions, remained in possession after the property was assigned, this might be some evidence that the reservation was merely colourable and the deed fraudulent.<sup>(16)</sup>

It was always open to a person to prefer one creditor to another as long as it was done bona fide,<sup>(17)</sup> a factor that was aided by the assignee taking possession as soon as possible. In

(15) *Ex parte Foord* (Gayner's Case) (1755) 1 Burr. 478.

(16) "A conveyance of goods, without deed, is fraudulent, unless possession of the goods be given: if it be by deed, it is fraudulent and an act of bankruptcy." Per Lord Kenyon in *Manton v. Moore* (1796) 7 T.R. 67 at 71. Speaking of retaining goods after an assignment in *Law v. Skinner* (1775) 2 Black W. 996 at 997, De Grey, C.J. said: "The keeping possession was hanging out false colours to gain a fictitious credit." And see *Twyne's Case* (1601) Co.Rep. III, 80 a, at 81 a, 81 b.

(17) That is to say, not in contemplation of bankruptcy. See per Lord Mansfield in *Wilson v. Day* (1759) 2 Burr. 827, at 830.

Jacob v. Shepherd,<sup>(18)</sup> one Leigh sold and conveyed certain of his goods in trust to a particular creditor, the creditor to pay himself a debt owing from Leigh of £1,500, after which he was to pay a debt owed by Leigh to one Merley and thereafter to pay such creditors as Leigh, with Merley's consent, should direct. The trust was immediately and openly carried out. It was held that this was not an act of bankruptcy and Lord Mansfield commenting in a later case said:<sup>(19)</sup>

"There might be many reasons, why it was not found fraudulent, upon the trial. The deed was executed the 8th of June, of specific goods: and was immediately carried into execution. The act of bankruptcy was not till the 11th of February following; and I see no suggestion that in June, Leigh thought of committing an act of bankruptcy. Besides, one ground upon which the assignee brought his bill, was "fraud and imposition upon the bankrupt himself, in obtaining the deeds:" therefore, most probably, he was frightened into giving this security by threats of legal diligence against him."

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(18) 1 Burr. 479 (1726)

(19) Worsley v. De Mattos (1758) 1 Burr. 467 at 480.

This freedom, however, became slowly enmeshed in a line of decisions which saw such assignments, whereby a debtor bona fide gave part of his estate to a just creditor, as giving a form of preference to one creditor to the eventual defrauding of the others. As the spirit of the bankruptcy laws was frequently said to be to ensure equality amongst creditors,<sup>(20)</sup> to allow such a preference was in itself a contradiction of such spirit,<sup>(1)</sup> yet two cases had allowed such preference to be good.

In *Small v. Oudley*,<sup>(2)</sup> the debtor, a goldsmith, assigned to one of his creditors, two leases and a two-third share he held in a wine business; it was held a good assignment since it was not of stock in his own business but of stock held in the wine trade and only two-thirds of that. Again, where a trader on the same day assigned half his stock-in-trade to a creditor (his mother) and then called a meeting of his creditors; the assignment was held good,<sup>(3)</sup> and Lord Mansfield said:

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(20) It was, in any case, provided by statute "That all and singular the ... statutes and laws... made against bankrupts and for relief of creditors, shall be in all things largely and beneficially construed and expounded for the aid, help and relief of the creditors of such person or persons as already be or hereafter shall become bankrupt." 21 Jac. I, c.19, s.1.

(1) Since if such a thing were permitted the other creditors might have very little in which they could share.

(2) 2 P. Wms. 427 (1727)

(3) *Hooper v. Smith* (1763) 1 Black W. 441.



"a preference to one creditor, especially by assigning only part of his goods, and to pay only part of the debt, has frequently been held to be good."<sup>(4)</sup>

In both cases there is an undoubted preference; yet, where a loan of £120 was made against an assignment of one-third of the bankrupt's estate<sup>(5)</sup> and two days later the debtor absconded this was held an act of bankruptcy on the grounds that it was the voluntary act of the debtor with intention of showing a preference.<sup>(6)</sup> The new position was more clearly explained in *Round v. Hope Byde*.<sup>(7)</sup> Byde, a banker in distressed circumstances,

(4) *Ibid* at 442

(5) *Linton v. Bartlet* (1770) 3 Wils. 47. The creditor was the bankrupt's brother, but there was no suggestion of fraud.

(6) *Per Curiam* at 47-48. "Although this may be a hard case upon the brother, who is a bona fide creditor, yet the giving him a preference is a fraud upon all the laws concerning bankrupts, which proceed upon equality, and say that all the creditors shall come in *pari passu*. There is no case where ever such a preference as this was allowed. The same spirit of equality ought to warm the Courts of Justice, which warmed the legislature when they made the bankrupt laws; and if we should let this deed stand, we should tear up the whole bankrupt laws by the roots; it is a bill of sale made by a trader, at a time when he was insolvent, and (plainly) had an act of bankruptcy in contemplation; it is partial and unjust to all the other creditors."

(7) (1779) - Cook, (W.) 'The Bankrupt Laws' (1804)I, p. 94.

made an assignment to his son of part of his real and personal estate. The assignment could not be impeached as the son had entered into engagements for and advanced money to his father to more than the value of the estate assigned and had taken possession immediately on execution of the deed. Despite these facts the assignment was held to be an act of bankruptcy. In the course of his judgment Lord Mansfield said:<sup>(8)</sup>

"I take it to be clear law, that if in contemplation of bankruptcy, a man conveys to the fairest Creditor that ever existed, it is not a fraudulent deed as between them; but it tends to defeat the whole Bankrupt laws, and as such is held to be a fraud on the rest of the Creditors. It is equally clear, that though it be not a conveyance of the whole of his property, and that a part be omitted, yet if it be made in contemplation of bankruptcy, it is a preference, and as such an act of bankruptcy. To apply this; the deed is fair as between the Bankrupt and his son the defendant, but having been made three days before his absconding, it is a preference."

In this manner it was the voluntary behaviour of the debtor which led to the preference being fraudulent; where the assignment was brought about through pressure,<sup>(9)</sup> by the creditor no question

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(8) Ibid at pp. 95-96.

(9) Ex parte Scudamore (1796) 3 Ves. Jun. 85.

of such preference arose, and this was so even if the debtor had mistakenly interpreted the intentions of the creditor.<sup>(10)</sup>

It was by this reasoning an act of bankruptcy to make a deed of assignment to some creditors only,<sup>(11)</sup> or to make a deed for the payment of all creditors save one,<sup>(12)</sup> as this would necessarily be a fraud on that creditor. If the deed was in favour of all the creditors it was necessary for them to give their assent to it,<sup>(13)</sup> those who assented might not set up the assignment as an act of bankruptcy,<sup>(13)<sup>a</sup></sup> although they were not prevented from coming in under a commission as long as the petitioning creditor was not a party to the deed.<sup>(13)<sup>b</sup></sup>

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(10) *Thompson v. Freeman* (1786) 1 T.R. 155. As to a fraudulent preference when not by deed see pp. 620-9.

(11) *Kettle v. Hammond* (1767) *Succ.Dig.* p. 28.

(12) *Ex parte Foord* (*Gayner's Case*) (1755) 1 Burr. 477.

(13) *Eckhart v. Wilson* (1799) 8 T.R. 140 - Partners assigned all their partnership effects, &c. to trustees for the benefit of their creditors, and some of the separate creditors of one of the partners objected to it. Held that the assignment was fraudulent and void: Per curiam "that an assignment by deed, by traders of all their effects, unless all their creditors concurred, was not only fraudulent and void as against those creditors who did not concur, but was an act of bankruptcy." *Ibid* at 142.

(13)<sup>a</sup> *Bamford v. Baron* (1788) 2 T.R. 595, in this case the assignees seeking to put in the deed as an act of bankruptcy had actually executed the deed. But in *Back v. Gooch* (1815) Holt 13, it was held that if the petitioning creditor was privy and assented to the deed of assignment, then although other creditors not privy and not assenting to the deed might set it up as an act of bankruptcy, nevertheless the petitioning creditor was estopped by reason of his assent even though he did not execute the deed. By 6 Geo. IV, c.16, s.4(1825) the assignment of all traders property by deed under the provisions of the Act was not to be deemed an act of bankruptcy unless a commission issued within six calendar months of its execution by the trader.

(13)<sup>b</sup> *Tappenden v. Burgess* (1803) 4 East 230.

The Act of 1 Jac. I, c.15<sup>(14)</sup> was not the only provision under which such attempts to convey away property from creditors might bring the debtor before a commission. In the same year as the Elizabethan enactment<sup>(15)</sup> there was passed an Act aimed at preventing all debtors, not merely those of the newly created, dubiously privileged class, avoiding the creditor.<sup>(16)</sup>

By this enactment conveyances and gifts of lands or goods made with the intent to defraud creditors and others should be as against the person so defrauded void and of non-effect,<sup>(17)</sup> with a proviso safeguarding the bona fide purchaser for good consideration.<sup>(18)</sup> A later enactment of Elizabeth I's reign<sup>(19)</sup> made fraudulent conveyances of lands with the intent of defrauding a subsequent purchaser for money or other good consideration void as against such purchaser.<sup>(20)</sup> where a

(14) S. 1

(15) 1571 - 13 Eliz. I, c.7

(16) 13 Eliz. I, c.5

(17) Ibid s. 1

(18) Ibid s. 5

(19) 27 Eliz. I, c.4 (1584-5)

(20) Ibid s. 1

conveyance was made with a clause of revocation or alteration which might be made at the pleasure of the seller and later the seller sold the land to another for money or other good consideration, such first conveyance was to be void as against the later vendees.<sup>(1)</sup> Bona fide conveyances made upon good consideration were expressly excepted from the provisions of the Act.<sup>(2)</sup>

With the enactment of 1 Jac. I, c.15<sup>(3)</sup> there were therefore two streams of law relating to attempts to convey away wealth from creditors; the Elizabethan, aimed at all debtors; and the Jacobean, concerned with the trader. The courts, whilst concerned with giving full support to the statutory enjoiner that interpretation should favour the creditor,<sup>(4)</sup> had made a firm stand against extending those acts by which a man might be

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(1) Ibid s.4

(2) Ibid s.3

(3) See s. 1

(4) See 21 Jac. I, c.19, s. 1

made bankrupt;<sup>(5)</sup> could not resist this chance and it was held that a deed fraudulent within either of the two statutes of Elizabeth was sufficient on which to found an act of bankruptcy.<sup>(6)</sup>

For twenty years these acts served to provide the tests whereby men were adjudged bankrupts. But in England, if trade was growing so was the number of bankrupts and with them the "frauds and deceits invented and practised for the avoiding and

(5) See for example *Cole v. Davies* (1699) 1 *Ld. Raym.* 724 at 725. In cases falling within the Elizabethan statutes against fraudulent and voluntary conveyances the courts for a long time wavered in just how much intention must be proved and how much it might be inferred from the bankrupt's act. In *Cadogan v. Kennet* (1776) 2 *Cowp.* 432, Lord Mansfield said in relation to 13 *Eliz. I, c.5*: "But the law says, if after a sale of goods, the vendee continue in possession, and appear as the visible owner, it is evidence of fraud; because goods pass by delivery." *Ibid* at 434. Later in the same judgment, in relation to 27 *Eliz. I, c.4*, he says: "A fair voluntary conveyance may be good against creditors, notwithstanding its being voluntary. The circumstances of a man being indebted at the time of his making a voluntary conveyance, is an argument for fraud." *Ibid* at 434-5. Whilst the first statement had some authority, the second was doubtful and did not prevail. For in *Doe v. Manning* (1807) 9 *East* 59, we find Lord Ellenborough holding that "a voluntary conveyance is fraudulent, as such within the Stat. 27th of *Eliz.*"

(6) In *Hassells v. Simpson* (1781) *Doug.* 89 *in notis*, Lord Mansfield commenting on one Jackson who had made an assignment of so much of his property that a capacity to trade had been swept away said: "By the assignment Jackson defeated every other creditor. The petitioning creditor was deprived of the benefit of an action. There was nothing left for him to take in execution, if the deed was valid. But it may be said to have been void against creditors, and that the goods might still have been taken in execution, under the Statute of Queen Elizabeth. [13 *Eliz. I, c.5*] If so, it was fraudulent, and therefore an act of bankruptcy, under the Statute of James." *Ibid* at 92.

eluding the penalties of the good laws in that behalf already made".<sup>(7)</sup> There were a number of additions to the possible acts of bankruptcy, but only three are important here.<sup>(8)</sup> Nor was the legislature going to bother with looking into the minds of men to gather their intentions, for these acts made a person bankrupt 'to all intents and purposes'.<sup>(9)</sup>

#### Escape on Imprisonment for Debt

If the legislature felt that it was not necessary to look into a man's mind however, the courts were not prepared to disregard his intention and behaviour. It was provided that it should be an act of bankruptcy where any merchant:

"Being arrested for the sum of One Hundred Pounds or more just Debt or debts, shall at any time after such arrest escape out of prison."

(7) Preamble to 21 Jac. I, c.19 (1623-4)

(8) The remainder were as follows: Debtor indebted for £100 or over not paying or compounding within six months after debt due and debtor arrested for such debt; or if debt not paid or compounded within six months of issue of original writ, notice of which had been left at last known abode of the debtor; or being arrested for £100 or more just debt or debts procuring enlargement by putting in common or hired bail; in such cases the debtor was to be adjudged bankrupt to all intents and purposes. In the cases of arrest or putting in common or hired bail bankruptcy was to be as from the time of the first arrest. These acts of bankruptcy were repealed by 10 Anne, c. 25, on the grounds that great inconvenience and mischiefs have arisen through them: *ibid* s. 1

(9) The provision in 21 Jac. I, c.19, s.2 which reduced the period of lying in prison from six months to two months has already been dealt with, see p. 469.

The circumstances necessary for this section to be invoked were thoroughly investigated in *Rose v. Green*.<sup>(10)</sup> Green was arrested on the 31st of March in Kent, on the 6th of May he was brought to London by virtue of a writ of habeas corpus, but on the way he was permitted by the sheriff's officer, in whose custody he was, to call at the house of his attorney in the city of London. After this Green was taken immediately to the judge's chambers and there bailed, but on bail being given it was surrendered and Green committed to the King's Bench prison.<sup>(11)</sup> In answer to the contention that the calling at the house of his attorney was an escape within the section Lord Mansfield observed:

"that where positive laws fixed and described what should be looked upon as acts of bankruptcy, they ought to be construed according to their intention, and so as to answer the ends of public benefit, which the Legislature had in view.

In thus construing this Act of Parliament, he held this case not to be such an escape as that the man should be thereby

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(10) 1 Burr. 437 (1758). A gaoler who wilfully permitted a bankrupt to escape was to forfeit £500 for the benefit of the creditors - 5 Geo. II, c.30, s.18. Whilst if he failed to produce the bankrupt to a creditor, on the creditor producing a certificate given by the commissioners, then he was to forfeit £100 for the benefit of the creditors - *ibid.* s. 19.

(11) This was done in order to obtain imprisonment in London. See per Wilmot, at 440: "Here is not a single moment in which the man is out of custody: it is a mere form of changing his prison."



"rendered a bankrupt and a criminal. For the Act clearly intended such an escape made by a prisoner, as shews that he means to run away, and thereby defeat his creditors. But this is not such an escape; and certainly a man shall not be made a criminal, where he had not the least criminal intention to disobey any law whatsoever. There is no escape at all, in the sense of this Act of Parliament: he remained substantially in custody, notwithstanding his being thus carried into another county."<sup>(12)</sup>

Apart from this airing of commonsense where otherwise a technicality might have produced an absurd result, the provision attracted curiously little attention from the courts.

#### Seeking Privilege

Although privilege and protection had been useful to the early debtor it failed to be of much use to the bankrupt be he peer or member of the House of Commons, although the privilege was safeguarded by the provision which made an act of bankruptcy of:

"Procuring protection or protections other than where lawfully protected by privilege of parliament."<sup>(13)</sup>

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(12) Ibid at 439

(13) 21 Jac. I, c.19, s.2

Blackstone regarded this as an 'endeavour to elude the justice of the law',<sup>(14)</sup> by claiming a privilege from arrest which the debtor did not have by virtue of parliamentary privilege or Act of Parliament. It is really only in relation to cases of arrest that it has any importance here. Shirley's Case,<sup>(15)</sup> had already succeeded in according the members of the House of Commons freedom from arrest during session, and this was later claimed to extend to forty days after every prorogation and forty days before the next appointed meeting,<sup>(16)</sup> in the case of dissolution a convenient time was to be given in which they might be able to return to Parliament

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(14) II Bl. Comm. 478.

(15) Jo. H.C. I, 149 (1604). The details of this case, together with extracts from various documents, can be found in 'Select Statutes and other Constitutional Documents illustrative of the reigns of Elizabeth and James' Prothero (G.W.) (1898) pp. 320-325.

(16) Athol (Earl of) v. Derby (Earl of) (1672) 2 Lev. 72. In this case the court received orders from the House of Lords that peers were privileged from sequestration, etc., for 20 days before and 20 days after each session of Parliament, "but it is said the Commons never assented to this, but claim forty days after and before each session ". *ibid* at 72.

for the first meeting.<sup>(17)</sup> Peers and peeresses were also privileged from arrest on the basis, "that they are of sufficient estate to have assets to satisfy all manner of debts, so by law they are to be summoned by distress on their land and not by their bodies."<sup>(18)</sup>

The result that followed from Shirley's case,<sup>(19)</sup> was an enactment which provided for the release of members of the Commons, freeing the gaoler from an action for escape by reason of his having obeyed the order to release,<sup>(20)</sup> whilst allowing

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(17) Under 11 Geo. II, c.24, s.1 (1737-8) actions might be commenced against peers or members of the Commons immediately after the dissolution or prorogation of Parliament up until the meeting of the new Parliament. Where there was an adjournment, actions might be commenced if it was an adjournment of both Houses for a period of over fourteen days. By s. 3, the creditor was not to find himself barred from action through the Statute of Limitations, where his failure to proceed was caused through privilege.

(18) Rutland's (Countess of) Case (1605) Hawarde, pp. 237-241, at 238, and see Co.Rep.VI, 52b, such persons might be punished for contempt however. Ibid. For a modern example see Stourton (Baroness Mowbray, Segrave, and Stourton) v. Stourton (Baron Mowbray, Segrave and Stourton) [1963] 1 All E.R. 606, in which the judge refused to give leave for a writ of attachment to issue against a peer of the realm at a time when Parliament was sitting. The reason for the decision was that the intention of the attachment was rather to compel performance of acts required by civil process, and not for contempt. See per Scarman, J., at 609-610. See also ibid at 607 where he sets out the reasons for such privileges. During the period in which Dr. Stricensee was Prime Minister of Denmark (c.1771) he gave authority for the arrest of noblemen for debt, a step which made him very unpopular. See White (T.H.) 'The Age of Scandal' (1963) p. 205.

(19) 1 Jo.H.C. p. 149 (1604)

(20) Much earlier the courts had in fact refused to allow an action against a sheriff for an escape where he had released a member of the House of Commons upon receiving a writ of privilege: Skewys v. Chamond (1544-1545) Dyer 59 b.

the creditor to sue out a new execution after the close of the parliamentary session.<sup>(1)</sup> By 12, 13 Wm. III, c.3 further provision was made for the suing of members of Parliament and peers and the manner and times in which process might issue.<sup>(2)</sup> Later enactments further regulated the manner in which such process might be sued out.<sup>(3)</sup>

The position in relation to bankruptcy of a member of the House of Commons, however, remained an awkward one.<sup>(4)</sup> In

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(1) 1 Jac. I, c.13 (1603-4), "An Act for new executions to be sued against any which shall hereafter be delivered out of execution by Privilege of Parliament and for discharge of them out of whose custody such persons shall be delivered." In this way the rights of the creditor were preserved, although he might still be greatly delayed.

(2) 1700-1701

(3) 2. 3 Anne, c.12 (1703); 11 Geo. II, c.24. The situation was clarified by 10 Geo. III, c.50 (1770) when it was provided that only the person of a member of the House of Commons should be free from arrest during the time of privilege, s. 2. Otherwise any suit might be brought against any member of Parliament or any peer, and his property attached even during the time of Parliament, s. 1.

(4) The position in relation to peers was virtually settled by reason of the decision in Wolstenholme's (Sir John) Case (1653) Vin.Abr.'A' No.4, p.55 and the subsequent enactment of 14 Car. II, c.24. S. 1 of this Act exempted "divers noblemen, gentlemen and persons of quality" from the bankruptcy laws where they merely held stock in certain specified trading companies. If they engaged in trade otherwise they might be made bankrupt. See p. 427.

1722 Sir George Caswell being a member of the House of Commons at first claimed privilege where a commission of bankrupts issued against him and his partner in relation to them as bankers.<sup>(5)</sup> Caswell attempted to waive his privilege but nevertheless it was resolved 'That no Copartner in any Trade or Undertaking, is intituled to the Privilege of this House, in respect of any Matter relating to such Copartnership'.<sup>(6)</sup>

Even with cases of members of Parliament being made bankrupts delays and uncertainty continued and it is not until 4 Geo. III, c.33<sup>(7)</sup> that the position is fully regularised, the

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(5) Jo. H.C. XX, pp. 55-6, 12 Nov. 1722. See Davies, p. 6.

(6) Jo. H.C. XX, p. 57, 16 Nov. 1722. Lord Hardwicke had no doubts as to the application of the bankruptcy laws to peers and members of the Commons alike. In *Ex parte Meymot* (1747) 1 Atk. 196 at 201, he states the position as follows: "A commission of bankruptcy formerly issued against a peer, an earl of Suffolk, for trading in wines; and though there may be some particular powers that commissioners of bankrupt could not exercise against a peer, yet notwithstanding this, he may be liable to a commission of bankruptcy, if he will trade, and so may a member of the House of Commons, though while he continues a member there are some particular powers of commissioners that cannot be exercised."

(7) 1763-4. James I, in 1604, made a proclamation to the effect that: "As he is about to summon Parliament (which he would have done before but for the Plague), and is anxious that his first should set a good example to others, the King lays down the following regulations: Great care to be shown in selecting Knights and Burgesses of good ability and sufficient gravity and modest conversation, men neither of superstitious blindness nor turbulent humours, not bankrupts nor outlaws but regular taxpayers." *Tudor and Stuart Proclamations*, I, pp. 112-3 No. 979. He was not the first head of state to realise that the seats of power should not be filled with insolvents. The Emperor Claudius in a speech in A.D. 52 "praised senators who voluntarily abandoned their rank through poverty. Those, however, who, by not retiring showed shamelessness as well as indigence were expelled." Tacitus (C.) 'The Annals of Imperial Rome' Bk. XII, 51. (Translated by Michael Grant (1961) p. 266).

situation the legislature sought to clarify is fully set out in the preamble:

"Whereas merchants, bankers, brokers, factors, scriveners, and traders, within the description of the statutes relating to Bankrupts, having privilege of parliament, are not compellable to pay their just debts, or to become Bankrupts by reason of the freedom of their persons from arrests upon civil process, and some doubts have also arisen whether in cases of bankruptcy, a commission can be sued out during the continuance of such privilege; to remedy which inconveniences, and to support the honour and dignity of parliament, and good faith and credit in commercial dealings, which require that in such cases the laws should have their due course, and that no such merchants, bankers, brokers, factors, scriveners, or traders, in case of actual insolvency should, by any privilege whatever, be exempted from doing equal justice to all their Creditors,..".

Therefore it is provided that creditors<sup>(8)</sup> having a debtor who comes within the description given above and who has privilege of Parliament, may file an affidavit in any of the courts of

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(8) 4 Geo. III, c.23, s.1 - To take advantage of the act there must be:  
(a) one creditor (or two or more if partners) with debt(s) of £100; or  
(b) two creditors whose debts amount to £150; or  
(c) three or more creditors with debts amounting to £200 or upwards.

Westminster of the debts due and as to their belief that the debtor comes within the above description. Having done this a summons or originating bill may be sued out of the same court against the debtor and a copy served upon him. If the debtor fails to pay or compound the debt to the satisfaction of the creditors within two months of the service of the summons, or fails to give a bond for the sum with two sufficient sureties<sup>(9)</sup> approved by judges of the court in which the affidavit is filed, then the debtor is to be accounted bankrupt from the date of service of such summons and the creditor may sue out a commission of bankrupts against him.<sup>(10)</sup> By a proviso no debtor having such privilege is to be arrested or imprisoned during the continuance of such privilege unless it be for one of the actions made felonious by the bankruptcy acts.<sup>(11)</sup> Other forms of protection did exist.

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(9) Such sureties to be liable to pay the amount recovered in any action(s) together with any costs, etc., ib.

(10) Ibid.

(11) Ibid s. 4 - As to these felonies see pp. 568, 576, 579, 686.

By 7 Anne, c.12<sup>(12)</sup> it was enacted that any process whereby the person of an ambassador, his domestic or domestic servant may be arrested or his goods seized, was to be entirely null and void, and persons issuing such were to be punished at the discretion of the Lord Chancellor, and two chief justices or any one of them.<sup>(13)</sup> By s. 5 it is provided:

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(12) 1708. Ambassadors and their staff had always been considered free from arrest: see Co. Inst. IV, 153. The reason for this statute is set out in the preamble: "Whereas several turbulent and disorderly persons having in a most outrageous manner insulted the person of his Excellency Andrew Artemonowitz Matueof Ambassador Extraordinary of his Czarish Majesty Emperor of Great Russia Her Majesty's good friend and ally by arresting him and taking him by violence out of his coach in the public street and detaining him in custody for several hours in contempt of the protection granted by Her Majesty contrary to the law of nations and in prejudice of the rights and privileges which ambassadors and other public ministers authorised and received as such have at all times been thereby possessed of and ought to be kept sacred and inviolable." Andrew's creditors knowing he had taken leave of the Queen were a little afraid that he might forget to take proper leave of them.

(13) 7 Anne, c.12, s.3. This was mild compared with the retribution sought by the Czar for this affront to his ambassador. For he demanded "that a Capital Punishment, according to the Rigours of the Law, be inflicted upon all the Accomplices of Indignity put upon the Person of his Ambassador; or, at least, such an one as was adequate to the Nature of the Affront, which every particular Person put upon the Ambassador." Boyer (A.) 'The History of Queen Anne' (1735) p. 536. Eventually everything was smoothed over, the Czar being content that a statute had been passed by virtue of his demands, *ibid* pp. 396-398.



"That no merchant or other trader whatsoever, within the description of any of the statutes against Bankrupts, who hath or shall put himself into the service of any such ambassador or publick minister, shall have or take any manner or benefit of this act."<sup>(14)</sup>

The reason for privilege afforded was explained by Lord Chancellor Talbot in *Barbuit's Case*,<sup>(15)</sup> where Barbuit an agent under a commission from the king of Prussia also traded as a tallow chandler:

"... a public minister is to have his person sacred and free from arrests, not on his own account, but on the

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(14) An example of the workings of this statute can be found in the case of *Triquet v. Bath* (1764) 1 Black W. 471. In an action for debt against the defendant it was sworn that he had contracted a debt whilst a trader in Dublin. The defendant sought protection by virtue of the fact that he was now English Secretary to Count Haslang, the Bavarian Minister. The necessary affidavits to support his claim were produced and it was shown that he was accredited to the secretaries of state and that his name appeared on the list of protections in the office of the Sheriff of London and Middlesex, (there could be no action against the person making the arrest unless such registration had been made - s. 6.) The only evidence of trading shown was one instance of buying only, and that seven years previous. The court held the defendant privileged although finding some of the circumstances of the case somewhat suspicious.

(15) *Cas. Temp. Talb.* 281 (1724)

"account of those he represents, and this arises from the necessity of the thing, that nations may have intercourse with one another in the same manner as private persons, by agents, when they cannot meet themselves. And if the foundation of this privilege is for the sake of the prince by whom an Ambassador is sent, and for the sake of the business he is to do, it is impossible that he can renounce such privilege and protection: for by his being thrown into prison the business must inevitably suffer:"<sup>(16)</sup>

This is one part of the law which has altered little, save that the list of such privileged persons has burst any bounds likely to have been visualized by a judge of the eighteenth century.

#### Procuring Bills of Conformity

As we have seen it was possible through application to the king, council or Chancellor to circumvent legislation in order to bring about a sometimes just, or otherwise reasonable

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(16) Ibid at 282. A note at the end of the case states: "The person was after discharged by the Secretary's Office, satisfying the creditors." Ibid at 283.

compromise. With the hardening world of commerce there was no place for the natural equity of an earlier age. Nevertheless the seventeenth century bankrupt still turned to the Chancellor or council for aid.

Bills or petitions to the Crown, courts or Chancellor from debtors seeking to force composition on a dissenting minority of their creditors were to some extent controlled by the Chancellor through the use of the injunction.<sup>(17)</sup> On a favourable answer to a debtor's request such creditors would be instructed not to sue the debtor in the ordinary courts and to accept the composition agreed upon; such directives becoming known as 'Bills of Conformity'. An example of such a bill can be found in *Ramsey v. Brabson*.<sup>(18)</sup>

"The Queen granted a Protection to Woodcock, Napton and Sewell to the end they might be better able to pay their debts to all their creditors. By which Protection her Majesty further willeth that an Injunction be granted out of this Court [Chancery] against all as should implead the said Woodcock, Napton and Sewell, and not content themselves

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(17) We have already seen that the council was prepared to use its powers to set up commissions to investigate petitions and order compositions; see pp. 415-423.

(18) Choyce Cases 174 (1583-4)

"with the aforesaid rate. And because the defendants do commence suit at Common Law, and do not content themselves with the aforesaid agreement, therefore an Injunction is granted if cause be not shewed to the contrary."<sup>(19)</sup>

That such machinery was capable of making endless delay for a creditor is obvious,<sup>(20)</sup> and if for a time it served to supplement the compositions enforced by the council,<sup>(1)</sup> yet it was out of place amidst the growing technicality of the bankruptcy laws. There was no place for rival concerns both intent on securing a payment but concerned with opposite parties.<sup>(2)</sup> The very spirit of the bankruptcy law was to the intent that the

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(19) See also *Mussett v. Crackplace* (1613-14) Tothill 25-26.

(20) See Malynes p. 160, "Bills of conformity.... of late years used in the Chancery, .... are made void, because of divers great abuses committed in the defence of Bankrupts, who to shelter themselves from the rigor of the Common-laws, did prefer their Bills of complaint in Chancery, which was in the nature of a Protection, and the Parties broken, became to be relieved for easie agreement with their creditors, albeit at charges another way extraordinary."

(1) But the council intervention also caused delay, a good example of which can be seen from letters between the council and the Mayor of London concerning one Nicholas Jones. *Remembrancia*, pp. 487-8, 488, 489.

(2) That is to say the Chancellor on the one side aiding the debtor to obtain a composition, whilst the commissioners of bankrupts sought to enforce the bankruptcy laws in favour of the creditors.

debtor be stripped of his estate so that it might be distributed amongst his creditors proportionately to the debts owed them.

The position was to some extent remedied by the Chancery, and on October 31, 1620 the following orders were published in open court: <sup>(3)</sup>

"That no compulsory Order be granted to Creditors to conform themselves, and agree upon any Rate of Composition, at the Suit and Petition of the Debtor in Insolvent himself, but only at the Suit of the Creditors in Imitation, and according to the Equity of the Statute of Bankrupts.

That where such Suits are exhibited in the Behalf of the Creditors, it be not enough that the Creditors are named in the Bill or Petition; but that there shall be always affixed to the Bill or Petition the Agreements of the Creditors, under the Hands and Marks of so many as have agreed, with a Recital of the Sums and Times of their particular Debts. That to the End there may be a Ground of Information unto the Court what the Debts are in Truth, which otherwise may be but in Shew, there shall always be before any Order is

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(3) Goodinge p. 163.

"granted, a Reference made to some of the Masters of the Court or other Commissioners, upon due Examination to certify the Court what the Debts are in Truth, and of what Nature, and upon what security: Before which Masters or Commissioners shall also be heard the Informations and Allegations of such Creditors as have not compounded.<sup>(4)</sup>

That no Release be given upon any Bill or Suits, except the Debts of the Creditors that have agreed, amount at least to full three Parts in four to be divided of the Total of the Debts;<sup>(5)</sup> and not in these Cases neither, but sparingly by the Discretion of the Court, upon hearing what may be alleged on both Sides.

That no Proceedings at Law in Case of any such Suits be stayed against any Sureties of the Insolvent, nor against the Lands or Goods of the Insolvent himself, in Case of Recognizances or Statutes; but only against the Person of the Insolvent."

Although this Order had much to recommend it, either it did not work as intended, or, as is more probable, it was not

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(4) This followed the usual procedure ordered by the council where it instructed commissioners to see to a composition.

(5) It was later enacted that a certificate which would discharge the bankrupt from arrest for debts which might have been proved under the commission must be signed by four fifths of the creditors in number and value with debts of not less than £20. - 5 Geo. II, c. 30, s.10. See p. 637.

given sufficient time in which to be brought into normal practice. For within a short while after the introduction of the order there is a proclamation for the abolishing of the abuses of 'Billes of Conformity'.<sup>(6)</sup> This in its turn served but a short time and in 1623-4 it is enacted:<sup>(7)</sup>

"That all and every person and persons, .... who... shall prefer or exhibit unto his Majesty, his heirs or successors, or unto any of the king's court any petition(s) bill or bills against his or her creditor or creditors, or any of them, thereby desiring or endeavouring to compel or enforce them or any of them to accept less than their just and principal debt, or to procure time or longer days for payment, than was given at the time of their original contract.. shall be accounted and adjudged a bankrupt for all intents and purposes."

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(6) Tudor and Stuart Proclamations I, p. 155 No. 1312 Westminster 31 March, 1621. A Proclamation for abolishing of abuses of Billes of Conformity. "Whereas Bills of Conformity (Bills of complaint) have been brought into Chancery and other equity Courts, whereby creditors are forced to accept less than their debts, or to give long delays: Judges are to dismiss all such suits where the creditor does not assent: Orders on such Bills are to be suspended, and no further bills are to be received until order is taken by Parliament. Any one in prison on such accounts to be released or discharged of their bail."

(7) 21 Jac. I, c.19, s.2

In this way any power of the Chancellor to enforce composition on wrangling minorities ceased without any apparent struggle to hang on to the natural equity with which the court was imbued, in 1683 the Lord Keeper declares that "bills of conformity.... had long since been exploded, and there was no such equity now in this court."<sup>(8)</sup> This, however, did not prevent debtors from still seeking out the king to aid them,<sup>(9)</sup> nor did the Council cease to interfere merely because of the above provision,<sup>(10)</sup> they may well have thought that it did not in fact include them and even if it did the members were quite capable of seeing to it that their commands were not overreached.<sup>(11)</sup>

On January 8th 1637<sup>(12)</sup> a petition before the council states that the petitioners have protection from the king in

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(8) Backwell's Case (1683) 1 Vern. 152 at 153.

(9) See S.P. (Dom) 1676-1677, p. 158.

(10) See S.P. (Dom) 1633-1634, p. 307, CCLI No. 58 and *ibid* 1637 p. 239, CCLXII No. 37.

(11) An earlier example of the way in which the Council might show its teeth can be found in A.P.C. 1613-1614, pp. 102-3, concerning the affairs of one Elizabeth Peart. An extract of the details of this case is given in the appx. p. 793

(12) S.P. (Dom) 1636-7, p. 351, CCCXLIII No. 47.



order that they might preserve their fortunes and themselves from ruin on their undertaking to give over their estate to their creditors. Upon this basis agreement had been reached with all but seven or eight of their creditors, to prevent which deadlock, the Council the previous June had mediated with these creditors to the effect that all but three or four yet refused to come into the general agreement. The petitioners state that they wish to do all they can for their creditors, but persons who owe them money are afraid to pay them in case they be forced to pay again on the issuing of a commission of bankruptcy.<sup>(13)</sup>

The answer of the Council to this is terse and direct:<sup>(14)</sup>

"The Lords do not hold it reasonable that the commission of bankrupts be used to uphold and strengthen the wilfulness of the few against the general and charitable consent of the greatest number of the creditors. Direct such of the debtors who on pretence or fear to be questioned by a commission of bankrupts to lay aside that fear,

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(13) Only persons paying a bankrupt without notice of an act of bankruptcy and before the issuing of the commission were saved from having to pay the debt again. See p. 651.

(14) S.P. (Dom) 1636-1637, p. 351 CCCXLIII No. 48.

"for that I the Lord Keeper am resolved presently to give to the clerk or officer appointed for issuing commissions of bankrupt that the creditors refusing such composition as so many have accepted, shall have no commission of bankrupts.'

All debtors who refused to pay, and such creditors as refuse to agree to what the rest had accepted, were to attend the Board within six days to show the reasons of their refusal."

But these were the fading rumblings of a once powerful body and soon it is only the legislature that can give aid of this nature.<sup>(15)</sup>

#### Preference after the Commission

This 'act' is a child of bankruptcy. By 1718<sup>(16)</sup> a way

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(15) In 1641 Lord Keeper Finch, dealing with an order made in the Council, stated "that whilst he was Keeper, no man should be so saucy to dispute those orders, but that the wisdom of that board should be always ground enough for him to make a decree in Chancery." Clarendon (E.) 'The History of the Rebellion' I, 158. (Edited by W. Dunn Macray - 1888 - I, p. 92).

(16) The avoiding of a commission in such a manner was first made an act of bankruptcy by 5 Geo. I, c.24, s.26.

of preventing a commission from getting further than the first stage of the swearing of an affidavit had been evolved. Upon a commission being sued out by a creditor, the debtor would come to an arrangement with him with the intent that the creditor would allow the commission to die away.<sup>(17)</sup> In this manner the creditor received more than the share he would otherwise be allotted under the commission. Since such practice was "contrary to the true intent and meaning of the several statutes concerning Bankrupts, which said statutes intend that all such Bankrupts Creditors shall be on an equal foot, and not one preferred before another, or paid more than another in respect of his or her debt",<sup>(18)</sup> it is enacted:

"That if any Bankrupt or Bankrupts shall, after issuing of any commission against him, her, or them, pay to the person or persons who sue out the same, or otherwise give or deliver to such person or persons goods, or any other satisfaction

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(17) The petitioning creditor had to make an affidavit as to his debt and make a bond to the Lord Chancellor, but this commission might be superseded unless the creditor prosecuted the commission within a reasonable time. That is to say, unless he obtained a meeting of the commissioners and had the debtor adjudicated bankrupt. By an order of the 26th June 1793, a petitioning creditor in London was given fourteen days, and a petitioning creditor outside London twenty-eight days, in which to prosecute such commission. - Christian (E.) 'The Origin, Progress and Present Practice of the Bankrupt Law' (1818) II, pp. 25-6.

(18) Preamble s. 24, 5 Geo. II, c.30.

"or security for his,..debt whereby such person or persons, suing out such commission, shall<sup>(19)</sup> privately have and receive more in the pound, in respect of his ... debt than the other Creditors, such payment of money, delivery of goods, or giving greater or other security or satisfaction, shall be deemed and taken to be such an act of bankruptcy, whereby, on good proof thereof, such commission shall and may be superseded;".<sup>(20)</sup>

On proof of such fraud, the Lord Chancellor, Lord Keeper or Commissioners for the custody of the Great Seal of Great Britain are to award a new commission. The defaulting creditor is to forfeit his debt completely and to return all that he has received from the bankrupt, such as money, goods, etc., to be distributed amongst the other creditors.<sup>(1)</sup>

In *Vernon v. Hankey*,<sup>(2)</sup> one Thackery sued out a commission against a Mrs. Tyler, the commission being sealed on the 13th of May. On the 19th of May, Thackery agreed that on the payment of £200 and further security being given he would allow the

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(19) Or 'may' see *Ex parte Paxton* (1809) 15 Ves. Jun. 461. See pp. 510-11

(20) 5 Geo. II, c.30, s.24.

(1) *Ibid.*

(2) Bull N.P. 38 (1787)

commission to die away. Buller, J., held this to be an act of bankruptcy expressly within the words of the statute.

Where a petitioning creditor was found to have taken security after suing out a commission, then the procedure was for such commission to be superseded, his proof under the commission was expunged, and if he was an assignee under the old commission a new choice of assignee would be directed under the new commission.<sup>(3)</sup> Lord Eldon explained the purpose of this provision as follows:<sup>(4)</sup>

"The prohibition is calculated to meet the mischief, where men act injudiciously, as well as where they act dishonestly towards third persons. I agree, the man must be a bankrupt within the meaning of this clause: but the language 'after issuing of any Commission against him' shews, an adjudged bankrupt was not intended; but that he might be a bankrupt within the meaning of this clause before any Commission established against him. In the passage, describing the effect of the security, 'whereby such person or persons suing out such Commission shall privately have and receive more in the pound' than other creditors, the word 'shall'

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(3) Ex parte Paxton (1809) 15 Ves. Jun. 461

(4) Ibid at 463.

"has been construed 'may'; and must be so construed."

These then were the acts for which a debtor might suddenly find himself made a bankrupt, only the lying in prison was an involuntary act, the rest demanded, at least to a greater extent, a conscious effort on the part of the debtor. But once the act committed then the way was open for the creditor to make haste to the Chancellor in order that he might obtain a commission against his debtor.

CHAPTER 19INSTITUTING A COMMISSIONThe Position of the Chancellor

Under the provisions of 34. 35 Hen. VIII, c.4, s. 1<sup>(1)</sup> the creditor was given a remedy which was superior to the previous system of petitioning only by virtue of the fact that he might in this way receive answer to his complaint more readily. The Act of Elizabeth<sup>(2)</sup> brought a further progression in the realms of delegation. The Chancellor<sup>(3)</sup> upon complaint by a creditor of the act of bankruptcy of a debtor is to issue a commission under the Great Seal appointing commissioners to act in respect of the bankrupt's estate.<sup>(4)</sup> At first this function of the Chancellor was purely originating and supervisory, there was no appellate jurisdiction. The Chancellor

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(1) 1542-3

(2) 13 Eliz. I, c.7 (1571)-s 2

(3) Or the Lord Keeper

(4) At first these commissioners were chosen from the names of persons appended at the bottom of the petition, but later lists were drawn up of persons who might act as commissioners for the greater London area. See pp. 665-6.

might see to the instituting or dismissing of commissions and see that commissioners did not abuse the powers given to them by the Act, but he did not at first attempt to review the decisions of the commissioners.

In 1676, when asked to take the first tentative steps in assuming an appellate jurisdiction over the commissioners of bankrupts, Lord Nottingham said:<sup>(5)</sup>

"I was at first unwilling to hear this matter because the commissioners were on their oaths, and if they were wrong were liable to an action at law, and because the precedent might draw upon me the inspecting of the execution of all commissions of bankrupts. But at last I did appoint this day for the commissioners to attend me, who justified their opinion:". <sup>(6)</sup>

After this the volume of work grew, but for a time the more usual practice where a difficult point arose on reference from the commissioners was to direct the issue to be tried by one of

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(5) Benzee, Guipponi, Bartelotti, &c. (1676) Nottingham's Chancery Cases (S.S.) vol. 1, p. 313, No. 450.

(6) Lord Nottingham can in no way have appreciated just how right he was to become. By 1818 one of the major delays in the execution of the commissions of bankrupts was that caused by the case being referred to the Lord Chancellor where the facts were argued anew and new evidence introduced. See pp. 702-3.



the courts.<sup>(7)</sup> Statute also combined to give the Chancellor a steadily increasing role as supervisor of all the more important aspects of bankruptcy. By 5 Geo. I, c.24<sup>(8)</sup> the power of the Chancellor over assignees and the granting of certificates was established and with the passing of 5 Geo. II, c.30<sup>(9)</sup> in which these earlier provisions were amended and strengthened the Chancellor's position became certain.<sup>(10)</sup>

Under these powers from the time of Lord Hardwicke<sup>(11)</sup> the Court of Chancery adjudicates on almost all major bankruptcy issues, nor is equity denied a place in this new jurisdiction, even if to most the bankrupt represented little less than a criminal. Mere clerical errors were not allowed to upset commissions.<sup>(12)</sup>

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(7) See e.g. *Dodsworth v. Anderson* (1682) Jones, T. 141. There was no appeal as such from the Chancellor's decision, but he could, if he wished, refer a very difficult case to the House of Lords; see *De Gols v. Ward* (1737-8) 1 Bro. P.C. 536.

(8) (1718-9)

(9) See especially ss. 10, 23, 24, 31, 41.

(10) This right of the Chancellor to oversee the business of the commissioners was in fact doubted by a Lord Chancellor as late as 1795. Lord Rosslyn considering the power he might exercise said: "I doubt the jurisdiction. Sitting here I have no more right to reverse an order of the commissioners than the Court of the King's Bench". - *Clarke v. Capron* (1795) 2 Ves. Jun. 666 at 667-8. This pronouncement did nothing to upset the power wielded by the Lord Chancellor.

(11) 21st February, 1737.

(12) *Woolrich's Case* (1676) Nott.Ch.Cas. (S.S.) I, p. 314, No. 452.

In *Ex parte Wood*<sup>(13)</sup> the bankrupt having failed to give himself up to the commissioners within the period allotted<sup>(14)</sup> was now faced with a creditor who sought an order that the clerk to the commission appear at the Old Bailey with the proceedings of the commission in order that he might support the creditor's prosecution of the bankrupt for felony in that he did not surrender within the specified time. The creditor sought to pursue this prosecution even though the bankrupt had now made a very thorough discovery and disclosure of all his effects to the creditors who had come in under the commission, the Lord Chancellor refused to give such an order saying:

"This is a penal law, and a severe one; for it reaches to the life of the bankrupt and therefore a court of equity will not lend its aid to such a prosecution, by ordering the clerk of the commission to attend at the Old Bailey with the proceedings under the commission, but the petitioner must go on in such a manner as the law prescribes to prove him a bankrupt and a felon within the intent and meaning of the

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(13) 1 Atk. 221 (1751)

(14) By s. 1 of 5 Geo. II, c.30 the bankrupt was allowed forty-two days in which to surrender to the commissioners after he had been notified of the issue of the commission. See pp. 566-577.

"act of parliament; and therefore would not grant that part of the petition, which relates to this intended prosecution."<sup>(15)</sup>

Yet even the Chancellor was powerless in certain situations to save the bankrupt from the oppression of creditors who demanded the last ounce of their allotted pound of flesh. The difficulties which arose when the law was enforced almost to the letter can be seen from a case concerning a certain creditor Allen.<sup>(16)</sup>

Edwards, a former sheriff, becoming indebted through trading matters to, among others, Allen and Habersley, was adjudicated bankrupt. All of Edwards' lands, which were subject to a number of incumbrances including a mortgage, were conveyed to Allen and Habersley for £400, although free of the incumbrances the lands were found to be worth £2,400. At a meeting of the creditors it was agreed that they, the creditors, would accept ten shillings in the pound on Allen and Habersley conveying the lands to two of their number, Smith and Wood, the latter standing as security for the payment of the ten shillings in the pounds to the creditors.

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(15) 1 Atk. at 222.

(16) A full report of this case appears in 'The Law For and Against Bankrupts' by a late Commissioner of Bankrupts (1743) at p. 115.

This agreement was then certified by the commissioners.

Allen now refused to comply with this agreement and "sought the Advantage of the Law, to the great Loss and Hindrance of the rest of the Creditors, and to the undoing of Edwards the Bankrupt, his Wife and Children".<sup>(17)</sup>

On petition to the Lord Chancellor, whereby the creditors sought performance of the agreement, Allen contended that the various incumbrances on the lands were in fact fraudulent. At the hearing it was discovered that only £30 was outstanding on the mortgage and decreed by the Lord Chancellor that on Allen discharging this amount the lands should be conveyed to Allen and Habersley free of all incumbrances.

Allen now sought to hold the unincumbered lands for £400, despite the fact that they were worth £2,400 and also that he had agreed with the commissioners that if the lands were sold within three years then any overplus would be paid to the

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(17) Ibid. at p. 116.

creditors. At this point Allen again "sought the Advantage of the Law":

"Allen gets a Commission out of the Chancery to the Sheriffs of York there, to put him in Possession of the Land upon .... decree in Chancery made for him; and Allen with the Under-Sheriff cast Edwards's childing all out of Doors in Frost and Snow, that they were inforced to succour themselves in a Mashfat;<sup>(18)</sup> and when some of the Tenants of the land would have taken them in and relieved them, Allen threatened to turn them out of their Tenements, if they did so, and did turn one of the Tenants out of his House who entertained them but one Night. Also Allen took divers Cattle and Goods that were Edwards's Father's Goods, and not the Bankrupt's, and the old Man suing for them in the King's Bench Court, Allen procured an Injunction out of Chancery, and stay'd all the Suits so long as the old Man liv'd, who shortly after died: And Edwards and his Wife at London following the Suit to be relieved against Allen, died both together of the Plague, leaving seven poor Children

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(18) A tub in which malt is mashed - O.E.D.

"behind them."<sup>(19)</sup>

At this point the matter again came to the ears of the Lord Chancellor, on his orders Wood is made guardian for the children, the creditors' agreement is revived and counsel is appointed to look after the interests of the children on the matter being brought before him. At this hearing the Lord Chancellor decrees:

"Allen should pay the Overplus of the Value of the Lands above [£400] if they should be sold for more; and the uncharitable and unchristian Usage of Allen towards the poor Children of Edwards, being all Infants not able to help themselves, consider'd, ..... that Allen and the rest should be satisfied with ten Shillings in the Pound for their Debts, according to the agreement certified by the Commissioners; but no Abatement to be made of the [£400] paid for the Land, nor of the [£30] paid for the Mortgage; and withal that Allen should have reasonable Allowance for Costs of Suit;..."<sup>(20)</sup>

It is ordered that the estate accounts be worked out by a Master and that any overplus is to be paid "for the Relief of

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(19) Commissioner, p. 118.

(20) Ibid. p. 119.

the poor Children". On the accounts being taken it is found the overplus amounts to £600. Allen is given the right to elect whether he will sell the land or hand over £600, but Allen refuses to elect. At this the Lord Chancellor decrees that Allen convey the land to two sufficient men who would see that the creditors and Allen were paid and also pay the £600 to the children. On refusal to perform this decree Allen is committed to prison.

The case commenced in the first year of the reign of James the First and reached this unhappy conclusion in the eleventh year of the same reign, during which time three people had died and seven starving children edged their way towards six hundred pounds; equity took time to work, but at least, occasionally, it worked.

The Chancellor was the starting point of a long and often very expensive process.<sup>(1)</sup> On the petition being submitted and a commission granted<sup>(2)</sup> it was the duty of the Chancellor to appoint the commissioners who were to be responsible for the

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(1) By 1743 the cost of suing out a commission was put at about £50. Some of these charges are given as follows: Commissioner, p. 166.

	£	s	d.
"For Drawing the Affidavit,	0	4	6
To the Secretary of the Bankrupts,	2	2	0
To his Clerk,	0	5	0
For the Private Seal,	2	0	0
To my Lord Chancellors Secretary &c.,	2	2	0
To the Sealer,		10	0
For the Commission,	5	16	2."

(2) See pp. 522-525.

sorting out of the bankrupt's estate.<sup>(3)</sup> These commissioners might, if they so wished, make assignment of the bankrupt's estate to assignees chosen by the creditors, the assignees then being responsible for administering of the estate in place of the commissioners.<sup>(4)</sup> Notice of meetings to be held had to be given in order that the creditors might come forward and prove their debts,<sup>(5)</sup> the payment of dividends had to be arranged,<sup>(6)</sup> and finally there was the meeting to decide whether or not the allowance of a certificate of discharge be recommended to the Chancellor. This then was the basic machinery with which after the enactment of 5 Geo. II, c.30,<sup>(7)</sup> Parliament sought to control the growing menace of the bankrupt, machinery which was to remain almost unaltered until the era of reform in the nineteenth century.<sup>(8)</sup>

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(3) See pp. 533-538.

(4) See pp. 539-549

(5) See pp. 540-552

(6) See pp. 547, 654-662.

(7) 1731-2

(8) The enactment of 6 Geo. IV, c.16 in 1825 marks the opening of a new era in the laws against bankrupts; although it was not until 1861 that the distinction between trader and non-trader was finally abolished - 24. 25 Vic. c. 134.



The Application for a Commission

In order that a commission might issue it was necessary for a creditor to make petition<sup>(9)</sup> to the Chancellor.<sup>(10)</sup> The petition, supported by an affidavit as the debt owed, being presented to the Chancellor, the commission issued as a matter of right to the creditor and not at the discretion of the Chancellor.<sup>(11)</sup> But it is only on the petition of a creditor that such commission would issue.<sup>(12)</sup>

The cost of taking out and continuing the commission until the assignees were chosen had to be borne by the petitioning

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- (9) Unless there was a petition, the Lord Chancellor had no authority to grant a commission: Hinton's Case (1680) 1 Freeman, 270. But it was sufficient for one creditor alone to sue out a petition, Greenwood v. Knipe (1677) Nott. Ch. Cas. (S.S.) II, pp. 570-1, No. 754.
- (10) As to the conditions which must be fulfilled by the petitioning creditor, see pp.525-9.
- (11) Backwell's Case (1683) 1 Vern. 152.
- (12) Although it would appear from Backwell's Case (1683) 1 Vern 152, that it was necessary for a creditor to petition for the commission to issue, this in fact was not the case under the early bankruptcy laws. The true position was stated by Treby, C.J., in Smith v. Blackham (1698) 1 Ld. Raym. 724, in which he ruled: "That it is not necessary to prove, that the person, upon the petition of whom the commission of bankruptcy was granted, was a creditor of the bankrupt; because upon view of the statutes, they do not require that." It is only with s. 7 of 6 Anne, c.22 that a petitioning creditor is specifically mentioned, and this provision was subsequently re-enacted in 5 Geo. II, c.30, s.23.

creditor,<sup>(13)</sup> and to prevent false accusations of bankruptcy being made, it was necessary for him to give a bond to the Chancellor for £200<sup>(14)</sup> against his proving the debtor a bankrupt.<sup>(15)</sup>

Once the commission had issued, it was necessary for it to be executed within a reasonable time otherwise it may be avoided,<sup>(16)</sup>

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- (13) 5 Geo. II, c.30, s.25. The procedure prior to this enactment was for the creditors to contribute rateably towards the cost of the commission. Now such costs were payable by the petitioning creditor, but were to be repaid out of the first monies collected in by the commissioners or assignees.
- (14) This was the practice even before the legislature made it law. Thomas Powell, writing in 1630, says that it is necessary that a "Bond bee given with good Sureties, of the penalty of two hundred pounds at least, to prove the partie against whom the Commission is sued foort to bee a Banquerupt". - 'The Attourney's Academy', p. 56.
- (15) 6 Anne, c.22, s.7; later 5 Geo. II, c.30, s.23. The provision that the bond might be assigned to the bankrupt did not take away the right of the bankrupt to proceed at common law in respect of his injury. In *Ex pte. Gayter* (1751) 1 Atk. 145, Lord Hardwicke said: "...it is in the breast of the court, where the bankruptcy was a doubtful case, and the commission superseded, either to direct an inquiry before a master of the damages sustained by the bankrupt, or... an issue at law and after the damages are settled, the court might, for the better recovery thereof, order such bond to be assigned." Lord Mansfield, referring specifically to 5 Geo. II, c.30 said: "There is no clause in that Act, that takes away the common law remedy; nor that says 'that the party shall not recover more than [£200] damages'. It can never be for the benefit of trade, that a man should be at liberty to sue out commissions of bankruptcy maliciously." - *Brown v. Chapman* (1763) 3 Burr. 1419 at 1419.
- (16) Commissioner, p. 57. See *Combs' Case* (1725) Sel.Cas. Temp.King 46 Commission taken out and not proceeded in within three months superseded. Later rules laid down that the commission should be proceeded in within fourteen days of the issuing of the commission - See per Lord Eldon in *Ex pte Leyton* (1801) 6 Ves. Jun. 435 at 437-8. Section 24 of 5 Geo. II, c.30 hit at the evil caused by creditors suing out commissions without any intention of executing them, and whose sole purpose was to force the debtor to pay their debt in full. Paying the creditor after such commission issued, itself constituted an act of bankruptcy, see p. 507.

and the petitioning creditor might not at the same time as he tried to prove the bankruptcy also proceed against the debtor in the common law courts,<sup>(17)</sup> nor may he, having his debtor in execution for debt, commence bankruptcy proceedings against him.<sup>(18)</sup>

The manner of instituting or suing out a commission has been described as follows:

"FIRST, you bespeak the Commission of the Secretary of the Bankrupts, who takes a Bond of the petitioning Creditor or Creditors, and their Affidavit of the Debt. You leave with the Secretary [£3. 3s.] and pay him the rest when you take away the Commission which comes in the whole to [£7. 8s. 2d.]. The Secretary usually prepares the Affidavit, and you get it Sworn before the Master, for which you pay 1s. 6d. The Affidavit runs thus:

"B.H. of Sandwich in the County of Kent, Silk-dyer, maketh Oath that Richard W. late of the same Place, Merchant and

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- (17) Ex pte. Lewes (1746) 1 Atk. 154 Per the Lord Chancellor: "A petitioning creditor cannot keep the bankrupt in gaol, because he has no election as common creditor has; for if he was to elect to proceed at law, the commission must of course be superseded, which would affect those creditors who have proved debts under the commission." Ibid.
- (18) Burnaby's Case (1725) 1 Str. 653. This situation was altered to some extent by 41 Geo. III, c.64, s.1.(1801) which stated that if a creditor had his debtor in execution he might consent to his discharge with out losing the benefit of the judgment. Also such creditor might "stil bring any Action or Actions on every such judgment, or bring any Actio or use any Remedy for the recovery of his or their Demand, against any other Person or Persons liable to satisfy the same, in such and the same Manner as such Creditor or Creditors could or might have had or done in case such Debtor or Debtors had never been taken or charged in Execution upon such Judgment." The Act, however, was given only a limited duration of three years.

"Chapman, is justly indebted unto him this Deponent in the sum of [£100] and upwards: And that the said R.W. is become a Bankrupt, within the Intent and Meaning of the Statutes in Force concerning Bankrupts, some or one of them, as this Deponent is informed and verily believe."

You acquaint your Messenger with your having a Commission, who gets you a list of the Commissioners' names, who act in Turns; and if you are minded to have a particular Set whom you approve of best, you may wait till it comes to their Turn. The Messenger then Summons the Commissioners to attend at some certain Time and Place, usually a Coffee-House, to declare the Party a Bankrupt."<sup>(19)</sup>

#### The Petitioning Creditor

The debt of the petitioning creditor must have been one that was incurred by the debtor whilst engaged in trade,<sup>(20)</sup> although

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(19) Commissioner, pp. 267-8. As to the way in which the lists were operated and manner in which the commissioners abused creditors and bankrupt alike, see p. 700.

(20) Meggott v. Mills (1697-8) 12 Mod. 159.

where debts were incurred after the debtor left off trading, such creditors might come in under the commission if a trading creditor sued out a commission.<sup>(1)</sup>

It was sufficient that one creditor made a petition, but the amount of the debt owing before such petition might be made became regulated by Parliament. As from the 27 April 1707,<sup>(2)</sup> a petitioning creditor suing alone had to show that he was a creditor to the value of at least £100,<sup>(3)</sup> if there were two creditors they must show debts of £150 or more and three creditors had to establish debts totalling £200 or above.<sup>(4)</sup>

At first it was required that the debt upon which the petition rested be actually due at the time of suing out the commission,<sup>(5)</sup>

(1) Ibid.

(2) 6 Anne, c.22, s.7.

(3) This was usual even before the legislature intervened. In *Greenwood v. Knipe* (1677) Nott. Ch.Cas. (S.S.) II, p. 570, Lord Nottingham said that the creditor suing out the commission must be a creditor for £100, and refused to allow it to be supported by a bond for £100 when the true debt was only £50. However in *Smith v. Blackham*, (1698) 1 Ld. Raym. 724, Treby, C.J. put the true position in stating "That it is not necessary to prove, that the bankrupt was indebted in [£100] though the practice has been to do so; because though the Chancellor frequently before he grants a commission of bankruptcy, requires such proof, yet it is only a matter of discretion in him."

(4) This was later s. 23 of 5 Geo. II, c.30.

(5) It was provided by 7 Geo. I, St.1, c.31, s.1 (1720-1) that creditors whose debts were payable at a future day upon bills, bonds, promissory notes or other securities might come in and prove their debts under a commission. By s.3 of that Act, however, it was specifically laid down that no such debt might support a petition for suing out a commission. As to debts payable at a future day or upon a contingency, see pp.558-61

but in s. 22 of 5 Geo. II, c.30 it was provided that persons taking security by way of bills, bonds, promissory notes or other personal security payable at a future day might petition or join in petitioning for a commission of bankruptcy.

The failure to prove the debtor a bankrupt did not necessarily mean that the bond of £200 given by the petitioning creditor to the Chancellor was forfeit.<sup>(6)</sup> In *Ex parte Mackerness*<sup>(7)</sup> the creditor relied on two notes given by the debtor, one for £50 and the other for £53, which together were sufficient to support the petition. Unfortunately only the first note was due at the time of the petition. Although the commission was superseded on this ground,<sup>(8)</sup> the court refused to assign the bond to the debtor on the grounds that it did not appear that the commission had been taken out 'fraudulently or maliciously' within the express words of the Act.<sup>(9)</sup>

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(6) See s. 23 of 5 Geo. II, c.30.

(7) 1 P. Wms. 260 (1714)

(8) Until 7 Geo. I, St. I, c.31, s.1 such a debt, payable at a future day would not have been provable under the commission, even by an ordinary creditor seeking to come in under the commission. As to superseding the commission, see pp.673-77.

(9) In *Ex pte. Goodwin* (1740) 1 Atk. 100, it was stated that: "Where a commission is superseded, merely because there was a defect of form, as to the petitioning creditor, but no manner of doubt as to the act of bankruptcy; the costs of the supersedeas shall be allowed only; otherwise if the act of bankruptcy had been fully proved." Ibid. at 101.

Generally it was agreed that it was necessary for the debt relied on by the petitioning creditor to have been contracted prior to the act of bankruptcy relied upon. This was satisfied even if the debt was assigned to the petitioning creditor after the act of bankruptcy.<sup>(10)</sup> The law, however, became somewhat confused for a time by virtue of a decision in the House of Lords in *De Gols v. Ward*.<sup>(11)</sup> In this case the bankrupt became indebted to the plaintiff in 1730 and later committed an act of bankruptcy. The plaintiff, in order to set aside as many conveyances as possible,<sup>(12)</sup> tried to show earlier acts of bankruptcy and succeeded in showing an act of bankruptcy by the bankrupt in 1726. It was decided by the House of Lords, reversing the decision of the Lord Chancellor, that the commission was not to be set aside on the ground that the petitioning creditor's debt arose after the act of bankruptcy

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(10) *Ex pte. Thomas* (1747) 1 Atk. 73

(11) 1 Bro. P.C. 536 (1737-8)

(12) The general rule was that all conveyances of property by the bankrupt after the act of bankruptcy were void as against the commissioners or assignees, see pp. 601-610. This rule was altered in 1806 by 46 Geo. III, c.135, s.1, which stated that all conveyances by, and all payments to and by the bankrupt to another, who acted bona fide and without notice of an act of bankruptcy, should be good if made more than two months before the date of the issuing of the commission.

in 1726, but this was on the basis that at the time when the commission issued the old statutes of bankruptcy were in force, thus the provision requiring that petition be made by a creditor was not applicable.<sup>(13)</sup>

It became the rule, therefore, that the petitioning creditor's debt must have been contracted, albeit payable at a future date, prior to the act of bankruptcy upon which it was sought to base the commission.<sup>(14)</sup>

#### Joint and Separate Commissions

Where persons owed debts jointly, especially in cases of partnership, which failed, the query arose as to whether a joint commission must be taken out against both the debtors, or could

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(13) Both 6 Anne, c.22 and 5 Geo. I, c.24 had lapsed at the time of the act of bankruptcy in 1726.

(14) This was eventually altered by s. 5 of 46 Geo. III, c.135, which stated that no commission was to be avoided on the grounds that there had been an act of bankruptcy committed by the bankrupt prior to the contracting of the petitioning creditor's debt; as long as at the time when the petitioning creditor contracted his debt he had no knowledge of such prior act of bankruptcy.



a separate commission be issued against one debtor only?

For a time the courts struggled with this problem,<sup>(15)</sup> but it was finally decided that a separate commission might be issued against a partner.<sup>(16)</sup> Where such a separate commission was sued out only the separate creditors might come in to prove their debts, although the joint creditors might come in to protest against the allowance of a certificate of discharge to the bankrupt.<sup>(17)</sup>

In the case of a joint commission, separate accounts were to be kept of the joint and personal estates of the debtors;<sup>(18)</sup> and in such cases the joint commission must issue against all the debtors or partners involved and not just two of several.<sup>(19)</sup>

(15) See e.g. *Craven v. Widows* (1682) 2 Chan. Cas. 139; and *Ex pte. Crowder* (1715) 2 Vern. 706.

(16) *Crispe v. Perrit* (1744) Willes 467

(17) *Ex pte. Turner* (1742) 1 Atk. 97. But see *Ex pte. Elton* (1796) 3 Ves. Jun. 238, where joint creditors were admitted under a separate commission, but it was ordered that they were not to receive a dividend until an account had been taken of what they might have received from the partnership effects.

(18) *Simpsons, In re.* (1752) 1 Atk. 137

(19) *Allen v. Downs* (1761) Willes in notis 474. See further *Beasley v. Beasley* (1736) 1 Atk. 97, where it was held that if a joint commission issued against two partners, they must both be found bankrupt. Should one of them then die, the commission continues, but if one partner be dead at the time when the commission is taken out, then the commission abates and is void.

If a separate commission had already been sued out it was then not possible for a joint commission to issue whilst the first commission endured, but this difficulty might be overcome by having the first commission superseded.<sup>(20)</sup> The reason for this lay in the theory that on the issuing of the first commission all the property became vested in the appointed commissioners so that there was nothing upon which the second commission might operate.<sup>(1)</sup>

At least once, however, the court allowed a second commission to stand although in fact no certificate of discharge had been obtained under a first commission which was still extant. In *Ex parte Proudfoot*<sup>(2)</sup> a commission was sued out against one Jackson in respect of which no certificate was ever obtained. Four years later a second commission issued against Jackson in respect of which he obtained a certificate of discharge. Prior to the allowance of this certificate, however, assignees under the first commission had called a meeting of Jackson's creditors and also sent letters to thirty-nine creditors under the first commission, so that they might

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(20) *Simpsons, In re* (1752) 1 Atk. 137, at 139.

(1) *Martin v. O'Hara* (1778) Cowp. 823.

(2) *Ex pte. Proudfoot* (1743) 1 Atk. 252.

meet the new assignees. A large number of creditors under both commissions in fact turned up and assented to the allowance of the certificate and also to the sum of £65 being paid the assignees under the first commission to cover their expenses. Two and three-quarter years after the allowance of the certificate of discharge under the second commission by the Chancellor, two creditors under the first commission petitioned to have the second commission superseded. Lord Hardwicke, agreeing that normally a second commission could not issue whilst the first still existed, refused to set aside the second commission having regard to the acquiescence of the majority of the creditors under both commissions to the allowance of the certificate and "because it would be a great prejudice and injustice to those persons, who have given Jackson credit ever since his certificate was confirmed, ..."<sup>(3)</sup>

This case can be distinguished from cases where there is no interference of creditors under the first commission in the second commission. In *Martin v. O'Hara*<sup>(4)</sup> an uncertificated bankrupt moved from London to Bristol and there set up in partnership with another. Six months later he again became bankrupt and a second

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(3) Ibid at 253

(4) Cowp. 823 (1778)

commission issued. The court held that a second commission could not be sued out against an uncertificated bankrupt and that he obtained no discharge whatsoever by the certificate gained under the second commission.

#### Appointing the Commissioners

The Commissioners first make their appearance in the statute of Elizabeth I<sup>(5)</sup> which gave the Lord Chancellor the power to appoint "such wise and honest, discreet persons as to him shall seem good".<sup>(6)</sup> Malynes<sup>(7)</sup> explains the regulations governing the appointment of such commissioners:

"The Commissioners appointed by the Lord Chancellor under the great Seal, to execute this commission of the Statute of Bankrupts, must be Counsellors at the law, joyned with some citizens or merchants, which are to seise of the party (which by the said commission is proved to be bankrupt) all goods, debts, chattels, and moveables into their

(5) 13 Eliz. I, c.7.

(6) Ibid. s.2. See Backwell's Case (1683) 1 Vern. 152 where the Lord Keeper directed that counsel "bring him the names of such sufficient and honest persons, as might be fit to be Commissioners." at 154.

(7) Malynes (G.) 'Consuetudo Vel Lex Mercatoria' (1686) p. 158.

"hands and to appoint one or two of the creditors to be Treasurers of the same, which is afterwards to be distributed by the said Commissioners, unto all such as they shall find and admit to be right Creditors to the party (and with his privy and consent) upon such specialties, books or accounts, as they shall produce, and shall be made apparent unto them."

It was sufficient for three commissioners to be appointed to be in charge of a commission, so that where one Johnson acted both as clerk and commissioner to a commission, receiving money for both positions held, it meant that there were always four commissioners present, including the clerk; and on petition Johnson was removed.<sup>(8)</sup>

Although this power of appointing commissioners was given in 1571<sup>(9)</sup> it was not until 1719<sup>(10)</sup> that they were forced to make oath as to the manner in which they would perform their duties. Unless the oath was taken, the commissioners could not use the powers given

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(8) Wood's Case (1725) Sel.Cas. Temp. King 46.

(9) 13 Eliz. I, c.7, s.2

(10) 5 Geo. I, c.24, s.32, this later became s. 43 of 5 Geo. II, c.30.

to them, save the power of any two or more of them to administer the oath to each other.<sup>(11)</sup> The oath became settled in the following form:<sup>(12)</sup>

"I A.B. do swear, That I will faithfully, impartially, and honestly, according to the best of my skill and knowledge, execute the several powers and trusts reposed in me, as a Commissioner in a commission of Bankrupt against  
and that without favour or affection, prejudice or malice.

So help me GOD."

Memorials of the oaths, properly signed, were to be kept with the other depositions and proceedings of the commission.<sup>(13)</sup>

At the first meeting of the commissioners the petitioning creditor had to show that the debtor was a trader within the statutes, that his debt is such as permits him to sue out a commission and the act of bankruptcy.<sup>(14)</sup>

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(11) 5 Geo. II, c.30, s.44 previously s. 33 of 5 Geo. I, c.24.

(12) 5 Geo. II, c.30, s.43.

(13) Ibid. s. 44.

(14) Ibid. s. 23 i.e. that if a sole creditor his debt was for £100 or more.

At first, the bankrupt might not be examined by the commissioners as to his bankruptcy, but later this was permitted.<sup>(15)</sup>

The common law rule that a wife was not admissible as a witness against her husband, however prevailed and the wife might not be called and examined concerning the bankruptcy of her husband.<sup>(16)</sup>

On the evidence produced before them the commissioners were the sole judges as to whether or not the debtor might be adjudicated a bankrupt, but if the matter came before the court by way of an action then the jury were to decide the issue as to the bankruptcy on the evidence appearing and not merely on the weight of the commissioners decision.<sup>(17)</sup>

The need for the decision of the commissioners to be subject to review by the courts is explained by Coke:<sup>(18)</sup>

(15) Definite powers to examine the bankrupt were not introduced until 1 Jac. I, c.15, s.4. By s. 16 of 5 Geo. II, c.30, the commissioners are given the right to question the bankrupt concerning his trade, dealings, estate and effects, the right to examine him concerning the act of bankruptcy, included in the case of examination of witnesses, is specifically omitted. As to examination of the bankrupt, see pp. 577-588.

(16) Ex pte. James (1719) 1 P. Wms. 610, per Lord Parker at 611. This related to the act of bankruptcy itself, whether it has been committed and how and when. The wife might otherwise be questioned on all matters concerning the whereabouts of the bankrupt's goods, etc., see 1 Jac. I, c.15, s.5. As to examination of the wife by the commissioners see pp. 590-591.

(17) Bambridge v. Bates (1679-80) Raym. Sir T. 337.

(18) Co. Inst. IV, 277.

"The authority of the commissioners is by commission under the great seal; their jurisdiction and power is by force of .... acts of parliament which ought to be pursued, or else they are subject to the action of the party grieved, for he hath no other remedy."<sup>(19)</sup>

The review of a decision of the commissioners might come before the court in the guise of an application for habeas corpus,<sup>(20)</sup> or perhaps an action for false imprisonment<sup>(1)</sup> or trespass. In *Doswell v. Impey*<sup>(2)</sup> Abbot, C.J. stated the position thus:<sup>(3)</sup>

"The general rule of law as to actions of trespass against persons having a limited authority (and commissioners of bankrupt are such persons,) is plain and clear. If they do any act beyond the limit of their authority, they thereby

(19) See *Bonham's Case* (1608) 8 Co. Rep. 107a at 121a, where Coke, C.J., remarking on the commissioners of bankrupts, says: "... their warrant is under the great seal, and by act of Parliament; yet because the party grieved has no other remedy, if the commissioners do not pursue the act and their commission, he shall traverse, that he was not a bankrupt, although the commissioners affirm him to be one."

(20) Where the bankrupt was committed by the commissioners for not answering fully the questions put to him, it was provided that he might be brought before a judge on an habeas corpus. If, however, the judge found for the commissioners he might recommit the bankrupt to prison. s. 18 of 5 Geo. II, c.30. See pp. 583-4.

(1) As to the right to sue the commissioners see *Miller v. Seare* (1777) 2 Black W. 1141 which was to some extent criticised in *Doswell v. Impey* 1 B. & C. (1823) 163.

(2) 1 B. & C (1823) 163.

(3) *Ibid.* at 169.



"subject themselves to an act of trespass: but if the act done be within the limit of their authority although it may be done through an erroneous or mistaken judgment, they are not thereby liable to an action."

Where the commissioners were sued for action taken by virtue of the statutes relating to bankruptcy they might plead the statutes to justify their action.<sup>(4)</sup> This right to sue the commissioners did not find favour in all quarters, and one Lord Keeper saw it as a deterrent to recruitment of commissioners saying:<sup>(5)</sup>

".... it was a mischief that the Act of Parliament had subjected the Commissioners to an action, so as no sufficient persons, and such as might be fit to manage such a concern as this, would undertake the trouble of it."

Commissioners who dealt badly or unfairly with the matters allotted to them were subject to the control of the court of Chancery.<sup>(6)</sup>

All matters relating to the commission or actions taking place before the commissioners might, on petition to the Lord Chancellor, be entered on record and filed away.<sup>(7)</sup>

(4) 1 Jac. I, c. 15, s.11

(5) Backwell's Case (1683) 1 Vern. 152 at 154.

(6) See Wood v. Hayes (1606-7) Tothill 62; and see Lewes v. Lany (1607) Hawarde pp. 342-3.

(7) 5 Geo. II, c.30, s.41. As to records of the commission, see pp.670-73.

CHAPTER 20PROCEEDING UNDER THE COMMISSION

Once the commission had been granted and the debtor made a bankrupt, it became necessary for the commissioners to appoint assignees to deal with the administrative details of the estate. Creditors had to be admitted under the commission in order to prove their debts so that they might thereby recover something from their debtor's collapse. Such creditors had to be checked carefully in order to prevent persons proving under the commission and then paying the amount recovered to the bankrupt. It is with the growth of this administrative machinery that we deal now.

Appointing the Assignees

An attempt to save the commissioners time in settling the estate of the bankrupt was made in the early years of the seventeenth century when they were given power to assign debts due to the bankrupt to his creditors.<sup>(1)</sup> By virtue of this provision all the rights formerly enforceable by the bankrupt might then be exercised by the person to whom the debt was assigned. A little over a hundred years later the principle was extended so that commissioners might, if they so wished, appoint assignees to carry on the general business of administration necessary before there could be distribution of the estate.<sup>(2)</sup> The intention, no doubt, was to cut down the long delays which arose in waiting for the

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(1) 1 Jac. I, c. 15, s.8

(2) 6 Anne, c.22, s.4.

commissioners to deal with the bankrupt's estate, but the provisions were not widely used.

Under the latter enactment<sup>(3)</sup> the commissioners' named in a commission of bankrupts, or the major part of them, were to give notice of the commission in the 'Gazette'<sup>(4)</sup> and also to appoint a time and place for the creditors to meet<sup>(5)</sup> in order that they might choose the assignees of the bankrupt's estate and effects. This meeting was altered by 5 Geo. II, c.30 in that the meeting for the appointing of the assignees became the second meeting, the commissioners to call such meeting after having declared the debtor a bankrupt.<sup>(6)</sup> It is in this last mentioned Act that the general rules governing the behaviour of such assignees are to be found.

At the creditors' meeting a vote was taken on the choosing of the assignees, creditors with debts of less than £10 were not entitled to vote<sup>(7)</sup> and the vote itself was decided on the basis of major part in value of debts then proved by creditors present

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(3) Ibid.

(4) Called the London Gazette in 5 Geo. II, c.30, s.26.

(5) For the City of London and places within the bills of mortality this was to be the Guildhall - Ibid.

(6) 5 Geo. II, c.30, s.26. See Ex pte. Gregnier (1744) 1 Atk. 91.

(7) Ibid. s. 27 - there had been no such minimum debt in order to have a right to vote for the assignees under 6 Anne, c.22. By s. 32, the creditors, before choosing the assignees were to decide where and with whom, moneys collected by such assignees should be kept. The assignees were to deposit such moneys as instructed whenever the amount in hand reached £100. The assignees were indemnified against any loss which resulted in their carrying out the creditors' directions.

and voting.<sup>(8)</sup> The assignees having been selected the commissioners were then to assign the estate and effects of the bankrupt to them.<sup>(9)</sup>

The commissioners, in order not to waste time, might, if they so wished, appoint provisional assignees until the meeting of the creditors, assigning all or any part of the bankrupt's estate to them as they shall think fit. Such provisional assignees might then be removed at the meeting of the creditors by the majority in value with debts of over ten pounds if so desired.<sup>(10)</sup> If upon written notice such provisional assignee refused to assign the estate or the part thereof formerly assigned to him, within ten days of written notice of the change and appointment of new assignees and their consent to act, such written notice being given by the new assignees, then the first assignee to forfeit £200 and this to be distributed amongst the creditors in payment of their debts.<sup>(11)</sup>

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(8) 5 Geo. II, c.30, s.26. In 6 Anne, c.22 it had been merely stated that the assignees were to be chosen by the major part of the creditors then present.

(9) 5 Geo. II, c.30, s.26.

(10) Ibid. s. 30.

(11) Ibid. s. 30. In *Ex pte. Gregnier* (1744) 1 Atk. 91 at 92 Lord Hardwicke said that as the law was that assignees be appointed as soon as possible, such as were appointed ought not to be removed for other than very good reasons; "therefore the true rule is, that the assignees ought to be continued, unless the petitioners can shew there is some objection with regard to the substance or integrity of the person who is chosen assignee."

Power is also given to the Lord Chancellor, at his discretion on petition by a creditor, to vacate the commissioners' assignment or assignments made on the vote of the creditors. Such new assignees as were then appointed to stand legally vested of the estate. Notice of such removal and appointments is to be given by the commissioners in two successive editions of the London Gazette immediately following the change, in order that debts should not be paid wrongly to the former assignees.<sup>(12)</sup>

On appointment the assignees are to keep a book or books of accounts relating to all moneys or other effects received by them relating to the bankrupt's estate, such books of account to be produced free of charge at reasonable times on the request of a creditor.<sup>(13)</sup> To aid them in their gathering together the estate, the bankrupt was, upon oath, to deliver to them all his books, papers and accounts, not already taken by the commissioners, and also to make discovery of all papers, etc., concerning his estate or effects in the possession of other people. The bankrupt, if he is at liberty,

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(12) Ibid. s. 31. In *Smith v. Jameson* (1794) Peakes, N.P., 279, it was held that the new assignees might maintain an action for money had and received against the removed assignee if he failed to pay over all moneys belonging to the bankrupt's estate.

(13) Ibid. s. 26. See *Tarleton v. Hornby* (1835) 1 Y. & C. Ex. 172 at 191 regarding the duties of the assignees.

is also to attend before the assignees at their request at all times, reasonable notice of such requirement of attendance having first been left at his house or place of abode.<sup>(14)</sup>

The assignees' main task was to gather together the entire of the bankrupt's estate and compile the accounts relating to it; and in this respect they stood in the position of trustees.<sup>(15)</sup>

(14) Ibid. s. 4. If the bankrupt was in prison or in custody, then the assignees were to appoint a person to attend upon the bankrupt and to produce to him his papers, books and writings, so that the bankrupt might prepare for his final examination; - *ibid.* s.6. Even after the bankrupt had been granted his certificate of discharge, he was still to attend upon the assignees, if so required, in order to settle up the estate. For such attendance the bankrupt was to be allowed 2s. 6d per day., *ibid.* s. 36. See p. 659

(15) *Litchfield (Earl of) In re.* (1737) 1 Atk. 87 per Lord Hardwicke at 88. "Where assignees under a commission of bankrupt, employ an agent to receive money, or pay, and he abuses this confidence; I will not lay it down as a general rule, but at present I am at a loss to distinguish such assignees from any other trustee, who, if his agent deceive him, respondeat superior to the cestuique trusts; in the present case, as one of the assignees employed the clerk of the commission, a person of very little credit, to pay dividends, who mis-applied and embezzled the money, this assignee will be liable to make good to the creditors, as he did not consult the body of the creditors who are his cestuique trusts in the appointment of this agent." Where the assignees own interests conflicted with those of the creditors they must make full disclosure: *Whichcote v. Lawrence* (1798) 3 Ves. Jun. 740, s. per Lord Chancellor Loughborough at 749, 750. In *Ex pte. James* (1803) 8 Ves. Jun. 337, Lord Eldon discussing the strictness of the rule against purchase from a bankrupt by assignees for their own benefit said: "This doctrine as to purchases by trustees, assigns, and persons having a confidential character, extends much more upon general principle than upon the circumstances of any individual case. It rests upon this; that the purchase is not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance; as no Court is equal to the examination and ascertainment of the truth in much the greater number of cases."

Once the estate was gathered in it was the duty of the assignees to sell it as advantageously and as soon as possible, so that the creditors might receive some payment of their debts.<sup>(16)</sup>

The effect of the assignment of the estate of the bankrupt to an assignee is that his interest in the estate dates back to the act of bankruptcy.<sup>(17)</sup> Therefore, save where excepted by statute,<sup>(18)</sup> all dealings in the bankrupts property between the act of bankruptcy and the date of the commission are avoided at

(16) The Lord Chancellor had no discretion which permitted him to refuse to order a dividend to be paid if petition was made to him by a creditor, if in fact the assignees had money in their hands - Ex pte. Goring (1790) 1 Ves. Jun. 168. "If it turn out, that the assignees have kept money in their hands unwarrantedly, my opinion is, that you need not go into the points, as to the manner, in which they have employed it; for an assignee must not keep money in his hands." Ibid at 169, per Lord Thurlow.

(17) Kiggil v. Player (1709) Salk. 111

(18) By s. 9 of 1 Jac. I, c.15, a debtor of the bankrupt might pay his debt to the bankrupt without being liable to pay it again, if at the time of the payment he had no notice of the act of bankruptcy. Further protection was given by s. 13 of 21 Jac. I, c.19, where a purchase from a bankrupt, made for valuable consideration, might not be impeached unless a commission was sued out within five years of the act of bankruptcy. As to the workings of this provision see p. 630. As to notice of an act of bankruptcy see p. 652.

at the instance of the assignee.<sup>(19)</sup>

In relation to their gathering of the estate, the assignees stand in the place of the bankrupt; therefore, all defences which might have been raised against the bankrupt in actions by him can be raised against the assignees. Thus the Statute of Limitations<sup>(20)</sup> might be pleaded against an assignee, and it was held that the right of wager of law<sup>(1)</sup> lay against the assignees where it would have lain against the bankrupt.<sup>(2)</sup>

The assignees might begin actions in law<sup>(3)</sup> to recover parts of the bankrupt's estate without the assent of the creditors, but in order to commence a suit in equity, it was necessary for them to obtain the consent of the creditors after notice being given

(19) By s. 1 of 19 Geo. II, c.32 (1745-6) creditors receiving payment for goods honestly sold to the bankrupt, or receiving bills drawn in good faith upon the bankrupt and accepted by him in the ordinary or usual course of trade, were not to be liable to repay any money received in good faith from the bankrupt, prior to the suing out of the commission without notice of an act of bankruptcy. See p. 651. Under the Act 46 Geo. III, c.135, s. 1 (1806), all conveyances by, payments to, and contracts with a bankrupt, made in good faith two months before the date of a commission were to be good.

(20) *Grey v. Mendez* (1723) 8 Mod. 171, at 172. See *South Sea Company v. Wymondsell* (1732) 3 P. Wms. 143 at 144.

(1) As to wager of law, see p. 145.

(2) *Bradshaw's Case* (1605) Cro. Jac. 105

(3) *Hussey v. Fidell* (1701) 3 Salk. 59



of the meeting in the London Gazette.<sup>(4)</sup> Similarly, if the assignees wished to submit to arbitration differences between them and another relating to the state of accounts between the bankrupt and another,<sup>(5)</sup> or they wished to compound a debt,<sup>(6)</sup> they must call a meeting of the creditors, first giving notice of such meeting in the London Gazette. They might only proceed on the course they wished to adopt if such was agreed to by the majority in value of the creditors present at the meeting.<sup>(7)</sup> The fact that certain creditors did not turn up after the meeting had been properly called and notice given did not invalidate the decision of the majority in value of those present, even if they might otherwise be a minority, for, said Lord Chancellor Hardwicke:<sup>(8)</sup>

"I do not see any thing fraudulent in the conduct of the assignees, for they have done every thing which the act of parliament prescribes on meetings for a composition of debts;

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(4) 5 Geo. II, c.30, s. 38.

(5) Ibid. s. 34.

(6) Ibid. s. 35.

(7) In *Ex pte Whitchurch* (1742) 1 Atk. 91, it was held that the creditors could not give the assignees a general power that they might prosecute such suits as they in their discretion thought fit. Per Lord Hardwicke at 91: "... assignees must have a meeting of creditors, upon notice given for that purpose in the London Gazette, to consider of each particular suit, or each particular case for arbitration..".

(8) *Cooper v. Pepys* (1741) 1 Atk. 106 at 107.

"and if some of the creditors do not think proper to come, 'tis their own fault, and those who are present have a right to bind the whole, if the majority in value at the meeting are of the opinion to sign the composition."

Where the assignees found it necessary to bring an action they had to prove that the bankrupt was a trader, the act of bankruptcy itself, that the commission had been properly granted and that the property in the object of the litigation was in the bankrupt; they were allowed all expenses due to them by virtue of bringing such actions.<sup>(9)</sup>

Once the assignees had moneys in their hands they should make a dividend to the creditors at the first opportunity, and in any case at some time after four months and within twelve months of the suing out of the commission; twenty one days' notice of such meeting being given in the London Gazette.<sup>(10)</sup> At the meeting to pay such dividend, the assignees must produce the accounts and

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(9) See 5 Geo. II, c.30, s.33. Records of the commission were to be kept, so that they might be produced as evidence of such facts - *ibid.* s. 41. See s. 10 49 Geo. III, c. 121 (1809) - where in an action by the assignees, evidence of the commission and proceedings were to be sufficient evidence of the petitioning creditors debt, unless notice was given that the matters were to be disputed.

(10) If the assignees failed to advertise a meeting for the giving of a dividend then the commissioners had power to do so, if they think it proper to do so. - *Ex pte. Whitchurch* (1742) 1 Atk. 91.

swear as to the truth of them; after which the commissioners were to make an order as to the payment of a dividend to the creditors according to their debts, such order being filed with the papers of the commission, the assignees keeping a book of receipts of the money paid to the creditors.<sup>(11)</sup>

A final dividend was to be made by the assignees within 18 months of the issuing of the commission after notice given in the London Gazette, at which point creditors who had not yet proved their debts might be allowed to attend to prove them. Once this dividend had been made no further payments were permissible unless there was property which for some reason or other cannot be disposed of; in which case the assignees were to call a meeting within two months of their being able to dispose of such property so that the proceeds might be divided amongst the creditors.<sup>(12)</sup>

An assignee might be removed for bankruptcy, or for breach of the trust reposed in him on petition to the Lord Chancellor;<sup>(13)</sup> the

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(11) 5 Geo. II, c.30, s.33. In *Ex pte Lane*, (1741) 1 Atk. 90 at 91, Lord Hardwicke discussing the position of assignees not paying the dividend when able said: "Where the effects of a bankrupt are so inconsiderable that no one creditor may think it worth while to call upon assignees for a dividend, yet if they neglect to make a dividend in a proper time, and are making a private advantage to themselves of the bankrupt's effects, I shall always charge such assignees with interest." See further s. 12 of 49 Geo. III, c. 121 whereby creditor may petition Chancellor for payment of dividend but may not bring an action against the assignee. The Chancellor might compel payment of dividend with costs and interest.

(12) *Ibid.* s. 37.

(13) See *Ex pte. Newton* (1749) 1 Atk. 97.

latter also having the power, in the case of an absconding assignee, to vacate the appointment and appoint a new assignee.<sup>(14)</sup>

### The Role of the Creditor

The need to define who might be a creditor for the purpose of the commission arose not only in respect of those who might prove under the commission, but also in order to decide those who were barred from taking the debtor in execution at common law after he had obtained his certificate of discharge.

The basic rule was that any person having a debt due to him from the bankrupt prior to the latter's act of bankruptcy was a creditor for the purposes of the commission.<sup>(15)</sup>

Creditors with debts due at a future date, i.e. with debts contracted prior to, but payable after, the act of bankruptcy, "on bills, bonds, notes, or other securities, promise or agreements

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(14) 5 Geo. II, c. 30, s. 31.

(15) This position remained basically unaltered until 46 Geo. III, c. 135, s. 2(1806), when it was provided that persons contracting debts with a bankrupt, which if they had been contracted before the act of bankruptcy was committed might have been proved under the commission, then, if such debts contracted in good faith without notice of an act of bankruptcy, the creditors might now prove under the commission

for the same", were allowed to come in and prove such debts under the commission by virtue of 7 Geo.I, st.1, c.31.<sup>(16)</sup> But 5% per annum interest was to be deducted from the allotted share, such interest to be computed from the time of payment to the creditor to the time when the debt was actually due.<sup>(17)</sup>

A mortgagee or pledgee could choose whether or not to come in under the commission.<sup>(18)</sup> Persons with debts payable only on a contingency, unless the contingency happened prior to the act of bankruptcy, were not creditors within the Acts.<sup>(19)</sup>

By 21 Jac. I, c.19, s. 8 it was provided that:

"... all and every Creditor and Creditors, having security for his or their several debts by judgment statute recognizance

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(16) S. 1

(17) As to debts payable at a future day see p 558. Before this enactment, a creditor on a bond made prior to the act of bankruptcy, but only becoming payable after it, was not able to prove such debt nor have any dividend until such time as the bond became payable. - See Tully v. Sparkes (1729) 2 Ld. Raym. 1546.

(18) See pp. 556, 649.

(19) Ex pte. Harrison (1789) 2 Bro.C.C. 615.  
payable upon a contingency, see p 560.

As to debts

"specialty with penalty or without penalty or other security, or having no security, or having made attachments in London or any other place, by virtue of any custom there used, of the goods and chattels of any such Bankrupt, whereof there is no execution or extent served and executed upon any the lands tenements hereditaments goods chattels and other estate of such Bankrupt before such time as he or she shall or do become Bankrupt, shall not be relieved upon any such judgment statute recognizance specialty attachments or other security, for any more than a rateable part of their just and due debts with the other Creditors of the said Bankrupt, without respect to any such penalty or greater sum contained in any such judgment statute recognizance specialty with penalty attachment or other security."<sup>(20)</sup>

Under the provisions of 1 Jac. I, c.15<sup>(1)</sup> the creditors were to be allowed four months in which to come in after the suing out of the commission, after which time the commissioners might proceed

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(20) By 49 Geo. III, c.121, s.2 executions and attachments against the estates of bankrupts which were levied more than 2 months before the issuing of the commission were to be valid, notwithstanding any prior acts of bankruptcy.

(1) S.2

to distribution of the estate.<sup>(2)</sup>

It was provided that under the commission the commissioners were to appoint a meeting at which the creditors might attend to prove their debts.<sup>(3)</sup> A creditor failing to come in at this time might still come in at the discretion of the Chancellor, even after the payment of a first dividend; although in such a case this would not in any way affect the first distribution.<sup>(4)</sup> The Chancellor might also allow a creditor to come in where he was barred by mere technicalities, upon fulfilment of certain conditions.

In *Nash v. Vanacker*<sup>(5)</sup> judgment was obtained against a debtor after the act of bankruptcy for £6,000, and £2,000 of goods

(2) As to payment of the dividend and distribution of the estate see p.654.

(3) 5 Geo. II, c.30, s. 26.

(4) See *Ex pte. Stiles* (1758) 1 Atk. 208, where Lord Hardwicke remarking on the above provision said: "Upon the common equity of this court, if creditors will make an affidavit that they have not read the Gazette, they will be admitted, so as not to disturb the former dividend; and by that means must, in the first place, be brought up equal to the creditors under the former dividend, before the commissioners can proceed to make a second." *Ibid.* 209. In *Ex pte Peachy* (1754) 1 Atk. 111, the Lord Chancellor refused to admit a creditor who applied to be able to prove his debt some fifteen years after the issuing of the commission.

(5) *Nott. Ch. Cas. (S.S.)* II, p. 491, No. 652.

were taken in execution by the defendant's father, part of which the latter converted to his own use, the remainder passing to the defendant as executor. Soon after the judgment a commission of bankruptcy issued against the debtor. The assignees sought first to recover the goods in the defendant's hands,<sup>(6)</sup> and now requested that the defendant be made to account for the goods converted by his father. This was refused on the grounds that otherwise the other creditors would be paid in full and the defendant whose debt was larger than all the other creditors would get nothing; the defendant, having relied on the judgment was unable to come in under the commission.<sup>(7)</sup> It was, however, later consented that the defendant could come in under the commission and that he might retain what he had in his hands pro rata towards his own satisfaction.

There was no provision for forcing a creditor to come in under a commission and he might, if he wished, elect to sue the bankrupt at law as a common debtor, but if he proceeded at law he was still to be allowed to prove his debt in order that he

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(6) No execution having been obtained prior to the act of bankruptcy, the case fell within s. 8 of 21 Jac. 1, c.19.

(7) This was on the basis that the defendant had not come in to prove under the commission, having been contented with the judgment and execution.



might dissent from the certificate of discharge being allowed.<sup>(8)</sup> Even where a creditor had received two dividends under the commission he was permitted to return the two dividends and elect to proceed at law.<sup>(9)</sup> A petitioning creditor, however, was taken to have elected by taking out the commission,<sup>(10)</sup> it being explained that to permit it to be otherwise would mean that if the petitioning creditor elect to proceed at law after the issuing of the commission then the commission would have to be superseded which would seriously affect those creditors who had proved under the commission.<sup>(11)</sup>

At no time could the creditor have the body of the bankrupt in execution on judgment for debt and at the same time proceed to bring his debt before the commissioners and contest the allowing of a certificate of discharge to the bankrupt, Lord Hardwicke had no doubts on this point when it came before him<sup>(12)</sup> and he refused

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(8) Ex pte. Lindsey (1745) 1 Atk. 220, per Lord Hardwicke: "The creditor must either waive his proof under the commission, or make his election to proceed under it; but notwithstanding he elects to proceed at law, he may still assent or dissent to the certificate." Ibid.

(9) Ex pte Capot (1739) 1 Atk. 219. By s. 14 of 49 Geo. III, c. 121, a creditor bringing an action against the bankrupt at law was not to be admitted under a commission unless he relinquished the action and any benefits obtained from it.

(10) Ex pte. Ward (1743) 1 Atk. 153. See p. 524.

(11) Ex pte. Lewes (1746) 1 Atk. 154.

(12) Ex pte. Williamson (1750) 1 Atk. 82.

to stop the issuing of the certificate saying:<sup>(13)</sup>

".. though he [the creditor] called himself a judgment creditor, [he] did not so much as produce a copy of the judgment on which he had the bankrupt in execution; and if he had, it would not have done, unless he had likewise by oath verified his debt; nor ought he to have been admitted a creditor even then, unless he would have discharged him from the execution, for he must not come under the commission, and prosecute at law likewise."

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(13) Ibid. at 83. Where the creditor was chosen as an assignee this would not prevent him from commencing proceedings at law and being discharged as a creditor under the commission and he retained the right to assent or dissent to the granting of the bankrupt's certificate. - Ex parte Dorvilliers (1746) 1 Atk. 221.

(14) In Ex pte. Salkfield ( 1719 ) 1 P. Wms. 560, it was held to be no election if the creditor came in under the commission to be paid out of the bankrupt's effects if he had no effects. It was also said that in such a case the creditor, although having proved his debt and been appointed assignee, might still take the bankrupt in execution if he would waive the benefit of the bankruptcy enactments.

Proving the Debt

Creditors were required to make oath in the first instance as to the debt they claimed,<sup>(15)</sup> if there was any doubt as to the validity of the debt, or the bankrupt contested that there was no such debt or that it had been paid, then the creditor would be called upon to produce further evidence to support his claim.<sup>(16)</sup>

Where the creditor was a mortgagee or pledgee there was no need to come in under the commission,<sup>(17)</sup> but if he thought that the amount realised from the sale of such security would not reach the amount loaned he could make application to the commissioners

(15) 5 Geo. II, c.30, s. 26. See *Ex parte Williamson* (1750) 1 Atk. 82 at 83.

(16) *Ex parte Simpson* (1744) 1 Atk. 68. See per Lord Hardwicke at 70: "As it would be extremely hard to exclude persons who may perhaps be the greatest creditors, till the account is determined, which may be the work of several years; and as it may be necessary and convenient that assignees should immediately be chosen, the commissioners are not critically to examine into the debt, but to admit creditors upon their oath for what they swear is due to them, as they will still be liable to an account afterwards."

(17) In *Chapman v. Turner*, (1684) 1 Vern. 267, it was held that if the bankrupt had bought land and the entire of the purchase price had not been paid off, nevertheless the vendor need not come in under the commission as creditor, since the land would be charged for the balance due. This was explained as follows: "In this case there is a natural equity, that the land should stand charged with so much of the purchase money as was not paid; and without any special agreement for the purpose." *ibid.* at 268

to have the property sold and then to be admitted to prove for the residue. (18)

In those cases where the creditors lived a long way from the meeting place of the commission, provision was made for them to submit notice of their debts by affidavit (or if Quakers by solemn affirmation); or they might appoint other persons to act for them under powers of attorney. (19) Similarly, in the case of persons resident abroad, affidavits or solemn affirmations of

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(18) The position of the mortgagee is well illustrated in *Ex parte Jackson* (1800) 5 Ves. Jun. 357. In this case property of the bankrupt had been mortgaged twice. The assignee of the first mortgagee obtained an order from the commissioners that the property be sold, in that he expected to be only able to obtain part payment of his debt of £1,075 out of the proceeds of sale. The property sold for £1,443. 15s. The second mortgagee, who had not attempted to prove under the commission, refused to join in the sale; and the assignee petitioned the Chancellor for an order compelling the second mortgagee to do so. The Lord Chancellor refused to give such an order, saying: "I have no authority, sitting in bankruptcy, except where the Equity of redemption is in the bankrupt. Here it is not the bankrupt's property till the second mortgage is satisfied. If the second mortgagee claims any thing as a creditor, I have a hold upon him, no doubt. The petitioner went before the commissioners, thinking the estate was not enough for the first mortgage: but by accident it has turned out to be of more value than the first mortgage; and the second mortgagee thinks it of more advantage to exercise the right he has of redemption. I cannot make them a title unless they will pay the second mortgage as well as the first." *Ibid.* 358.

(19) 5 Geo. II, c.30, s. 26.

the debts might be made before a magistrate and these together with powers of attorney attested by a notary public might be sent to the commissioners, such attorneys being then empowered to act in all affairs for the creditors.<sup>(20)</sup>

### Future and Contingent Debts

Prior to 7 Geo. I, st. 1, c.31<sup>(1)</sup> where debts were contracted before the act of bankruptcy, but by their nature were not repayable until some future date which now fell after the act of bankruptcy, such debts could not be proved for under the commission.<sup>(2)</sup> The preamble of the Act gives the situation which necessitated changing this rule:

"Whereas merchants, and other traders in goods have been often obliged, and more especially of late years, to sell and dispose of their goods and merchandizes to such persons as have occasion for the same upon trust or credit, and to take bills, bonds, promissory notes, or other persons securities for their monies, payable at the end of three, four, or six months, or other

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(20) 24 Geo. II, c. 57, s.10 (1750-1). Foreigners were allowed to prove in the bankruptcy by virtue of s. 14 of 21 Jac. I, c. 19.

(1) 1720-1

(2) See Tully v. Sparkes (1729) 2 Ld. Raym. 1546, at 1549.

"future days of payment, and the buyers of such goods becoming bankrupts, and commissions of bankruptcy being taken out against them, before the money upon such bonds, notes, or other securities, became payable, it hath been a question, whether such persons, giving such credit on such securities, should be let in to prove their debts or be admitted to have any dividend or other benefit by the commission, before such time as such securities became payable, which hath been a great discouragement to trade, and great prejudice to credit within this realm:"

To remedy this situation it is provided that persons giving such credit upon valuable consideration in good faith may prove for their debt under the commission and share equally with the other creditors save that a deduction of 5% per annum out of what is received computed from the time of actual payment to the time when the debt was due to be paid.<sup>(3)</sup>

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(3) 7 Geo. I, c.31, St. I, s.1. By s. 2, the certificate of discharge of the bankrupt would also bar any person from suing the bankrupt on any security which could have been proved by virtue of s. 1. The Act by s. 3 stated that no such debt would be sufficient to support a petitioning creditor's debt, but this bar was removed by s. 22 of 5 Geo. II, c.30.

The provision was taken to extend to all personal securities given for valuable consideration and not merely to those securities given for goods sold and delivered in the normal course of trade,<sup>(4)</sup> but the debt must become payable upon a day certain.<sup>(5)</sup>

Debts which became payable upon the happening of some contingency were not therefore within the provision, and this was said to be because in such cases it was not possible to compute the 5/6 deduction to be made under the statute.<sup>(6)</sup> Even if the contingency happened after the issuing of the commission, yet before the time of distribution to the creditors, the creditor could not come in under the commission; Lord Hardwicke dismissed any attempt to allow this saying "There is no such thing as drawing a line between the contingency not happening before the bankruptcy, and yet happening before the time of the distribution:". <sup>(7)</sup>

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(4) See *Pattison v. Bankes* (1777) Cowp. 540, per Lord Mansfield at 543: "I am very clear, First, here is a construction by the stat. 5 Geo. II, c.30, s. 22, which, without conceiving doubt, takes it for granted, that the stat. 7 Geo. I, c.31, is not merely confined to securities for goods sold and delivered in the course of trade, but that it extends generally to all personal securities for a valuable consideration where the time of payment is certain, though postponed to a future day; and it corrects the blunder in the preamble of the Stat. 7 Geo. I, which, after specifying particular securities, adds, "or other persons securities," which clearly should have been "other personal securities"

(5) *Ibid.*

(6) *Tully v. Sparkes* (1729) 2 Ld. Raym. 1546 at 1549.

(7) *Ex parte Groome* (1744) 1 Atk. 115 at 119. The creditor might, in such a case, proceed against the bankrupt after he had obtained his certificate - *Young v. Hockley* (1772) 2 Black W. 839.

This rule was in fact relaxed in respect of certain contingency debts by 19 Geo. II, c.32<sup>(8)</sup> which permitted claims in respect of bottomry and respondentia bonds and policies of insurance where entered into for good and valuable consideration. The obligee of such bond and the assured under such policy might claim under the commission and upon the happening of the contingency, be permitted to prove the debt as though the contingency had happened before the issuing of the commission.<sup>(9)</sup>

Creditors Motivated by Fraud

The provision of the first bankruptcy enactment,<sup>(10)</sup> that creditors fraudulently claiming debts to which they were not entitled, was continued by the Act of Elizabeth<sup>(11)</sup> and the

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(8) 1745-6

(9) s. 2

(10) 34. 35 Hen. VIII, c.4, s.3. See pp. 410-11

(11) 13 Eliz. I, c.7, s.6.



creditor was still to lose double the amount of the debt falsely claimed, the amount forfeited being distributed amongst the bona fide creditors.

Persons who collusively recovered debts, goods, etc., from the bankrupt without any just cause were to give up what they had recovered to the true creditors and might not enforce any such alleged right until such creditors had been fully satisfied.<sup>(12)</sup>

With the advent of the eighteenth century, the penalties for completely false claims or claiming too much were stepped up. The false claimant, upon being found guilty upon indictment or information, was to forfeit double the sum claimed to the true creditors and might also be made to suffer the penalties then imposed by statute for perjury.<sup>(13)</sup>

Under 5 Eliz. I, c.9, the punishment for perjury was six months imprisonment, perpetual infamy, a fine of £20 or to have both ears nailed to the pillory.<sup>(14)</sup> We are told,<sup>(15)</sup> however, that it was more usual to proceed against a perjurer at common law under which

(12) 34. 35 Hen. VIII, c.4, s.4

(13) 5 Geo. II, c.30, s. 29.

(14) As to punishment for perjury, see pp. 307-9.

(15) Bl. Comm. IV, 138.

fine, imprisonment and loss of the right to give testimony were the penalties. By 2 Geo. II, c.25<sup>(16)</sup> courts were given the power to order that an offender be sent to a house of correction, or to transportation, for a period not exceeding seven years.

After the issuing of the commission two major concerns arose in relation to the possible frauds between the debtor and the creditor.

The first was the possible payment by a debtor to a creditor, of either the entire or of part of the sum owed, as a means of persuading the creditor to allow the commission to lapse.<sup>(17)</sup> This being a fraud on the other creditors was declared void as well as constituting an act of bankruptcy in itself.<sup>(18)</sup>

The second chance for fraud arose in relation to the certificate of discharge of the bankrupt which had to be agreed to by creditors representing four parts out of five of the value of the debts owing.<sup>(19)</sup> To obtain this consent the bankrupt might either

(16) 1728-9

(17) The preamble to s. 24 of 5 Geo. II, c.30, speaks of "... commissions of bankrupts... frequently taken out by persons, who, by means of such commissions (on a composition proposed by the bankrupts) and on promise not to execute the same, prevail with and extort from the Bankrupts their whole debts, ...".

(18) Ibid. s. 24.

(19) Ibid. s. 10.

try to obtain false debts to be proved against him, so that such creditors might be able to join in giving their consent,<sup>(20)</sup> or, he could attempt to persuade genuine creditors to accept extra payment in order that they would give their consent.<sup>(1)</sup> Where the bankrupt actually transferred money, property, etc. to the creditor this might be recovered under the bankruptcy statutes since it was part of the bankrupt's estate,<sup>(2)</sup> the difficulty arose if the bankrupt made some form of agreement whereby payment might be made at a later date. To combat this, it was therefore enacted that if the bankrupt gave any bond, bill, note, contract

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- (20) The creditors in such a case, as we have seen, would be guilty of perjury - *ibid.* s.29. However, to prevent the bankrupt achieving his desire and procuring his discharge by such a means, legislation was introduced in 1750-1. By s. 9 of 24 Geo. II, c.57, if the bankrupt did not declare the fact of such fraudulent creditors proving in his bankruptcy to the commissioners, before the major part of them signed his certificate, then the certificate was void. Also in such a case the bankrupt was not to have any of the benefits or allowances given by 5 Geo. II, c.30. The declaration to the commissioners was to be in writing.
- (1) This would mean that the bankrupt had kept back property from the commission, and would therefore probably be liable to the punishment set out in s. 1 of 5 Geo. II, c.30.
- (2) In such a case the creditor would be liable for concealing effects which rightly belonged to the assignees appointed under the commission. In such a case persons concealing the bankrupt's estate were to forfeit £100 and double the amount of the estate forfeited. - *Ibid.* s.21 see pp. 591-2.

agreement, or other security payable at a later date, such security was to be wholly void and the moneys secured or agreed to be paid under it were not recoverable; any person being sued on such security being permitted to plead the provisions of the statute.<sup>(3)</sup>

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(3) Ibid. s. 11

CHAPTER 21THE COMMISSIONERS' INQUISITIONForcing the Bankrupt to Appear

In order that the Commissioners might obtain the maximum return for the creditors it was necessary that they should be given full and effective powers to enforce the appearance and conduct the examination of the bankrupt.

The system of proclamations commanding the bankrupt to appear, used in the first bankruptcy statute,<sup>(1)</sup> was continued by the act of Elizabeth;<sup>(2)</sup> the commissioners being given a discretion as to their orders for the taking of the body of the bankrupt.<sup>(3)</sup> Persons concealing the bankrupt or helping to hide him or conveying him to safety were liable to fine and imprisonment at the discretion of the Lord Chancellor.<sup>(4)</sup>

These provisions, however, meant a great deal of time might

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(1) 34. 35 Hen. VIII, c.4, s. 5.

(2) 13 Eliz. I, c.7, s. 8

(3) Ibid. s. 2

(4) Ibid. s. 8

be wasted before the commissioners could gather in any of the bankrupt's estate. In 1 Jac. I, c. 15<sup>(5)</sup> the situation is altered slightly; three separate notices are to be left at the usual place of abode of the bankrupt commanding him to appear. If the bankrupt fails to appear the commissioners may cause him to be proclaimed a bankrupt in such public places as they think best, warning the bankrupt to appear before them after five proclamations a warrant may be issued for the arrest of the bankrupt.<sup>(6)</sup> With 21 Jac. I, c. 19<sup>(7)</sup> the commissioners received power to break open the house of the bankrupt in order that he might be seized.

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- (5) It is of interest to note that the act of Elizabeth did not have any provision whereby the commissioners might declare the absent trader a bankrupt. In such cases the commissioners presumably relied on the procedure set out in s. 5 of 34. 35 Hen. VIII, c.4, under which the outlaw's goods were to go to be distributed amongst the creditors. This latter provision was not overruled by the later statutes and remained in force, though unused.
- (6) 1 Jac. I, c.15, s.4 - the preamble to s. 4 says: "And for that the practices of Bankrupts of late are so subtle as that they can very hardly be found out or brought to light, and for that the former statute giving power to the Commissioners to examine others than the Bankrupts, hath not fully nor sufficiently authorised them to examine the said Bankrupt upon Oath."
- (7) 21 Jac. I, c.19, s.7 - this provision finished completely any chance of the bankrupt attempting to set up the inviolability of his home. S. 2 of 13 Eliz. I, c.7 seems to state plainly that the commissioners might take the body of the bankrupt whether in his own house or in sanctuary, but the uncertainty continued until 21 Jac. I, c.19. See per Lord Hardwicke in *Ex parte Lingood* (1742) 1 Atk. 240 at 242.

The first bankruptcy enactment of the reign of Anne<sup>(8)</sup> largely swept aside the more lethargic methods of enforcement of the earlier statutes. But this itself was streamlined by 5 Geo. II, c. 30<sup>(9)</sup>

Upon the issuing of the commission, written notice is to be given to the bankrupt at his place of abode, or personally if he is in prison, and notice is also to be given in the London Gazette that the bankrupt is to appear before the commissioners. The bankrupt has 42 days after such notice is given in which to surrender to the commissioners and submit to examination by them; any wilful default or omission in appearing is felony and punishable by death.<sup>(10)</sup>

In order that the bankrupt might appear before the commissioners not less than three meetings are to be appointed,

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(8) 4. 5 Anne, c.4 (1705)

(9) (1731-2)

(10) 5 Geo. II, c.30, s. 1. Such criminal proceedings might be instituted by prosecution on indictment or by way of information. As to the wording of s. 1 see R. v. Bullock (1807) 1 Taunt. 71 where "Heath, J. remarked that some editions of the Statutes do not give this act correctly, having in s. 1 the words 'being thereof convicted by judgment or information' but that in the parliament roll the words are 'by indictment or information'." Ibid 1 Taunt. 71 in notis.

at any of which the bankrupt may surrender himself; the last of the three meetings is to be on the forty-second day after the notice to appear.<sup>(11)</sup>

For the first time an attempt is made to render the act of surrendering and delivering up the estate more attractive.<sup>(12)</sup>

The bankrupt who appears and in all ways conforms to the requirements of the statute might now be made an allowance from the neat produce of the estate, the allowance being dependent upon how much in the pound is paid to the creditors.<sup>(13)</sup> Lord Hardwicke, speaking of this provision says:<sup>(14)</sup>

"... the statute of the 4 & 5 Anne<sup>(15)</sup> .... was temporary at first, and never intended to be a perpetual law, but was made in consideration of two long wars which had been very detrimental to traders, and rendered them incapable of paying their creditors; ..."

This statement is of some interest if contrasted with the preamble of 4. 5 Anne c. 4<sup>(16)</sup> which tells us the reason for the enactment

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(11) 5 Geo. II, c. 30, s.2

(12) The provision first appears in 4.5 Anne, c.4, s.8 see pp. 659-60.

(13) 5 Geo. II, c.30, ss. 7 & 8, see p. 660.

(14) Ex pte. Burton (1744) 1 Atk. 255 at 255-6.

(15) s. 8

(16) (1705)



is because:

"... many persons have and do daily become Bankrupt not so much by reason of losses and unavoidable misfortunes, as to the intent to defraud and hinder their Creditors of their just debts and duties to them owing:"<sup>(17)</sup>

The commissioners could, upon making certificate as to the issue of the commission and the fact that such person have been proved before them to be a bankrupt, obtain a warrant from a judge or justice of the peace for the arrest of the bankrupt and his committal to the local county gaol.<sup>(18)</sup> The gaoler, upon receiving the body of the bankrupt is to notify the commissioners that such bankrupt is held in his prison, so that they might send their warrant for the body of the bankrupt to be handed over to their officer; the commissioners are also empowered by warrant to seize any property of the bankrupt which might be in that prison or any other prison.<sup>(9)</sup>

A bankrupt so taken and imprisoned, if he submitted to the examination of the commissioners and the other requirements of the Act within the time allowed, was to be permitted to receive all

(17) Lord Hardwicke is more probably right; the legislature being unlikely to admit to such a fact for fear of increasing the number of bankrupts.

(18) 5 Geo. II, c.30, s. 14 - formerly 4. 5 Anne, c.4, s. 5.

(19) Ibid.

the benefits of the act as though he had surrendered in the normal way within the allotted time.<sup>(20)</sup>

The foregoing provisions came before the court for consideration in *Ex parte Lingood*.<sup>(1)</sup> A commission was sued out against Lingood and three sittings at Guildhall, viz. the 27th of April, the 8th and the 22nd of May were advertised in the London Gazette for the bankrupt to surrender. Whilst examining witnesses the commissioners discovered that the bankrupt was removing and concealing his effects, they therefore summoned Lingood to attend before them, and on his failure, certified the matters required under 5 Geo. II, c.30, s. 14<sup>(2)</sup> to a judge who had Lingood committed to Newgate prison. Lingood petitioned against his committal on the grounds that he had been illegally committed, since the days allotted in which he might surrender had not elapsed. Lord Hardwicke was at first somewhat doubtful as to his right to adjudicate upon such a matter of the commitment, it being "an intire new question, and quite a new case;

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(20) Ibid. s. 15 - formerly proviso to s. 5 of 4. 5 Anne, c.4

(1) 1 Atk. 240 (1742)

(2) See p.570

and... a habeas corpus might have been sued out, and have been decided by the judges of the common law, which is the ready way."

He decided, however, that such a matter had been decided upon once before and therefore proceeded to hold that the commitment had been properly and rightly carried out, giving judgment as follows:<sup>(3)</sup>

"The 5 Geo. II appoints three sittings at Guildhall in the space of forty-two days for particular purposes; but would it not be a very great absurdity, if the bankrupt might make use of the forty-two days to imbezzle his effects and to quit the kingdom; and that the commissioners, though apprized of his intention, should have no power to prevent it, by summoning him before them in the intermediate time, and committing him if he refuses to be examined? .... As in this case the commissioners had full evidence of the bankrupt's intention to secrete his effects, and to make fraudulent assignments of them, they have done rightly, wisely, and discreetly in the method they have taken to prevent it, by summoning the bankrupt, and committing him for disobeying their summons.

I do not say this to encourage commissioners of bankrupt to use this power wantonly; but upon such circumstances as appear in the

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(3) 1 Atk. 242, 243.

"present case, I am of opinion it was very properly exercised; and the proviso which immediately follows the clause that relates to the certificate of the commissioners of bankrupt to the judges, &c. in the 5 Geo. II makes it extremely clear, that the commissioners at their discretion may examine a bankrupt in the intermediate time, between his being declared a bankrupt and the sittings at Guildhall.

But though I have no doubt as to the construction of this act of parliament, yet I do not mean to preclude the bankrupt from his habeas corpus, which I shall leave him at full liberty to bring if he thinks proper."

Where the bankrupt was in prison or in custody at the time of the issuing of the commission, then if he was willing to submit to examination one of two methods might be adopted depending upon the type of imprisonment.<sup>(4)</sup> If the bankrupt was in custody on mesne process and could be brought before the commissioners for the examination the expense for such attending was to be paid out of the estate of the bankrupt. Where the bankrupt was imprisoned on execution the commissioners were to attend upon the bankrupt in prison.<sup>(5)</sup>

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(4) 5 Geo. II, c.30, s.6

(5) Ibid. The assignees were also to appoint one of their number to attend upon the bankrupt in prison, so that they might produce his books and papers, etc., to him, in order to prepare for "his.. last discovery and examination."

As it might not always be possible for the bankrupt to surrender within the time allotted, or for the examination of the bankrupt to be commenced within that time, provision was made whereby on application to the Lord Chancellor he might enlarge the time in which the bankrupt must surrender at his discretion but not exceeding a further fifty days; this time was to be computed from the end of the forty-two days.<sup>(6)</sup> Such order was enlarging the time for surrender was to be made at least six days before the time when the bankrupt should have surrendered.<sup>(7)</sup>

The need and use of the discretion of the Chancellor can be seen in the following case.<sup>(8)</sup> One Bould, being ill in bed during the time allowed for surrender, a few days before the last meeting, requested information of his solicitor as to what

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(6) 5 Geo. II, c.30, s.3

(7) This particular provision does not appear to have been very rigorously applied; for as we have seen if the bankrupt eventually surrendered and made full discovery the Chancellor would do little to aid his prosecution for felony. See p.515 and Ex pte. Wood (1751) 1 Atk. 221. Lord Macclesfield would apparently supersede a commission where there was no fraud in the bankrupt and his only crime was ignorance of the proceedings; *ibid.* 222.

(8) Ex pte. Bould (1786 ) 2 Bro. Cas. in Ch. 49.

he should do. The solicitor wrote saying the bankrupt should approach his attorney who would instruct him, but the letter arrived after the last day for the surrender. The bankrupt made application to the Chancellor stating the above, plus the fact that his partners had surrendered within time and that all effects were in the hands of the assignees, upon which the Chancellor gave an order to the commissioners to appoint a meeting at which the bankrupt might surrender.

The nature of the discretion and its effects were discussed in a case of 1786.<sup>(9)</sup> White, a bankrupt, petitioned that a meeting of the commissioner be appointed so that he might surrender. He excused his not attending during the proper time by saying that a few days before being declared bankrupt he had had to go abroad for the sake of his health, and between that time and his return he had been extremely ill. This was a partnership bankruptcy, and other partners had surrendered within the proper time. The assignees did not oppose the petition, but made affidavit that only a few days before his going abroad the bankrupt had been seen in apparent good health, also that the bankrupt's son had said at the last meeting that the bankrupt would not surrender. Dismissing the petition the Lord Chancellor said:<sup>(2)</sup>

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(9) Ex pte. White (1786) 2 Bro. Cas. in Ch. 47.

(10) Ibid at 48.

"Ordering the commissioners to appoint a meeting, in order to afford a bankrupt the opportunity of surrendering, does not avoid the effects of the statutes; it only declares the opinion of the court, that the bankrupt had no intention of keeping out of the way fraudulently.<sup>(11)</sup> But my opinion in this case is, that he did purposely keep out of the way, and that he is perjured when he says he went away for his health."

This need to be available to the commissioners was important, for it was "the duty of every bankrupt to attend the commissioners at all times till his affairs are finished, or at least to be answerable to their call."<sup>(12)</sup> Even after the granting of the certificate of discharge the bankrupt was to attend upon the assignees upon request and reasonable notice being given.<sup>(13)</sup> If the bankrupt omitted to do so, the assignees might give proof of such fact to the commissioners who would, in turn, issue a warrant for the arrest of the bankrupt. Upon committal to the county gaol, the bankrupt was to be kept in close custody without bail or mainprize until he

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(11) This was important, since it was unlikely the bankrupt would be prosecuted under the penal provision of 5 Geo. II, c.30, s.1. In such a case, however, it was also possible to start such proceedings by way of information.

(12) *Norris v. Levy* (1778) 2 Black. W. 1188 at 1189.

(13) 5 Geo. II, c.30, s. 36.

conformed and until instructed to be released by the commissioners, or upon special order of the Chancellor or by due process of law. Any Gaoler not keeping his bankrupt safely within the four walls of the prison at all times was to be liable to a fine of £500 which was to be shared among the creditors.<sup>(14)</sup>

#### The Bankrupt's Examination

The sole purpose of enabling the commissioners to procure the attendance of the bankrupt was so that they might discover and obtain from him the entire of his estate. The commissioners were to examine the bankrupt fully and might not agree to desist from certain questions, unless perhaps with the full agreement of all the creditors.<sup>(15)</sup>

Under the statute of Elizabeth, the powers given for the examination of the bankrupt were rather vague,<sup>(16)</sup> but this was to some extent put right by the first statute of the reign of James I.<sup>(17)</sup> By virtue of this statute, the bankrupt might be examined

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(14) Ibid.

(15) *Nerot v. Wallace* (1789) 3 T.R. 17

(16) The powers seem to stem largely from s. 2 of 13 Eliz. I, c.7, in that the commissioners might have the bankrupt brought before them and imprisoned if necessary.

(17) 1 Jac. I, c.15, s.4 (1603-4) the need for clarification appears from the wording of the preamble to the section, see p. 567.



by interrogatories as to all matters which tended to disclose his estate or any secret conveyances he might have made. Failure to answer the commissioners meant that the bankrupt might be committed until such time as he was prepared to conform. If the bankrupt, in an attempt to keep his property, committed wilful or corrupt perjury by virtue of which the creditors suffered damage to the value of ten pounds or more, then upon indictment and conviction the bankrupt was to stand upon the pillory in some public place for two hours, to have one of his ears nailed to the pillory and then cut off. This provision marked only the beginning of the road towards death for the fraudulent bankrupt.

The second bankruptcy statute of James I widened the scope of the punishment.<sup>(18)</sup> If the bankrupt, upon examination, is found to have concealed or conveyed away estate to the value of £20 or above, and does not disclose such fact to the commissioners upon his examination, recovering the same where possible, or cannot show that he sustained some casual loss by virtue of which he is unable to pay what was then owed; then upon indictment and conviction the bankrupt again to be set upon the pillory for two hours and to lose a nailed ear.

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(18) 21 Jac. I, c.19, s.6.

Under Anne<sup>(19)</sup> default or wilful omission to make full disclosure and to deliver up the estate upon examination including all books papers, etc., was, regardless of amount, to be treated as felony without benefit of clergy. Later in the same reign this is altered as to personalty, so that the bankrupt who, either by himself or through others, caused to be carried away, concealed, destroyed or embezzled any goods, wares, merchandizes, monies or effects, to the value of £20 or over, or any books of accounts, bonds, bills, notes, papers or writings relating to the estate, with intent to defraud his creditors is to suffer as a felon without benefit of clergy.<sup>(20)</sup>

The act of 5 Geo. II, c.30 stated that if the bankrupt did not make full disclosure of all his estate, real or personal however held, and concealed or embezzled any part of such real or personal estate to the value of £20 or any books of account, etc., with intent to defraud his creditors should, upon conviction upon indictment or information, be adjudged guilty of felony and suffer as a felon without benefit of clergy.<sup>(1)</sup> This provision of death

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(19) 4. 5. Anne, c. 4, s.1.

(20) 6 Anne, c.22, s. 1 (1706-7)

(1) 5 Geo. II, c.30, s.1

was only rarely used.

The use of interrogatories was the only way in which the commissioners might question the bankrupt as to his estate until the above Act, when it was provided that the bankrupt might be examined as well by word of mouth, as on interrogatories in writing.<sup>(2)</sup> If the bankrupt should "refuse to answer, or ..not fully answer to the satisfaction of the Commissioners ..... all lawful questions put to him, ..... or refuse to sign and subscribe his .... examination so taken down or reduced into writing ... (not having a reasonable objection either to the wording thereof, or otherwise,)" the commissioners might, by warrant, have the bankrupt committed to prison without bail or mainprize until such time as he submitted to be examined by the commissioners as required by the Act.<sup>(3)</sup> The commissioners, where committing to prison for failure to answer a question or questions, are to specify the

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(2) Ibid. s. 16. Whilst the witness called before the commissioners might be examined on matters concerning the trade, dealings, estate and effects of the bankrupt, and also about any act(s) of bankruptcy committed by him; the bankrupt may only be examined as to matters concerning his trade, dealings, estate and effects. The right to question him about acts of bankruptcy is specifically omitted.

(3) Ibid. Failure to answer at all would not be perjury, merely contempt, and for this the bankrupt might remain in prison a long time. It did not render the bankrupt liable to any further punishment unless he could be brought within the provisions of s. 1 relating to "wilful omission in not surrendering and submitting to be examined...".

question or questions asked in the warrant of committal.<sup>(4)</sup> The questions according to the section might touch on "all matters relating to the trade, dealings, estate, and effects" of the bankrupt.<sup>(5)</sup>

Although this power to commit seems fairly rigorous, the courts enforced a strict following of the wording of the Act in relation to the issuing of warrants. A warrant which concluded - or "otherwise discharged by due course of law" was held bad, since the words of the statute are "till he submit himself to be examined by commissioners".<sup>(6)</sup> Similarly where the warrant recited that the bankrupt in his examination had notoriously prevaricated and was

(4) Ibid. s. 17.

(5) Ibid. s. 16. Such questions might be asked even if the answer would subject the bankrupt to some penalty. This particular point was explained in *Ex parte Meymot* (1747) 1 Atk. 196 by Lord Hardwicke who said: "In the case .... of smuggling, there is no examination of the commissioners, but will subject to penalties; and yet that is no reason why the commission should not proceed; for if the bankrupt has an objection to the question, he must demur to the interrogatories, and this court will judge the question upon a petition; or if the bankrupt refuses to answer any question, and the commissioners commit him, and the delinquent brings an habeas corpus, the question must be set forth, particularly in the return to the habeas corpus, that the judges may judge whether it was a lawful question or not; and notwithstanding all this, the commissioners may undoubtedly examine as to his estate and effects, what he has, where it lies..."ibid. at 200.

(6) *Hollingshead's Case* (1702-3) 1 Salk. 351.

therefore committed "until he should make a full and true disclosure and discovery of his estate and effects, or be otherwise delivered by due process of law"; it was held the bankrupt must be discharged.<sup>(7)</sup> Where, however, one Langhorn was asked the following question:<sup>(8)</sup>

"As you do admit since the month of October, 1771, being the time you entered into trade, to the time of your bankruptcy, [February 1773] there is a deficiency to the sum of [£2,751] notwithstanding your books do not show such deficiency; give a true and particular account of what is become of the same, and how and in what manner you have applied and disposed thereof."

Langhorn made answer to this in a general manner allotting sums to various purposes but without making a particular account in any of them although such sums amounted to the £2,751. Later the bankrupt, after signing his answer and the warrant of committal prepared, made voluntary acknowledgment of several other small payments by him, which were endorsed on the signed answer. It was held by the judges that the commissioners were right in committing him since he should have particularised his answer not given a general one. Similarly, where a bankrupt said that he had spent £5,000 on a woman in one year, but was unable to remember much else

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(7) R. v. Nathan (1731) 2 Stra. 880

(8) Langhorn's Case (1773) 2 Bl. Rep. 919.

save her name, that she was, as he had heard dead, and that he believed that all letters between them save one or two had been burnt, the court held the commissioners right in finding the answer somewhat unsatisfactory.<sup>(9)</sup>

In order to prevent a bankrupt, committed on warrant by the commissioners, from being discharged on a writ of habeas corpus due to the return to the habeas corpus showing some insufficiency in the form of the warrant, it is provided that the judge may recommit the bankrupt to the prison from which he was brought unless it appeared that the bankrupt has made a good and sufficient answer to the commissioners, or in the case of refusing to sign his examination, that he had a good reason for refusing to sign it.<sup>(10)</sup>

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- (9) R. v. Perrott (1761) 2 Burr. 1122. "If the question put was improper; or if the question be proper, and the answer satisfactory, the man ought to be discharged. But this is a proper question; and the answer is very insufficient and unsatisfactory." Per Lord Mansfield at 1123.
- (10) 5 Geo. II, c.30, s.18. This section did not apparently deprive the Lord Chancellor of his power to discharge the bankrupt on petition being made to him. In Crowley's Case (1818) 2 Swans. 1 at 30 Lord Eldon said "I find that it was the practice before the statute 5 Geo. II, c. 30, for the Lord Chancellor to discharge prisoners under commitment from commissioners of bankrupt, by order; and it seems clear that the act had not deprived this court of the authority which it then possessed. .... This Court has, in several instances, on petition, ordered the discharge of persons committed by the commissioners; sometimes ordering the commissioners to discharge him, sometimes the jailer, passing over the commissioners." See further 43 Geo. III, c.140 (1803) which gave the judges at Westminster the right to issue a writ of habeas corpus to have a person in prison in England brought before the commissioners to be examined on matters depending before them.

Where the bankrupt was committed under the warrant of the commissioners the gaoler was to keep the bankrupt safe within the prison, neither bail nor mainprize being allowed, if the bankrupt was allowed out then the gaoler was to forfeit £500 to the use of the creditors.<sup>(11)</sup> Any promise to indemnify the gaoler for permitting an escape was unenforcible as being against the policy of the law.<sup>(12)</sup> The creditor who had proved his debt under the commission might request the gaoler to produce the committed bankrupt to him, on displaying a certificate given to him by the commissioners, and if the gaoler refused to produce the bankrupt, having him in his actual custody then the gaoler is to forfeit the sum of £100 to the use of the creditors.<sup>(13)</sup>

Whilst all these provisions are made in case the bankrupt should not properly submit to his examination, the legislature also took care of the bankrupt who attended regularly. The bankrupt who surrendered himself was to be free from arrest by his creditors during the forty-two days allowed in which to surrender or such further time as may be allowed; he is also to be free

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(11) 5 Geo. II, c.30, s. 18

(12) Martyn v. Blithman (1610-11) Yelv. 197

(13) 5 Geo. II, c.30, s. 19 - the certificate of the commissioners was to be given to the creditors free of charge.

during such time to inspect his books, papers and writings in the presence of the assignees or a person appointed by them.<sup>(14)</sup>

Difficulties arose over this provision and the requirement that the bankrupt was to attend upon the assignees after he had obtained his certificate in order to settle the matters of his estate.<sup>(15)</sup> The gap which was left between the two provisions became apparent in the case of *Ex parte Turner*.<sup>(16)</sup> The bankrupt received notice from the assignee to attend upon him, to explain certain matters, after the expiration of the forty-two days during

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(14) 5 Geo. II, c. 30, s. 5. This was held to cover the prevention of the attachment of the bankrupt for non-performance of an award: *Ex pte. Parker* (1797) 3 Ves.J554; but not to prevent the bankrupt being surrendered to gaol in discharge of bail: *Ex pte. Gibbons* (1747) 1 Atk. 238. In explaining the reason for the latter decision it was said: "Bail are no Creditors till damnified, and therefore are not within the description. ... It plainly appears through the whole clause, to be confined to an arrest, restraint, or imprisonment by his creditors. ..... in the constant language of [the King's Bench] court, the bail are his [the bankrupt's] gaolers, and it is upon this notion the bail have an authority to take the principal, and he may be arrested on a Sunday; for as he is only at liberty by the permission and indulgence of the bail, they may take him up at any time. Therefore to say that an act of parliament shall prevent a person, who has been so kind as to give the principal his liberty, from taking him up in discharge of himself, would be very hard, especially as there is no sort of danger here to the bankrupt, of his being a felon, as the commissioners may examine him in gaol, and consequently it in no sort can be said to be in contradiction to the act of parliament." *Ibid* at 238, 239.

(15) 5 Geo. II, c. 30, s. 36.

(16) 1 Atk. 148 (1742)



which the bankrupt was protected but before the signing of his certificate. The bankrupt refused to attend unless his certificate was signed, and the assignee made application to the Court requesting the bankrupt be compelled to attend. The Lord Chancellor looked first at the provision requiring the bankrupt to attend upon the assignee and then at the provision granting freedom from arrest during the forty-two days or enlarged period and concluded that the latter "seems to confine it to the 42 days, or the enlarged time at the most, and therefore the bankrupt's protection from arrests, &c. can extend no further". He went on to say:

"That the clauses in the act of parliament, relating to this matter, are very darkly and obscurely penned, arising chiefly from the words forty-two days being thrown into the latter clause."<sup>(17)</sup>

This decision in itself seemed to question the right of the commissioners to require the bankrupt to submit to examination after the expiration of the forty-two days or such extended time

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(17) Ibid. at 149. As a compromise the Lord Chancellor suggested that the assignee give an undertaking, on behalf of the creditors proving under the commission (whose consent he would have to obtain), that they would not arrest the bankrupt. If such an undertaking were given then the Lord Chancellor agreed to order the bankrupt to attend, it not being necessary to "pay any regard to the danger the bankrupt might run, from his creditors at large." Ibid.

as might be granted to him, for the act says he is to submit to examination within that time,<sup>(18)</sup> and also in such circumstances the bankrupt would not be free from arrest unless he had gained his certificate.<sup>(19)</sup> Lord Mansfield, explaining the purpose of the Act, gave short thrift to arguments that the examination must be completed within the allotted time:<sup>(20)</sup>

"The examination is not confined to be within the time limited for the bankrupt to come in and surrender and submit to be examined. The bankrupt must indeed submit within the limited time; and he must submit, within the limited time, to be examined from time to time; and he must upon his examination, disclose and discover and deliver up his estate and effects: but the Act does not require the examination to be full and perfect and completed within the limited time; nor is it proper that it should be so. A man's memory may fail him at one time, and be refreshed at another; or his first answer may be equivocal or imperfect; and why should he not be called upon to explain and complete it? The power of the commissioners is general, and is not limited to the compass of time given to

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(18) 5 Geo. I, c.30, s.1.

(19) This would seem to be the effect of the decision in *Ex parte Turner* (1742) 1 Atk. 148, on ss. 5 and 36 of 5 Geo. II, c.30.

(20) *R. v. Perrot* (1761) 2 Burr. 1122 at 1123-4.

"the bankrupt to come in.

The last examination within the limited time is material indeed to the bankrupt himself (because he cannot afterwards contradict himself), but he may be compelled by the commissioners to make further answer after that time. The bankrupt may omit to come in until the very last minute of his time; and if then surrenders and submits to be examined, this will save his felony; but it may be absolutely impossible for him to make a full discovery and disclosure of his estate and effects, or to give full answers to proper questions within this space of time."

#### Examination of the Witnesses

From the very beginning the commissioners were given fairly extensive powers enabling them to call before them third parties who might be able to give information concerning either the bankrupt or his goods.<sup>(1)</sup> Under Elizabeth, the witness who refused to be examined or did not make proper answer to the commissioners, and

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(1) See s. 2 of 34. 35 Hen. VIII, c.4

refused to disclose all the effects of the bankrupt were to forfeit double the value of the goods held by them.<sup>(2)</sup> A similar punishment was provided for persons who fraudulently detained or claimed possession of goods which were rightly under the ownership of the bankrupt.<sup>(3)</sup>

This power to extract double values was apparently thought nothing like as efficient in causing witnesses to appear or answer properly before the commissioners as the power of committal.<sup>(4)</sup> Under 1 Jac. I, c.15<sup>(5)</sup> power is given to have the witness committed to prison where he fails to make answer when before the commissioners, or fails to attend before them after two summonses, or if after one summons and a warrant by the commissioners to have the witness brought before them and the witness refuses to answer when so brought.<sup>(6)</sup> Witnesses summoned before the commissioners are to be allowed such costs as the latter in their discretion think fit, the charge to be

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(2) 13 Eliz. I, c.7, s.5 the commissioners had a discretion as to how they enforced appearance under this provision.

(3) Ibid. s. 6

(4) See the preamble to s. 5 of 1 Jac. I, c. 15.

(5) Ibid. s. 5

(6) This interpretation of the section was given in *Dyer v. Missing* (1775) 2 Black. W. 1035. A more direct method whereby the commissioners might imprison persons who failed to attend without a lawful excuse was given in s. 4 of 4.5 Anne c.4 but its effect was only temporary. See also 43 Geo. III, c. 140 (1803) which gave any of the judges at Westminster the right to award a writ of habeas corpus for bringing any persons in gaol in England before the commissioners of bankrupts, so that they might be examined touching any matter depending before the commissioners.

born rateably by the creditors.<sup>(7)</sup> Where upon being questioned upon interrogatories the witness commits wilful and corrupt perjury he is to be punished as set out in 5 Eliz. I, c.9<sup>(8)</sup>

The position of the examination of the wife of a bankrupt was the next difficulty which legislature attempted to clear up.

"..Whereas by the former laws the Commissioners appointed have power to examine the Bankrupt himself, and such person or persons as are suspected to have or detain any of the estate, goods, or chattels of the Bankrupts, but some doubt hath been made whether the Commissioners have power to examine the wives of the Bankrupts touching the same, by reason whereof the Bankrupts wives do daily conceal and convey away, and cause to be conveyed away much part of their husbands monies, wares, goods, merchandize, and other estate, to person or persons unknown to any but such wives, by reason whereof much of the Bankrupt's estate is concealed, and detained from the Creditors."<sup>(9)</sup>

To remedy this the Commissioners are empowered to examine

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(7) 1 Jac. I, c.15, s.6

(8) Ibid. As to the provisions of 5 Eliz. I, c.9 (1562-3) see p. 307. Any person procuring a witness to commit "unlawful, wilful and corrupt" perjury was to suffer as set out in the latter act.

(9) Preamble to s. 5 of 21 Jac. I, c.19, s.5.

the wife of a bankrupt on all the above matters, and if she refuse to appear, or to be sworn and examined or makes false answer, then she is to suffer as would any other witness in like circumstances.<sup>(10)</sup>

This power, however, did not enable the wife to be questioned regarding the act of bankruptcy, or whether such act had been committed nor how and when.<sup>(11)</sup> In the case of other witnesses there was no such barrier, and the court refused to absolve a mother from the need to answer questions which tended to show her son to be a trader.<sup>(12)</sup>

Later enactments provided that any persons having property of the bankrupt in trust for him, who did not, within forty-two days after the issuing of the commission and notice of it appearing

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(10) An example of a wife being committed for failure to make satisfactory answer appears in the London Chronicle in 1802 where a Mrs. Rebecca de Costa was brought before the court on an habeas corpus from her committal into Newgate. The court on hearing the affidavits, came to the conclusion that she might not be legally detained and ordered immediate discharge. - London Chronicle (1802) vol. 91, p. 615.

(11) Ex pte. James (1719) 1 P.W. 610, at 611.

(12) Ex parte Parsons (1747) 1 Atk. 204. On a request by the mother that the Lord Chancellor make an order that she "should be at liberty to be attended by counsel upon her examination," the Lord Chancellor refused "because it may be made a precedent in other commissions, and he thought an inconvenience would arise if allowed in every case, and therefore only recommended it to the commissioners, in this particular instance," to indulge the mother. Ibid. at 205. In Ex parte Bland (1747) 1 Atk. 205 - a banker requested that the commissioners be restrained from asking him particular questions relating to his business as a banker. The "Lord Chancellor dismissed the petition... and said he would not limit or restrain the commissioners in their examination for if he did, it would be attended with expence and inconvenience from applications of this kind." Ibid.

in the London Gazette, make full discovery and disclose such trust in writing to the commissioners and permit himself to be examined by them regarding it, was to forfeit the sum of £100 and double the value of the estate so concealed.<sup>(13)</sup> Witnesses who refused to answer, or who did not answer to the satisfaction of the commissioners, questions put to them, either by word of mouth or on interrogatories,<sup>(14)</sup> or who refused to sign the written account of the examination without just reason might be committed to prison by warrant under the hands of the commissioners.<sup>(15)</sup> As in the case of commitment of the bankrupt<sup>(16)</sup> the warrant had to specify the question or questions<sup>(17)</sup> and had to follow the

(13) 5 Geo. II, c.30, s.21 - a similar provision was first enacted in 4. 5 Anne, c.4, s. 10.

(14) Under 4.5 Anne, c.4, s.3 the commissioners were given power to call before them by "such process ways or means as they in their discretions shall think convenient" and to examine them "as well upon their oath, as otherwise, by such ways and means as the .... commissioners are by law authorised to examine..." S. 4 of the same act also provided that no witness should be obliged to travel over twenty miles to be examined.

(15) 5 Geo. II, c.30, s.16.

(16) See p.579. The provision of 5 Geo. II, c.30, s.18 relating to the power of a judge to recommit a person applying under habeas corpus where there was some error on the warrant, but the judge thought the person rightly committed, also applied in the case of witnesses.

(17) 5 Geo. II, c.30, s.17. The Lord Chancellor explained the reason for this on the grounds that if "the delinquent brings an habeas corpus, the question must be set forth, particularly in the return to the habeas corpus, that the judges may judge whether it was a lawful question or not; ..." Ex parte Meymot (1747) 1 Atk. 196 at 200, per Lord Hardwicke.

wording of the statute.<sup>(18)</sup> These provisions caused as much difficulty in the case of witnesses as they had done in the case of bankrupts.

The problems of the commissioners and the court are well illustrated in Miller's Case.<sup>(19)</sup> One Miller, being examined concerning the bankruptcy of a Samuel Cole, was asked whether he had purchased two particular bales of silk through a broker. To this question Miller answered that he could not positively recollect this fact, but he rather thought he had bought them through a broker. He was then further asked whether he believed he had bought the two bales through a broker, to which he said he could make no other answer than that already given. For refusal to answer further he was committed to the Fleet prison.

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(18) See p.581. Thus in Bracy's Case (1697) 1 Salk. 348, the return to the habeas corpus regarding one Bracey was that "he be committed to prison, there to remain till he conform himself to our authority." It was said that it should have read till "he submit himself to be by them examined." The court held that the word 'conform' instead of 'submit' was alright since the sense was the same. But as the commissioners "had other authorities besides that of examining, and it did not appear but it might require a submission to them in other respects, and for that all powers given in restraint of liberty must be strictly pursued..." the witness must be discharged.

(19) 2 Black. W. 881 (1773)



On the matter coming before the court by way of habeas corpus Miller was discharged. De Grey L.C.J. thought that the answer to the first question was a sufficient one, and that the answer to the second question amounted "to a degree of belief sufficient to answer civil purposes." He went on to say:

"I think in this case Miller would be liable to be convicted of perjury, if it could be proved that he bought the silk himself, and not by brokers... After Miller had said, he rather believed he bought the silk by a broker, the commissioners might have proceeded to ask him who was his broker, &c. I am of opinion on the whole, that Miller must be discharged out of custody."<sup>(20)</sup>

The witness or bankrupt who merely refused to answer or merely did not give a satisfactory answer, was in a much better position

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(20) Miller later brought an action for false imprisonment on the grounds that the committal warrant was bad and recovered damages: *Miller v. Seare* (1777) 2 Black W. 1141. Remarking on the power of the courts in such matters Blackstone, J. said: "... the King's Courts will examine whether the commissioners have made a due use of the authority with which Parliament has armed them, and had legal grounds for issuing this process of imprisonment. If not, they will deliver the party committed; which they would not do if committed by a Court of Record, in which the law reposes confidence and trust; and will also redress him by action for the injury thereby sustained." This case was subjected to some criticism later in the case of *Doswell v. Impey* (1823) 1 B. & C. 163. See Per Abbot, C.J. 168, 169.

than committing perjury with its attendant punishments.<sup>(1)</sup>  
 Refusal to answer was a contempt and imprisonment followed,<sup>(2)</sup>  
 but it did not bring the penalties of perjury and concealment,  
 although the provisions of s. 1 of 5 Geo. II, c.30<sup>(3)</sup> seem  
 fairly all embracing in relation to the bankrupt.

The right to protection of the witness from arrest whilst  
 attending upon the commission, seems to have been agreed, although  
 it remained somewhat uncertain in the minds of the judges. In  
 1744<sup>(4)</sup> where an assignee was arrested by a sheriff's officer  
 whilst returning home from a commission, and this despite the fact  
 that the assignee showed him the summons, which the said officer  
 "damned.. and said he did not regard it of a farthing", the Lord  
 Chancellor made an order that the cases be searched for precedent  
 in such a matter.<sup>(5)</sup> In 1802<sup>(6)</sup> a principal creditor was arrested  
 on his return from the Guildhall and an application was made for

(1) See pp. 307-9.

(2) The Court of Star Chamber often used this process of committal for refusal to answer interrogatories, such committal being until the witness agreed to answer; apparently some men remained thus imprisoned for the entire of their lives. See Hawarde, p. lvi.

(3) See pp. 568, 579.

(4) Ex parte Kerney (1744) 1 Atk. 54.

(5) Ibid. at 55.

(6) Report of proceedings in the Court of Chancery on 19th July 1802 concerning the arrest of one John King, arrested for debt on leaving the Guildhall having attended before the commissioners - London Chronicle (1802) vol. 92, p. 79. Apparently even the commissioners had protested at King's arrest, but to no avail: ibid at p. 19.

his release and also for the punishment of the attorney who had issued the process and the officers who executed it. The Lord Chancellor outlined the general nature of the privilege and, in coming to a slightly shaky decision in favour of the creditor, gave judgment as follows:

"If a man is attending a Court of Justice to prosecute a claim, he is protected from arrest eundo, morando, et redeundo, consequently if the Law, as in the case of bankruptcy, compels a man to one particular mode of enforcing his demand, it should seem that he is entitled to the same degree of personal protection as if prosecuting his suit in any of the Courts of Common Law .... I have no doubt, upon the principles of law and equity, as well as upon the enactment of the Statute, that persons attending a Commission of Bankruptcy, as well as those who are summoned by the Commissioners, are protected from arrest; yet, when I advert to what Lord Kenyon is supposed to have said, in the case of *Kinder v. Williams*,<sup>(7)</sup> there is, I confess, sufficient to create a doubt; though supposing the language imputed to him in the Report to be accurate, the doctrine is certainly new. Under these

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(7) 4 T.R. 377 (1791)

"circumstances, therefore, and having it explicitly understood, that such a thing must never happen again, I dismiss the parties."

With all the penalties being placed on witnesses and persons helping to conceal the bankrupt's goods the latter's chances of aid were severely cut, yet the legislature brought in one further provision to deal a body blow to the bankrupt. Any person who, after the time given for the bankrupt to surrender himself and conform as set out in the Act, would make discovery of any part of the bankrupt's estate, not previously known to the assignees or the commissioners, was to be allowed 5% of the value of the estate discovered and such further reward as the assignees and major part in value of creditors present at any meeting of the creditors shall think fit. (8)

This provision should have opened a trap door underneath the bankrupt. It is one thing to conceal another's property knowing there are grave risks in so doing, it is quite another and much simpler to reveal it at the right moment and claim a secure legal five per cent.

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(8) 5 Geo. II, c.30, s.20.

CHAPTER 22REALISING THE ESTATE

With this authority to enforce discovery of the bankrupt's estate, the commissioners also received vast powers which enabled them to lay claim to it. At first, all the property of the bankrupt, which had been in his possession at the time of his act of bankruptcy, fell before, and was seizable by, the commissioners, no matter to whom such property had now passed.

Slowly, however, it became necessary to lessen to some extent the hardship caused by the severe application of this rule, and concessions were made in respect of the bona fide purchaser for value who could show he knew of no act of bankruptcy at the time of his dealing with the bankrupt. In order to prevent the duplication of payment and repayment the position of mutual credit and debts between the bankrupt and another were dealt with, and a right of set off allowed.

Yet if the act of bankruptcy was the magic mark which might determine a purchaser's right to keep property, it also became necessary to deal with the situation of the bankrupt who, knowing he was failing, gave preference to one particular creditor, however

meritorous, just prior to his act of bankruptcy.

This struggle between the assignees and the innocent purchaser, or fraudulent rogue, took up a great deal of time and money. The results of these actions often benefited no one. The costs of litigation often wiped out any benefit which the assignees had sought to gain for the creditors. The just all too often suffered the same fate as the unjust, they had already parted with money to buy the property, now they lost that property and stood faced with the mountainous fees which accompanied litigation.

#### The Commissioners' Power of Seizure

Whatever doubts may have been entertained at first, as to the right of the commissioners to break into the house of the debtor to seize either his goods or his body, they were quickly dispelled in 21 Jac. I, c.19.<sup>(1)</sup> It is stated that some doubt has been conceived as to the right of the commissioners to break into the bankrupt's property, therefore, power is given to the

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(1) The provisions of s. 2 of 13 Eliz. I, c.7 seem fairly clear on the rights of the commissioners, but a man's castle did not fall easily.

commissioners or their officers to "break open the house or houses, chambers, ships, warehouses, doors, trunks or chests of the said bankrupt, where the said bankrupt or any of his or her goods or estate shall be or reputed to be".<sup>(2)</sup> Although the words of the statute give this power to effect an entry "where the ... goods or estate shall be or reputed to be", yet it was held that this right to break open and search related only to the house of the bankrupt and not to the house of another.<sup>(3)</sup>

The right of seizure extended to the entire of the bankrupt's effects and estate, excepting only the necessary wearing apparel of bankrupt, his wife and children.<sup>(4)</sup> There was no provision that the bankrupt might retain a certain amount of his effects so

(2) S. 7.

(3) Anon (1682) 2 Show. 247.

(4) This is first enacted by 4.5 Anne, c.4, s.1 and was re-enacted in s. 1 of 5 Geo. II, c.30. It is interesting to note that where a commission issued against a bankrupt who had failed before; or where a debtor had previously made a composition with his creditors, or had delivered up his estate and effects to them, or been discharged from prison under an insolvent debtors relief Act, then by virtue of s. 9 of the latter Act, unless his estate was sufficient to pay 15/- in the £1, the future effects of the bankrupt remained liable to the creditors. In such a case, however, the bankrupt might retain not only the necessary wearing apparel of himself and his family, but also his household goods and furniture and the tools of his trade.

that he might maintain himself and his family during the course of the examination.<sup>(5)</sup> Although, it is true, the bankrupt whose estate realised specified amounts in the pound for the creditors might recover up to £300 for himself.<sup>(6)</sup> Also after the allowance of the certificate of discharge to the bankrupt, if he was further required to attend before the assignees when he was to be given an allowance for such attendance at the rate of 2/6d per day;<sup>(7)</sup> yet during the course of the examination the bankrupt had to rely on the generosity of his creditors.

#### Property Liable Under the Commission

The property which became liable to the commissioners, so that they might realise for value and thus relieve the creditors,

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(5) See *Thompson v. Council* (1786) 1 T.R. 157. See p. 661.

(6) See s. 7 of 5 Geo. II, c.30. In such a case, however, the bankrupt could not claim such allowance until after he had obtained his certificate: *Ex parte Grier* (1744) 1 Atk. 207; nor until the final dividend had been made to the creditors, for until that time other creditors might be admitted: *Ex parte Stiles* (1758) 1 Atk. 208 at 209. See pp. 660-1.

(7) *Ibid.* s. 36



was really everything bar what the bankrupt and his family stood up in.<sup>(8)</sup>

The commissioners were to take<sup>(9)</sup> all the lands, tenements, hereditaments, whether they be copyhold,<sup>(10)</sup> freehold or held customary,<sup>(11)</sup> which the bankrupt held in his own right before he

- (8) Ibid. s. 1. Although by virtue of this section the bankrupt was to declare all the property which he had possessed at the time of his act of bankruptcy, the section made an exception in respect of such "part of his estate and effects, as shall have been really and bona fide before sold or disposed of in the way of his trade and dealings; and except such sums of money, as shall have been laid out in the ordinary expence of his family". This provision was to some extent supplemented in 19 Geo. II, c.32, s.1, which provided that creditors of the bankrupt, for goods provided or on bills etc., drawn and accepted by the bankrupt were not liable to refund money paid to them in respect of such, unless they had knowledge of some act of bankruptcy at the time of receiving the same. The provision for seizure under this section was not really any stronger than the provision at common law for the taking of personalty. In *Hardistey v. Barney*, (1697) Comb. 356, the powers of the sheriff, in seizing a debtor's property under a writ of fieri facias, were stated as follows: "...upon a fieri facias the sheriff may take any thing but wearing clothes; nay, if the party hath two gowns, he may take one of them." Per Holt, C.J. *ibid*.
- (9) 13 Eliz. I, c.7, s.2.
- (10) See *Crisp v. Pratt* (1635) Cro. Car. 549 at 550.
- (11) By s.3 of 13 Eliz. I, c.7 purchasers from the commissioners of copyhold land, or land held by custom, were to make such payment to the Lord as was usual in such cases. After the giving of power to the commissioners to assign the entire of the bankrupt's estate to assignees, it was recommended that copyholds should not in fact be so assigned but excepted out of the deed of assignment. The basis for this was that in this way only one fine was made to the Lord and that was after the commissioners had conveyed the copyhold to a purchaser. If the property was first conveyed to the assignees and then conveyed by them to a purchaser, two fines would have to be rendered: *Drury v. Man* (1746) 1 Atk. 95 at 96.

became bankrupt; together with all his money, offices,<sup>(12)</sup> goods, chattels, wares, merchandizes, and debts wherever they might be. All these assets were to be valued and either sold or used in some way so as to satisfy the creditors of the bankrupt. The sale of lands, tenements or hereditaments together with all deeds, etc., relating to them was to be by deed indented, "inrolled in one of the Queen's Majesty's Courts

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- (12) The offices which might be sold by the commissioners were generally those held by inheritance, e.g. the Wardenship of the Fleet Prison. Offices of trust or judicial offices could not be sold - Commissioner p. 126. In *Ex parte Butler* (1749) 1 Atk. 210, it was held that the office of the under marshal of the city of London might be sold by the assignees, since it did not concern the administration of justice, but only the police of the city of London. Lord Hardwicke was also of the opinion that if an army officer became bankrupt, he, the Lord Chancellor, had power to lay hold of the officer's pay. In *Flarty v. Odlum* (1790) 3 T.R. 681, however, it was held that the half pay of an officer could not be the subject-matter of a sale in the case of a person delivering up a schedule of his disposable estate under an Act for the relief of insolvent debtors. In *Ex parte Lyons* (1750) Amb. 89, there arose the problem of whether the office of a 'Jew Broker' might be sold. It appeared in evidence that there were in fact twelve Jew brokers licensed by the Court of Aldermen of the city of London. Lord Hardwicke held that such offices might not be sold, since "they are not to be considered as places or offices, but at large as other common brokers are." *ibid.*

of Record".<sup>(13)</sup> Nothing in the above, however, gave the commissioners the right to interfere with any conveyance of land made by the debtor before he became bankrupt,<sup>(14)</sup> as long as the conveyance was made bona fide and not made on trust for the bankrupt or his heirs, and not with intent to deceive the bankrupt's creditors.<sup>(15)</sup>

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(13) 13 Eliz. I, c.7, s.2. Such procedure was held not to be necessary in the sale of personal property: *Smith v. Mills* (1584) Co. Rep. II, 25a at 26a. By s. 10 of the above Act future lands and effects which fell into the bankrupt's possession were also to be liable to the commissioners. The usual procedure in relation to personal property of the bankrupt, was for the assignees to enter into covenants, jointly and severally, in relation to such property that they would carry out their duties. See *Primrose v. Bromley* (1739) 1 Atk.89 at 90. As to the fact that the assignees were not to strictly enforce any time limit they may have set in which bids for the bankrupt's property might be made, see *Ex parte Green* (1747) 1 Atk. 202 per Lord Hardwicke at 203. Normally in such cases the property of the bankrupt was sold by auction. By s. 16 of 19 Geo. III, c.56 (1779) auctioneers employed by the assignees to sell the bankrupt's goods and effects, were to enumerate the particular goods and effects to be sold in the catalogue of sale. The assignees are to sign the catalogue, certifying that the list as set out is correct, at the foot of the list.

(14) 13 Eliz. I, c.7, s.11

(15) S. 13 of 21 Jac. I, c.19, stated that no purchaser from the bankrupt, for good and valuable consideration, was to be dispossessed of his property merely because purchased after an act of bankruptcy, unless a commission was sued out within five years of such act.

Lands purchased by the bankrupt jointly with his wife for the use of the bankrupt or in which he had an interest, or lands held on secret trust for the bankrupt might be seized by the commissioners to the extent of the bankrupt's interest in the land.<sup>(16)</sup> This provision became to some extent supplemented in 1 Jac. I, c.15,<sup>(17)</sup> in which it was provided that any conveyance or transfer of any of his property by the bankrupt to his children or other persons (unless upon the marriage of any of his children or for valuable consideration) could not be withheld from the commissioners, who were given the right to dispose of the property as though still held in the name of the bankrupt.<sup>(18)</sup>

In *Fryer v. Flood*,<sup>(19)</sup> the sister of the bankrupt, Flood, sought to borrow the sum of £80 from Flood in order that she might renew the lease to an estate which would cost her £160. Flood, by borrowing £30, was able to loan his sister the £80, taking as security a promissory note which was only to be enforced if the

(16) 13 Eliz. I, c.7, s.2

(17) S. 3

(18) S. 13 of 4. 5 Anne, c.4, later 5 Geo. II, c.30, s. 12, provided that if a bankrupt gave more than £100 upon the marriage of any of his children, unless he could show that at the time of such gift he had sufficient property remaining to satisfy all his debts, he was to forfeit all rights to the privileges and benefits granted by that Act. Basically this meant loss of the right to certain allowances and to the certificate of discharge: see ss. 7 and 10 of the latter Act.

(19) 1 Bro. C.C. 160 (1782)

sister did not devise the estate to one or more of Flood's children. The sister later devised the estate to Flood's daughter, but before the death of the sister Flood became bankrupt. The assignees of the bankrupt's estate now claimed the £80 or half of the estate as being purchased by Flood for the advancement of a child and falling within 1 Jac. I, c. 15, s.3. The Lord Chancellor, although expressing his regret, found that the father had procured an interest which must go to the assignees.<sup>(20)</sup>

Power was given to the commissioners to assign debts due to or becoming due to the bankrupt to his creditors in such manner as they thought best, the creditors being able to recover such debts in their own names and only they being empowered to give proper discharge of the debt.<sup>(1)</sup>

Attempts to have land extended after bankruptcy on the pretext that the bankrupt owed money to another, who was accountant to the king, and thus deprive the commissioners of the right to sell the land failed; for the commissioners were given power to

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(20) Ibid. at 161

(1) 1 Jac. I, c.15, s.8. Debts included money due on bills, bonds, by statute recognizance, judgment or contract; *ibid.* By s. 9 of this Act, a debtor of the bankrupt might safely pay him the debt owing, as long as at the time of payment he had no knowledge that his creditor had committed an act of bankruptcy. This was extended much later by s. 1 of 56 Geo. III, c. 137 (1816), whereby persons were not to be endangered by virtue of delivery of effects or goods to a bankrupt, if at that time they had no knowledge of the act of bankruptcy. No schedule was to be annexed to any deed of assignment of the personal estate of the bankrupt from the commissioners to the assignees - 5 Geo. II, c.30, s.42.

examine fully every such claim and where found false, such extent was void as against them.<sup>(2)</sup>

Goods which were found in the possession of the bankrupt with the consent of the true owner, such goods appearing to be in the reputed ownership of the bankrupt might be taken by the commissioners.<sup>(3)</sup> Some difficulties arose over the taking of the goods out of the possession of the bankrupt. In *Bourne v. Dodson*<sup>(4)</sup> the problem raised was whether a ship whilst at sea assigned for valuable consideration, and of which possession could not be taken by the assignee, might be taken as part of the bankrupt's estate. It was said that in such a case the

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(2) 21 Jac. I, c.19, s.9. As the bankruptcy enactments did not bind the Crown, an extent for a debt due to the king might be tested after the issuing of the commission, and the bankrupt's property taken for the king. This was not the case once the property had been assigned by the commissioners: *Attorney General v. Capell* (1687) 2 Show. 480.

(3) *Ibid.* s. 10.

(4) 1 Atk. 154 (1746)

assignment might stand against the assignees of the bankrupt, although this would not be the result in the case of the sale of goods on land.<sup>(5)</sup> The Lord Chancellor's reasoning was based largely on the possible effect on trade for as he says:

"..now it would be very detrimental to trade, as it would deter merchants from lending money, if, notwithstanding they should advance a large sum by way of mortgage, the property is not altered, but subject to mortgagor's creditors under a commission of bankruptcy, unless the ships return before the commission is taken out, and the effects are in the actual possession of mortgagees'."<sup>(6)</sup>

Even the revered entailed estate fell before the commissioners; such entailed lands whether in possession, reversion or remainder might be sold "for the better payment of debts, and discouraging men to become bankrupts".<sup>(7)</sup> The deed of such sale to be enrolled within six months of being made in one of the courts of record at Westminster, and by virtue of such sale the estate was then barred

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(5) For the doctrine of reputed ownership, see pp. 632-5.

(6) 1 Atk. at 156.

(7) 21 Jac. I, c.19, s. 11

to those who might have benefited through the bankrupt.<sup>(8)</sup>

The right of the Commissioners to assign the property properly seized, if carried out according to statute could not be impeached.<sup>(9)</sup>

Since the act of bankruptcy freezes the property of the bankrupt, no act of his after this time can alter the right of the commissioners to deal in such property;<sup>(10)</sup> but the property

(8) Ibid. There was no time limit for enrolment under ss. 2 and 10 of 13 Eliz. I, c.7, but in order that the property be sold this was necessary. In *Perry v. Bowers* (1679) Jones, T. 196 at 197, it is stated that the commissioners have only power to sell and do not possess any estate in themselves. Therefore in order that they might pass the estate to another there must be not only a deed indented but the deed must be enrolled. By s. 12 of 21 Jac. I, c.19 conditional estates or mortgages created by the bankrupt passed to the commissioners. If the time for the performance of the condition, or time for redemption had not passed, the commissioners might appoint a person to perform such condition or pay such money as the bankrupt might have done. Such property was then to be sold for the benefit of the creditors.

(9) 13 Eliz. I, c.7, s.2; 1 Jac. I, c.15, ss. 3,8; 21 Jac. I, c.19, s.11. See s. 41 of 5 Geo. II, c.30, making provision for the keeping of the records of the meetings and transactions of the commission to be kept safely, in order that purchasers under the commission could safely prove their right to the property so purchased. In the case of a bankrupt having stock or annuities transferrable at the Bank of England, s. 2 of 36 Geo. III, c.90 (1796) provided that since the consent of the owner was necessary for such transfer, if the bankrupt refused to consent, the Lord Chancellor might make an order transferring such stock, etc., to the assignees.

(10) See *Kiggil v. Player* (1708) 1 Salk. 111; and see *Brooks v. Sowerby* (1818) 8 Taunt. 783 at 793.



in the bankrupt's estate and goods remains in the bankrupt until the assignment by the commissioners to the assignees or creditors.<sup>(11)</sup>

A sale by the bankrupt after the act of bankruptcy, however is not void as between the parties, but merely subject to being avoided at the instance of the commissioners or assignees.<sup>(12)</sup>

#### Mutual Credit and Set-Off

In order to avoid endless payments and repayments where mutual credits existed between the bankrupt and his debtor it was enacted in 1705<sup>(13)</sup> that the commissioners might take the state of accounts between the parties and the debtor was then only to be obliged to pay the balance due.<sup>(14)</sup> This was apparently restricted

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(11) *Cary v. Crisp* (1689) 1 Salk. 108. The position under the commission was explained in *Brassey v. Dawson* (1733) 7 Mod. 182 by Lord Hardwicke at 183: "... though the property is not actually divested out of the bankrupt until assignment, yet when that is done, it relates to the time of the bankruptcy committed, so as to avoid all intermediate acts done by the bankrupts themselves, ....".

(12) *Hussey v. Fidel* (1701) 3 Salk. 59.

(13) 4.5 Anne, c.4, s.12.

(14) This Act was continued for seven years by 3 Geo. I, c.12, s.3. The provision was substantially re-enacted in 5 Geo. I, c.24, s.11; but it is only with s. 28 of 5 Geo. II, c.30, that provision is also made to cover the situation where the parties have mutual debts.

to cases involving the debtor of the bankrupt, so that a creditor of the bankrupt had no such right; the position is described by Lord Hardwicke as follows:<sup>(15)</sup>

"... if a person was a creditor, he was obliged to prove his debt under the commission, and receive perhaps a dividend only of 2s. 6d. in the pound from the bankrupt's estate, and at the same time pay the whole to the assignee of what he owed to the bankrupt; to remedy this very great inconvenience and hardship the act was made."

The 'act' of which Lord Hardwicke speaks is 5 Geo. II, c.30, s.28 of which provided:

"That where it shall appear to the said Commissioners, or the major part of them, that there hath been mutual credit given by the Bankrupt, and any other person, or mutual debts between the Bankrupt and any other person, at any time before such person became Bankrupt, the said Commissioners, or the major part of them, or the assignees of such Bankrupt's estate, shall state the account between them, and one debt may be set against another; and what shall appear to be due on either side, on the balance of such account, and on setting such debts against one another, and no more, shall be claimed or paid on either

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(15) Ex parte Prescott (1753) 1 Atk. 230 at 231

"side respectively."

The courts now refused to allow a strict construction to be placed on such a provision, especially if such construction would bring about an inequitable result. In *Ex parte Prescott*<sup>(16)</sup> it fell to be determined whether a bond given by the petitioner to a creditor, and payable after the date when the creditor was found to be bankrupt, might be set-off against a sum of money owing by the now bankrupt creditor to the petitioner. Against the petitioner it was argued that this was not a case of mutual debts since the above provision related to debts actually due and that in this case whilst one debt was due (i.e. the debt owed by the bankrupt to the petitioner), the other (that owed by the petitioner to the bankrupt) was most certainly not due. The Lord Chancellor refused to accept this argument and having stated that this provision must be read together with 7 Geo.I, st.1, s.31,<sup>(17)</sup> especially that part concerning the deduction of 5% per annum

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(16) *Ibid.* In order to take advantage of the provision it was necessary that the credit and debt attach in respect of the same legal personality. In *Bishop v. Church*, (1748) 1 Atk. 691, an executrix and residuary legatee of an estate tried to set-off against a debt owed by a bankrupt to the estate, a debt owing from her to the bankrupt in her private capacity. It was held that the debts being due in differing rights there was no mutual credit between the parties.

(17) See p 558.

interest where a bond payable at a future date was paid before that date, he went on to say:<sup>(18)</sup>

"This may indeed in strictness be said not to be a mutual debt, but is it not a mutual credit? The bankrupt gives a credit to the petitioner in consideration of this bond, though payable at a future day; and the petitioner gives the bankrupt credit for the debt he owes the petitioner upon simple contract; and therefore I think this case is within the equity of the 5th George II.

Therefore upon the petitioner's agreeing to pay the balance forthwith to the assignees, which the act of parliament requires, let it be referred to the commissioners to take the account between him and the bankrupt, and let what shall be found due from the bankrupt, at the time of the bankruptcy, be deducted out of what shall be due on the petitioner's bond for principal and interest, and the balance only be paid by the petitioner to the assignees!"<sup>(19)</sup>

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(18) 1 Atk. at 231-2.

(19) S. 3 of 46 Geo. III, c.135, provided that where there existed mutual credit or mutual debts between the bankrupt and another, that there might be a set-off notwithstanding that credit was given or the debt contracted after the act of bankruptcy. There must have been no knowledge of the other party of an act of bankruptcy and the debt or credit must have come into being two months before the suing out of the commission.

Property Voluntarily Transferred

The actual rights of the commissioners or assignees to recover property voluntarily transferred by the bankrupt were at times difficult to define.

By 13 Eliz. I, c.5<sup>(20)</sup> it was provided that voluntary conveyances, gifts, etc., of property made "to the end, purpose and intent, to delay hinder or defraud creditors" were to be entirely void. But for a gift or conveyance prior to the act of bankruptcy to fall within this category it had to be done with the purpose and intent mentioned in the act.<sup>(1)</sup> So that the act applied only where, at the time of the voluntary gift or conveyance, the person making it was already in debt, or if the person acted fraudulently. Lord Hardwicke expressed the position as follows:<sup>(2)</sup>

"If there is a voluntary conveyance of real estate or chattel interest by one not indebted at the time, though he afterwards becomes indebted, if that voluntary conveyance was for a child, and no particular evidence or badge of fraud to deceive or defraud subsequent creditors that will be good; but if any mark of fraud, collusion, or intent to

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(20) 1571 - s. 1

(1) Crisp v. Pratt (1635) Cro. Car. 549 at 550.

(2) Townshend (Lord) v. Windham (1750) 2 Vez. Sen. 1 at 11.

"deceive subsequent creditors appears, that will make it void."

A later act in the reign of Elizabeth provided that a voluntary settlement not made for valuable consideration was void against a subsequent purchaser for value;<sup>(3)</sup> but expressly excepts from this conveyances made upon good consideration and bona fide.<sup>(4)</sup>

Thus 13 Eliz. I, c.5 affected real and personal estate in favour of creditors but does not extend to purchasers; whilst 27 Eliz. I, c.4 extended only to real estate.<sup>(5)</sup>

Under the provisions of 1 Jac. I, c.15<sup>(6)</sup> the commissioners of a bankrupt might assign any lands, goods, debts, etc., which the bankrupt might have transferred into the names of his children or other people, unless such conveyance was made for valuable consideration or made for or upon the marriage of one or more of his children at a time when both parties to the marriage were of the age of consent.<sup>(7)</sup>

(3) 27 Eliz. I, c.4 (1584-5)

(4) Ibid. s. 3

(5) See *Daubeny v. Cockburn* (1816) 1 Mer. 626 at 635.

(6) S. 3. In *Brown v. Jones* (1744) 1 Atk. 188 at 190, Lord Hardwicke stated that "the statute of 1 Jac. I, cap. 15 was made to put creditors under a commission of bankruptcy in the same condition with creditors under the statutes of 13 and 27 Eliz."

(7) Although this made such assignments valid against the assignees, the provisions of s. 12 of 5 Geo. II, c.30 concerning gifts of over £100, would have to be complied with if the bankrupt was to obtain any benefits from the latter act. See p. 639.

Although the two enactments of Elizabeth I were not only concerned with bankrupts they were necessarily linked with the latter,<sup>(8)</sup> and provided the courts with a number of complex problems when applying them.

In *Crisp v. Pratt*<sup>(9)</sup> it was held that a voluntary settlement by the bankrupt before he became a trader and where the jury find that there was no fraud at the time of the settlement could not be attached and assigned by the commissioners. In the course of judgment it was said:<sup>(10)</sup>

"... when he was a clear man, he procured his land to be settled upon his son (no fraud, or purpose of being a bankrupt, being found): it would therefore be a mischievous case, and full of inconveniences, if it should be within the statute; for none might know with whom to deal by way of marriage or otherwise when he is not a tradesman, and settles land upon his wife and children bona fide and without cause of being suspected to be a bankrupt,..."

The occasions for the considerations of these various provisions arose for consideration in the case of *Walker v. Burrows*.<sup>(11)</sup> The plaintiffs were the assignees under a commission against the

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(8) An infringement of these provisions, made by deed and with the necessary intent, would be an act of bankruptcy. See p. 487.

(9) *Cro. Car.* 549 (1635)

(10) *Ibid.* at 550

(11) 1 *Atk.* 93 (1745)

defendant's father. The father had, in 1718, after his marriage, made a conveyance to trustees of his real estate, in consideration of five shillings and other valuable consideration. The estate to be held in trust for the father for life, for his wife for life, and to his eldest son if he survived his parents, and then to the next son, etc. In 1739 the father made a conveyance of all his shop goods by a bill of sale to his son, and in 1740 he became bankrupt. The plaintiffs claimed that the settlement of 1718 was either void against the creditors being voluntary and after marriage, therefore infringing 13 Eliz. I, c.5; or void by virtue of 1 Jac. I, c.15, s.3. The Lord Chancellor gave judgment as follows:<sup>(12)</sup>

"As to the first part of the case, there is not a foundation to set aside the assignment of household goods, because it was many months before the bankruptcy, and the consideration of the assignment proved, and also followed by the possession of the son.

With respect to the settlement by lease and release in 1718, made after marriage in a consideration of five shillings, and other valuable considerations, there are two points:

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(12) Ibid. at 93, 94.



"First, A general point, which it is insisted arises upon the construction of the statute of the 13th of Eliz., c.5 against fraudulent deeds.

Secondly, Upon the clause in the statute of the [1 Jac. I, c.15] As to the first, That statute is not sufficient to prevail against the settlement.

It has been said all voluntary settlements are void against creditors, equally the same as they are against subsequent purchasers, under the statute of 27th of Eliz., c.4.

But this will not hold, for there is always a distinction upon the two statutes: 'tis necessary on the 13th of Eliz. to prove at the making of the settlement the person conveying was indebted at the time, or immediately after the execution of the deed, or otherwise it would be attended with bad consequences, because the statute extends to goods and chattels; and such a construction would defeat every provision for children and families, though the father was not indebted at the time.

..... now here is no proof Burrows the father was indebted at the time or soon after, so as to collect from thence the intention to be fraudulent, or in order to defeat creditors; for as Mr. attorney-general said, if he had been indebted at that time, it would run on so as to take in all subsequent creditors.

Where a man has died indebted, who in his lifetime made a voluntary settlement, upon application to this court to make it subject to his debts as real assets, the court have always

"denied it, unless you shew he was indebted at the time the conveyance was executed.

But upon the statute of the 27th of Eliz. which relates to purchasers, there indeed a settlement is clearly void if voluntary, that is not for a valuable consideration, and the subsequent purchasers shall prevail to set aside such settlement; but this can only be applied to the case of subsequent purchasers, and there is a plain distinction between the two statutes.

The assignees under the commission stand only in the place of the bankrupt, and are bound by all acts fairly done by him, notwithstanding they gain the legal estate; and this proves that assignees of bankrupts are not considered as purchasers of the legal estate for a valuable consideration for every purpose.

It has been said, I must at this time take the deed in 1718 to be for valuable consideration, because expressed to be for 5s. and other valuable considerations.

But the consideration of 5s. and other valuable considerations, does not oblige the court to hold it, at all events, to be for a valuable consideration, and can at most only let the defendants in to prove that there were other valuable considerations.

"And therefore as to this part of the case, the trustees under the deed must convey to the assignees under the commission; for it falls directly within the clause of the first of James the First, cap. 15."

A voluntary conveyance by deed of goods, etc., to a creditor just prior to insolvency came to be held by the courts to be an act of bankruptcy.<sup>(13)</sup> Where there was no deed the conveyance was held void as against the other creditors. In both cases the reason was the same, the creditor receiving the goods was in fact being preferred to other creditors. This doctrine of fraudulent preference grew from the basic need to satisfy all creditors equally, and from the suspicion of possible collusion which arose automatically where one creditor was satisfied on the eve of the bankruptcy to the obvious detriment of the other creditors.

#### Fraudulent Preference

The first vague rumblings of the doctrine to come might be said to be heralded in a judgment by Lord Nottingham in 1677<sup>(14)</sup> in which, remarking on an account taken between a creditor and debtor

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(13) See p. 478.

(14) *Masters v. Williams* (1677) Nott. Ch.Cas. (S.S.) II, p. 554. No. 735.

just prior to the latter's bankruptcy, he said:<sup>(15)</sup>

"... the account stated in this case was so near to the time of breaking that being in the very confines of the bankruptcy, it is very suspicious that there may be some collusion in it."

This said the doctrine appears to have gone underground for some time, on re-appearance its growth was rapid. In 1721<sup>(16)</sup> in a case where a bankrupt made provision for her children only two months before the bankruptcy, the Lord Chancellor holding the settlement good as against the creditors, said:

"Is not the paying of a debt giving that creditor as great a preference as giving security? And yet it was never pretended, that paying a debt should be held an act of bankruptcy, because but two months before the bankruptcy."<sup>(17)</sup>

Some six years later the Master of the Rolls in the course of holding that a partial assignment of property just prior to the bankruptcy was good, remarked that it was "a case of great consequence" since it was possible to frustrate equal distribution among

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(15) Ibid at 554-5.

(16) Cock v. Goodfellow (1721) 10 Mod. 489.

(17) Ibid at 497. Remarking of the fact that the trust had been for the benefit of the children, Lord Chancellor Parker said: "Very strange, that it should be esteemed a fraud in a parent to follow the voice of nature; especially when in doing this, she does what duty and justice require from her, as their guardian and trustee." Ibid at 497.

creditors in such a case.<sup>(18)</sup> He went on to say:

"There may be just reason for a sinking trader to give a preference to one creditor before another, to one that has been a faithful friend, and for a just debt lent him in extremity, when the rest of the debts might be due from him as a dealer in trade, wherein his creditors may have been gainers; whereas the other may be not only a just debt, but all that such creditor has in the world to subsist upon; in this case (I say) and so circumstanced, the trader honestly may, nay ought to give the preference."<sup>(19)</sup>

These words bore testimony to the humanity and understanding of the judge, they never came to represent the law of England.

The cases of partial assignment of property to a creditor just prior to failure came more and more to reflect the giving of a preference to one creditor, and where the creditor did not take possession, the court had evidence from which it might infer fraud.<sup>(20)</sup>

(18) *Small v. Oudley* (1727) 2 P. Wms. 427

(19) *Ibid.* at 429

(20) See *Worsley v. De Mattos* (1758) 1 Burr. 467 per Lord Mansfield at 484. Where the property remained in the possession of the bankrupt it risked falling within the reputed ownership of the bankrupt under s. 10 of 21 Jac. I, c.19. In *Manton v. Moore*, (1796) 7 T.R. 67, Lord Kenyon, speaking of such possession, said: "In cases of this kind, the question whether the act be or be not fraudulent depends on another question, whether the goods be or be not delivered with the instrument that professes to convey them. A conveyance of goods, without deed, is fraudulent, unless possession of the goods be given; if it be by deed, it is fraudulent and an act of bankruptcy." *Ibid* at 71.

But what of the creditor who was not a party to the bankrupt's plans, and who was merely the grateful recipient of his property?

For a time it was sought to show that whilst the bankrupt may have dispatched the property to the unsuspecting creditor before the act of bankruptcy, yet the creditor, not having accepted it before the act committed, he may not keep the property.

In 1768,<sup>(1)</sup> Lord Mansfield, whilst finding grounds for his decision within the then law, gave some indication of the doctrine he would later unfold. The facts of the case were that the debtors had indorsed a promissory note to one Temple, a creditor, and had posted it to him on Friday believing that the letter would be taken that day to the creditor. In fact the letter was not dispatched from the post office until the Saturday night and only received by the creditor on the following Monday; the debtors meanwhile had committed an act of bankruptcy on the Saturday morning, before the letter had even left the post office. It was argued strongly for the assignees that it was necessary for there to be an assent to such transaction by the creditor, or delivery to him, before the property in the note left the bankrupts. In the course of judgment Lord Mansfield said:<sup>(2)</sup>

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(1) Alderson v. Temple (1768) 4 Burr. 2235.

(2) Ibid at 2239.

"The only question I make is - "whether, under the circumstances of this case, the indorsing and sending this note to the defendant is fraudulent; and void as such". And I choose to put the case upon that ground; because the most desirable object in all judicial determinations, especially in mercantile ones, (which ought to be determined upon natural justice, and not upon the niceties of law,) is to do substantial justice. And therefore I will avoid laying the stress that might properly be laid upon the assent being necessary to complete the contract, or the want of delivery ...."

His lordship went on to say that whattook place had not been in the course of trade between the parties and no application for the notes had been made by the creditor. But substantially the judgment rests on his finding that the bankrupts had acted "with a view to positive iniquity:" for they, knowing they would become bankrupt the next day, had forwarded the note to the creditor in order to avoid the drawer of the note setting-off notes given to him by the bankrupt.

In *Hague v. Rolleston*<sup>(3)</sup> the intending bankrupt sent a bill for seven parcels of cochineal to a particular creditor, informing

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(3) 4 Burr. 2174 (1768)

him that the goods were held at a certain warehouse to the use of the creditor, as though the creditor had purchased them. It was held that the creditor had not assented to the possession of the goods until later after the bankrupt had committed an act of bankruptcy and therefore the transaction was void.

In another case,<sup>(4)</sup> one Fordyce sent certain bills to a particular creditor, stating he had the honour to shew him a preference since he, the bankrupt, conceived such preference to be justly due to him; but Fordyce became bankrupt before the letter reached the creditor. It was held the subsequent delivery did not render it a complete transaction, and, since it was done without the privity of the creditor, it was void; although the court recognised that the attempt had been made in favour of a very meritorious creditor.

Finally the problem where there was consent by the creditor to receiving property and actual possession of it by him before the act of bankruptcy was committed came before the court in *Rust v. Cooper* in 1777.<sup>(5)</sup> The debtors on the 22nd of September, 1772 ordered a third party holding some goods on their behalf to deliver

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(4) *Harman v. Fishar* (1774) 1 Cowp. 117

(5) 2 Cowp. 629 (1777) Thus, exactly one hundred years after Lord Nottingham had first forecast the possibilities of fraud by virtue of unequal distribution among the creditors in such cases, (see p.620-1) Lord Mansfield put the finishing touches to this, the doctrine of fraudulent preference.



them to a particular creditor to whom was owing the sum of £1,000. The transfer of the property to the creditor was completed on the 25th September before the debtor committed his act of bankruptcy on the morning of the 26th of September. Lord Mansfield held the assignment void on the grounds of a fraudulent preference, refusing to be drawn into arguments of counsel as to assent to, and possession of, the goods. Giving judgment he said:<sup>(6)</sup>

"This is a case, where the assent of the creditor to the act of the Bankrupt, and the delivery of the goods to the order of the creditor, is complete, before the act of bankruptcy committed; and further, it is the case of an act done not of a deed. In all its circumstances therefore, there is perhaps no case exactly similar to it. But the law does not consist in particular cases; but in general principles, which run through cases, and govern the decision of them. The general principle applicable to the present case is this; that a fraudulent contrivance with a view to defeat the Bankrupt laws, is void, and annuls the act.....

There is a fundamental distinction between an act like this,

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(6) Ibid at 632, 634.

"and one done in the common course of business. The statutes have relation back only to the act of bankruptcy. And I consider here, that there is no act of bankruptcy till the 26th. If, in a fair course of business a man pays a creditor who comes to be paid, notwithstanding the debtor's knowledge of his own affairs, or his intention to break; yet, being a fair transaction in the course of business, the payment is good; for the preference is there got consequentially, not by design: it is not the object; but the preference is obtained, in consequence of the payment being made at that time. .. in the present case, there is not a single thing but what is a step towards fraud, and a proof of an intended preference; and to support it, would be to overturn the whole system of the Bankrupt laws. The present therefore, is fraudulent... upon all the creditors, and all the laws concerning Bankrupts."

Mr. Justice Aston delivering judgment in the same case said:<sup>(7)</sup>

"Nothing but a number of authorities cited to throw a cloud over the question, can make one lose sight of the fraud in this case. It is a mere contrivance betwixt the creditor and debtor. .... I do not know where such a preference

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(7) Ibid at 635.

"as this is to stop. There is no case which says a preference shall be confined to a single creditor. If a trader may prefer one, he may prefer more. The present transaction is not in itself an act of bankruptcy; but not being a payment in the regular and common course of dealing and business, it is a fraudulent transaction, and therefore, void with respect to the other creditors."

The seal of the doctrine of fraudulent preference, which required no fraud in the creditor, was added a few years later, when it was agreed that payment by a debtor because of pressure put on him by the creditor could not be disturbed. Also a payment made by the debtor just prior to the act of bankruptcy under apprehension of legal proceedings was good even if such fears were in fact groundless.<sup>(8)</sup> This permitting payment under pressure but not where made voluntarily is merely a reversal of the law where a debtor voluntarily paid his debt to the bankrupt. For over a century earlier Lord Nottingham had said:<sup>(9)</sup>

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(8) *Thompson v. Freeman* (1786) 1 T.R. 155. Lord Mansfield stated the position as follows: "A bankrupt when in contemplation of his bankruptcy cannot by his voluntary act favour any one creditor; but if under fear of legal process he gives a preference, it is evidence that he does not do it voluntarily." *Ibid* at 157.

(9) *Green v. Holmes* (1675/6) Nott. Ch. Cas. (S.S.) I, p. 276, No. 405.

"... payment to a bankrupt is good if it be compelled, but if it be voluntary the money must be paid again to the assignees of the commissioners."

#### Limitations on Assignment

Generally for property not to be available to the commissioners it was necessary for the bankrupt to have completely divested himself of any power over the property prior to the act of bankruptcy.<sup>(10)</sup> The commissioners could not lay claim to the goods, etc. of the bankrupt which had been given over on a judgment on which execution had been levied prior to the act of bankruptcy.<sup>(11)</sup> In *Audley v. Halsey*<sup>(12)</sup> goods were taken on an extent<sup>(13)</sup> three days before the bankruptcy of the debtors. It was held that they could not be taken and sold by the commissioners even though the goods were not delivered to the creditor upon a liberate until three days after the act of bankruptcy. The principle behind this was that property upon which

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(10) By s. 2 of 13 Eliz. I, c.7 the commissioners might assign all which the bankrupt might "lawfully depart with". Thus even a contingent interest might be assigned under the commission: see *Higden v. Williamson* (1731) 1 P.Wms. 132 - benefit of a contingent legacy to the bankrupt, assignable.

(11) *Cole v. Davies* (1699) 1 Ld. Raym. 724. Where the seizure of the goods, etc. was made after the act of bankruptcy the position was governed by s.8 of 21 Jac. I, c.19. See p. 550.

(12) *Cro. Car.* 148 (1628)

(13) The debt was by way of a statutory recognizance made under the provisions of 23 Hen. VIII, c.6, see p. 203.

judgment had been executed was said to be in legal custody and therefore neither Exchequer process nor assignment by the commissioners of bankrupts might touch them.<sup>(14)</sup>

Where an extent issued for a debt due to the Crown and it was tested on the same day as the date of an assignment made of the bankrupt's property, the extent was to be preferred.<sup>(15)</sup> This decision rested on the fact that the bankruptcy laws did not bind the Crown, but had the extent been tested after the date of the assignment, it would not have been effective as the property would by then be vested in a third party.

A sale of lands by deed indented made by the bankrupt before the bankruptcy could not be overridden and the lands seized and sold by the commissioners merely because the deed was not enrolled until after the bankruptcy.<sup>(16)</sup> Nor could the commissioners assign property in the hands of a bona fide purchaser, who had purchased the property after the act of bankruptcy, unless the commission were sued out within five years of the act of bankruptcy relied on.<sup>(17)</sup>

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(14) *Lechmere v. Thorowgood* (1689) Comb. 123.

(15) *Attorney General v. Capell* (1686) 2 Show. 480.

(16) *Audley v. Halsey* (1628) Jones W. 202 at 203.

(17) 21 Jac. I, c.19, s.13.

This particular provision was argued over in the interesting case of Radford v. Bludworth.<sup>(18)</sup> The debtor first committed an act of bankruptcy in 1643, in 1645 he was outlawed (to little effect) and in 1648/9 he sold lands to the lessor of the plaintiff. Later in 1649 he was again outlawed, for a period there was calm, then in 1653 there was sued out a commission of bankrupts, upon which little seems to have been done until 1657 when the debtor is at last declared a bankrupt. The question now arose as to whether the sale of the lands could be avoided having regard to the five year restriction; and it was:<sup>(19)</sup>

"... resolved by all the Court, that the sale shall not be defeated by any act of bankruptcy made before the sale, if the act was not made within five years before the suing out of the commission: for if a man does an act of bankruptcy in 1654, and continues in possession till 1658, and then sells, and after commits another act of bankruptcy; and in 1660 a commission is sued, the vendee is safe, no commission being sued within five years after the act of bankruptcy

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(18) 1 Lev. 13 (1660/1). This case is also reported under Bradford v. Bloodworth, 1 Keb. 11; and Radford v. Blidworth, 2 Sid. 176.

(19) Ibid at 14.

"made in 1654; for the act to avoid the purchase must be done within five years before the commission, and also, done before the sale."

Although property in the possession of the bankrupt in such a manner as to make him the reputed owner was assignable by the commissioners;<sup>(20)</sup> yet if the bankrupt held the property in some special capacity it might not be liable to seizure. Thus factors were not liable to have the goods of their principals taken if such factors became bankrupt.<sup>(1)</sup> Lord Hardwicke found some conflict between this principle and statute law but agreed to it saying:<sup>(2)</sup>

"... and even contrary to the express words of the statute of 21 Jac. I.<sup>(3)</sup> factors have been excepted out of it for the sake of trade and merchandize."

Similarly in the case of executors and other trustees, where they held property for others, such property was not liable to be

(20) 21 Jac. I, c.19, s.10.

(1) Godfrey v. Furzo (1733) 3 P. Wms. 185

(2) Ex parte Dumas (1754) 1 Atk. 232 at 234.

(3) Lord Hardwicke was of the opinion that this provision of the Act was "very darkly penned". - Ex parte Marsh (1744) 1 Atk. 158 at 159. In some cases statutory enforcement was given to prevent funds in the hands of particular persons being seized by assignees. In 33 Geo. III, c.54, s.10 (1793), it is stated that where an officer of a Friendly Society has property or money of the society in his hands at the time of his bankruptcy, such property, money, etc., may be recovered by the Society. It is to be made over within forty days of a demand for the same being made by order of the Society, and before any other debts of the bankrupt are paid or satisfied.

taken and sold by the commissioners.<sup>(4)</sup>

Goods left with the bankrupt for a particular purpose could not be seized, though this depended on the nature of the contract between the parties;<sup>(5)</sup> nor could goods merely left temporarily with the bankrupt be taken. Lord Hardwicke explained the intention of parliament in *Ex parte Flyn and Field*;<sup>(6)</sup> where before the bankruptcy the bankrupt sold 500 barrels of tar to the petitioners, the barrels to be sent by the bankrupt to Ireland on his own account, and for this purpose he put the barrels in his own warehouse; the petitioners paid for two-thirds of the tar prior to the bankruptcy. The assignees now claimed the tar as against the petitioners, and Lord Hardwicke, holding that the petitioners must be allowed two-thirds of the tar said:<sup>(7)</sup>

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(4) See *Bennet v. Davis* (1725) 2 P. Wms. 316 per Jekyll M.R. at 318-9.

(5) *West v. Skip* (1749) 1 Vez. Sen. 239. See per Lord Hardwicke at 243: "... there has been no case upon this act, or ever will be, wherein a court of law or equity will do so severe a thing as to subject the property of one to the debts of another (it depends on the nature of the contract...), without proof of the consent of the real owner to leave them in the power of the bankrupt (possession only not being sufficient) or laches in letting them remain there, so to gain him a false credit."

(6) 1 Atk. 185 (1748)

(7) *Ibid* at 187.



"I think this case is not within the intent of the act of parliament, which meant to guard against leaving goods in the possession, order and disposition of bankrupts; but here it was merely a temporary custody, because the petitioners, the buyers of the tar, had not an opportunity of selling it by shipping it off immediately to Ireland.

It cannot with any propriety be said the tar was in the order, disposition, or power of the bankrupt; and therefore not within the act of parliament."

Creditors who sent goods to the bankrupt before hearing of his insolvency might stop the goods whilst still in transit, and on recovery might retain them as against the commissioners or assignees.<sup>(8)</sup> The commissioner might not, among other things, assign the benefit of an agreement with the bankrupt,<sup>(9)</sup> nor would an assignment pass property in goods delivered on a precedent

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(8) Snee v. Prescott (1743) 1 Atk. 245, at 248-9.

(9) Moyses v. Little (1690) 2 Vern. 194

consideration but not accepted until after the bankruptcy.<sup>(10)</sup>

Finally, among all the queries as to the right of the commissioners to attach property which might come to the bankrupt,<sup>(11)</sup> there arose the problem as to whether the commissioners might attach and assign the future earnings of the bankrupt; Lord Mansfield saved the bankrupt from what would have amounted to virtual slavery saying:<sup>(12)</sup>

"It is a question of great importance, and a terrible consequence if determined one way. For what is to become of the bankrupt if he cannot earn maintenance by his daily labour?... The single question is, whether the assignees are entitled to the earnings of a bankrupt, and we are clearly of the opinion that they are not."

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(10) *Atkin v. Barwic* (1719) 1 Stra. 165. See also *Salte v. Field* (1793) 5 T.R. 211. If, however, the sale having taken place, the goods are delivered to the bankrupt and he afterwards becomes bankrupt; the latter cannot, with the consent of the seller, rescind the contract and return the goods to the seller. To have permitted this would be identical to giving a preference to the seller over the other creditors: *Barnes v. Freeland* (1794) 6 T.R. 80.

(11) As to the problems which could arise through settlements, see *Hearle v. Greenbank* (1749) 3 Atk. 695.

(12) *Chippendall v. Tomlinson* (1785) 4 Doug. 318 at 321.

CHAPTER 23WINDING UP THE COMMISSION

With the greater part of the work necessary to the commission having been carried out, both bankrupt and creditor might be forgiven if they felt that reward in some form would be theirs. Both were to some extent to be disappointed. For the bankrupt there remained the inevitable arduous task of persuading the creditors to grant him his certificate of discharge.

The creditors found that whilst the costs of the various actions necessary to obtaining the full estate of the bankrupt seemed heavy enough, yet they could be relatively small when set along side the bulky costs of the commissioners. Added to these were the various allowances to be paid out to the deserving bankrupt, who, to most creditors was probably more of a myth than a reality.

The keeping of records and provision for the care all added to the expenses to be met before the creditor might at last come to his share.

Finally, the bankrupt who felt some injustice in his being adjudicated bankrupt, might strive to upset all that had gone before

and petition the Chancellor that the commission be superseded and his estate returned to him, but in this fate was largely against him.

#### The Certificate of Discharge

The bankrupt's passport to comparative commercial freedom, the certificate of discharge, first made its appearance in 1705,<sup>(1)</sup> when it was allowed that a bankrupt who surrendered himself and conformed as required by the Act might be discharged from all debts which were owing at the time of the act of bankruptcy and could have been proved under the commission.<sup>(2)</sup>

This certificate was only to be allowed if the commissioners certified under their hands and seal to the Lord Chancellor that the bankrupt had made full discovery of this estate, such certificate was then to be allowed and confirmed by the Lord Chancellor, but creditors might be heard against such allowance.<sup>(3)</sup> Two years later the law was altered to the effect that the certificate might only issue if it had first been signed by four parts in five in

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(1) 4. 5 Anne, c.4.

(2) Ibid. s. 8

(3) Ibid. s. 20

number and value of the creditors proving debts under the commission.<sup>(4)</sup> In order to prevent the fraudulent issuing of certificates, any security given to a creditor in order to procure his assent to the discharge was to be void and unenforceable.<sup>(5)</sup> Later in the same reign a further provision was made whereby the discharge of one partner through the issuing of a certificate did not in any way discharge any other partner under that commission.<sup>(6)</sup>

By virtue of 13 Eliz. I, c.7 all the future lands and effects of the bankrupt had been declared liable for unsatisfied debts,<sup>(7)</sup> whilst the rights of creditors to pursue the debtor at common law for the remainder of their portions was retained.<sup>(8)</sup> These provisions continue to be of interest for there were certain cases under which a bankrupt might derive no benefit from the clemency granted in the statutes of Anne. A bankrupt who had given more than a hundred pounds to a child on

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(4) 6 Anne, c.22, s.2 later s. 10 of 5 Geo. II, c.30.

(5) Ibid. s. 3

(6) 10 Anne, c.25, s.3. It was not until 3 Geo. IV, c.74, s.1(1822) that it is provided that a joint commission might be superseded as to one or more of the bankrupts without prejudice to the commission.

(7) S. 10.

(8) Ibid. s. 9.

marriage had to prove that, at the time of such gift, he had remaining sufficient estate in order to meet all outstanding debts.<sup>(9)</sup> The bankrupt who had lost in any one day, the sum or value of five pounds, or in the twelve months preceding the act of bankruptcy, the sum or value of one hundred pounds in:

"playing at or with cards, dice, tables, tennis, bowls, billiards, shovel-board, or in or by cock fighting, horse races, dog matches, or foot races, or other pastimes, game or games whatsoever, or in or by bearing a share or party in the stakes, wagers, or adventures, or in or by betting on the sides or hands of such as do or shall play, act, ride or run, as aforesaid"

might take no benefit of the provisions of the Act.<sup>(10)</sup> The Act of 5 Geo. II, c.30 added to these the case of the bankrupt who, in the year before he became bankrupt had lost the sum of one hundred pounds:<sup>(11)</sup>

"by one or more contracts for the purchase, sale, refusal, or delivery of any stock of any company or corporation whatsoever, or any parts or shares of any government or

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(9) 4. 5 Anne, c.4, s.13.

(10) Ibid. s.16. Such pastimes as these had been condemned by the legislature many years before in the reign of Edward the Fourth, 17 Edw. IV, c.3, see p.245.

(11) S. 12.

"public funds or securities, where every such contract was not to be performed within one week, from the time of the making such contract, or where the stock or other thing so bought or sold was not actually transferred or delivered in pursuance of such contract."

This statute of the fifth year of George II added a number of other provisions curtailing the granting of the certificate. The discharge must now be signed by four parts out of five in number and value of the creditors who had proved with debts of over £20;<sup>(12)</sup> later it was permitted that a creditor absent abroad might sign through a properly appointed attorney.<sup>(13)</sup>

In order to prevent the benefits of the discharge being too readily available to the compulsive bankrupt, there is restriction placed on the freedom to be granted in cases where a commission issued against a bankrupt who had obtained discharge after the 24th June, 1732 under an earlier commission, or after such date had entered into a composition with his creditors or secured release from prison under an act for the relief of insolvent debtors.<sup>(14)</sup>

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(12) Ibid. s. 10

(13) 24 Geo. II, c. 57, s. 10

(14) 5 Geo. II, c.30, s.9. Where a bankrupt was taken in execution for any debt which could have been proved under the commission, he might obtain his release on production of his certificate of discharge to any judge of the court in which the judgment had been obtained. The judge was to order the sheriff or gaoler to release the bankrupt, the sheriff or gaoler being indemnified against any action for escape by reason of compliance with the order - 5 Geo. II, c.30, s.1.

In such cases the estate of the bankrupt had to realise sufficient to pay the creditors under the commission fifteen shillings in the pound otherwise the future estate or effects of the bankrupt remained liable to the creditors; exception being made in the case of the bankrupt's tools of trade, his necessary household goods and furniture, and the necessary wearing apparel of himself, his wife and children. The body of the bankrupt was also to remain free from arrest and imprisonment by such creditors.<sup>(15)</sup>

A later statute<sup>(16)</sup> provided that certificates granted by virtue of false creditors proving in the bankruptcy and later assenting to discharge of the bankrupt were to be void and the bankrupt lost all right to any of the benefits granted in 5 Geo. II, c.30.<sup>(17)</sup> This situation could be avoided if the bankrupt made full confession of such false debts to the commissioners before they signed his certificate.<sup>(18)</sup> The certificate had effect only from the date of its actual allowance so that property coming to the bankrupt after the act of bankruptcy but before the granting of discharge properly

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(15) Ibid. .

(16) 24 Geo. II, c.57

(17) Ibid. s.9. An agreement whereby the bankrupt gave a creditor security in order to induce him to sign the certificate had already been declared void by s. 11 of 5 Geo. II, c.30.

(18) Ibid.



belonged to the assignees.<sup>(19)</sup> The Crown not being subject to the bankruptcy enactments was not barred by the certificate.<sup>(20)</sup>

Any creditor might make protest to the Chancellor against the allowance of the certificate there being no restriction that he be creditor for £20 or over, and this included the creditor who had elected to pursue the debtor at common law.<sup>(1)</sup> The grounds on which a creditor might try to prevent the bankrupt from obtaining his passport to a fuller life were numerous, requiring a great deal of discretion in order that justice should be done to both sides.<sup>(2)</sup>

(19) In *Ex parte Proudfoot* (1743) 1 Atk. 252, Lord Hardwicke, speaking of the bankrupt after the commission and before the certificate said: "... he is incapable of carrying on any trade, and all his future personal estate is affected by the assignment, and every new acquisition will vest in the assignees; but as to future real estates there must be a new bargain and sale." *Ibid.* at 253. See also *Evans v. Mann* (1777) 2 Cowp. 569. The bankrupt, a lighterman, carried on building lighters after the commission issued, and sold one of the lighters. The purchaser paid part of the purchase price to the bankrupt, and the assignees now proceeded against the purchaser for the remainder. In holding that the assignees might succeed, Lord Mansfield said: "... here the contract was after the bankruptcy, when the bankrupt could have no property of his own. The lighter was the property of the assignees; and consequently, the sale by him, a contract as their agent by operation of law, and on their account." *Ibid.* at 570.

(20) *Anon* (1745) 1 Atk. 262.

(1) 5 Geo. II, c.30, s.10. See *Ex parte Lindsey* (1745) 1 Atk. 220.

(2) Since it was necessary that the creditors sign the certificate before the commissioners received it, the Lord Chancellor's discretion only arose in cases where less than one fifth of the creditor(s) in value petitioned against the allowance, there being no provision for the bankrupt to petition for his certificate. See pp. 647, 696-699.

One major consideration was the amount of time between the suing out of the commission and the date of the signing of the certificate. In *Ex parte De Sausmerez*,<sup>(3)</sup> the bankrupt's certificate was signed on the 18th of May some six weeks at most after the taking out of the commission; yet a number of his creditors lived in Guernsey and could not possibly have got their accounts with the bankrupt settled within this time. The Lord Chancellor remarking on this said:

"The most important of the bankrupt's transactions, and the largest of his debts are in Guernsey, which, though part of the dominions of the crown of Great Britain, are at a great distance from hence; and yet notwithstanding the commission is taken out in April only, the certificate is signed on the 18th of May after. Such precipitation in a matter of this kind is very improper... The admitting such a certificate as this, would be turning the edge of the law against creditors in favour of bankrupts, which is not to be suffered in a commercial country."<sup>(4)</sup>

In another case<sup>(5)</sup> where the commission was taken out on the 10th of September and the certificate signed on the 30th of November

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(3) 1 Atk. 84 (1754)

(4) Ibid. at 87

(5) Anon (1753) 1 Atk. 84.

the Lord Chancellor stayed the certificate and remarked:

"I disapprove extremely of commissioners being so precipitate in signing certificates. This appears to me to be what is commonly called a clearing commission; for the assignees are very near relations of the bankrupt. Such hast proceedings invert the very intention of the acts of parliament, which were made in favour of creditors, but are too often abused for the service of insolvent persons."<sup>(6)</sup>

where, however, the certificate had been signed by the requisite four parts in five of the creditors, but was held up by one of the creditors claiming collusion between the bankrupt and his son, a stay of the certificate was refused when new creditors admitted at the meeting called for the signing did not join in the petition to stay.<sup>(7)</sup> Where petitioners had an unliquidated demand and sought to have an account taken they were to swear to a balance in their favour before the certificate would be stayed;<sup>(8)</sup> for a petitioner ought to prove his debt or show some reasonable ground for his dissention.<sup>(9)</sup> The signatory ought not to be allowed to

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(6) Ibid.

(7) Ex parte Fydell (1741) 1 Atk. 73.

(8) Ex parte Johnson (1745) 1 Atk. 81

(9) Ex parte Williamson (1750) 1 Atk. 82.

sign in more than one capacity under ordinary circumstances.<sup>(10)</sup>

A somewhat strange situation arose in the case of one Cooper,<sup>(11)</sup> where on the death of his father, who had also been the petition creditor, Cooper found himself in the position of being able to appoint himself assignee by virtue of the size of the debt owed to his father. Cooper, under the normal process of a commission, then proceeded to sign his own certificate of discharge, a fact which caused the other creditors to hurriedly petition the Chancellor making weak allegations of fraud and collusion between the clerk to the commission, the father and the son. Lord Hardwicke, showing commendable faith in the justice and heavenly quality of English law, dismissed the petition saying:

"It is well known that by the law of England, the act of God or of the law can do no man any injury or wrong; but in this case if I was not to dismiss this petition, the act of God, as well as of the law, would do the person against who it is preferred an irreparable injury; ..... as no other creditor is qualified for that purpose during the life of the

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(10) *Ex parte Sausmerez* (1754) 1 Atk. 84 at 85. Lord Hardwicke in holding this to be so, gave the reasoning that a person having a debt in his own right and another in his right as an executor, could not sign the certificate in two distinct rights as both were to be considered his own particular debt. Yet in the earlier case of *Bishop v. Church* (1748) 1 Atk. 691, Lord Hardwicke had held that where a person owed a debt in a personal capacity, and was owed a debt as executrix of an estate, there could be no set off under the commission, the debts being due in different rights, and therefore no case of mutual credit. See p. 612.

(11) *Cooper's Case* - reported in *Succinct Digest*, pp.137-8.

"bankrupt."<sup>(12)</sup>

The Lord Chancellor, after stating that there had been no real attempt to produce evidence of fraud and collusion, but allowing room for doubt, concludes on this rather nice point:

"..... and indeed was there such collusion as suggested, the deceased has made the bankrupt's creditors ample amends, by enabling him, perhaps, to pay every one of them 20s. in the pound, though it may be against his intention."<sup>(13)</sup>

The fact that the laws were to be interpreted in favour of creditors seems to have led some to believe that very little ought to be alleged or proved by them in order to deprive the bankrupt of his freedom, a belief they were not permitted to retain. In the case of one Williamson,<sup>(14)</sup> creditors petitioned against the allowance of the certificate. One only of the creditors bothered to make affidavit of his debt to the commissioners, although he did not think it necessary to produce any proof of the debt, despite the fact that he claimed it to be a judgment debt; nor did he trouble

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(12) Ibid at 138.

(13) Ibid at 138.

(14) Ex parte Williamson (1750) 1 Atk. 82.

himself to take oath as to the debt. The bankrupt's books, etc., had been in Ireland and a delay had already been granted in order that creditors in Ireland might come in under the commission. The Lord Chancellor in allowing the certificate to issue said:

"I cannot lock up certificates for ever, and deprive a man of his liberty, which the law has given him, after a full time has been allowed for inquiry, and a full time also for creditors coming from Ireland, or sending affidavits over. Nothing fraudulent comes out upon the inquiry, and no debt has been proved in a year and a half's time. Therefore the certificate must be allowed, and ordered accordingly."<sup>(15)</sup>

This harrassing of the bankrupt to prevent the allowance of the certificate continued until 1776 when, on petition of the bankrupt, the Lord Chancellor is permitted a fuller use of his discretion in granting or disallowing such certificate, even though such had not been assented to by the necessary number of creditors.<sup>(16)</sup> Another Act followed in 1778,<sup>(17)</sup> but both the Acts were of temporary

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(15) Ibid at 83, 84.

(16) 16 Geo. III, c.38, s. 69. Two years earlier it had been enacted that uncertificated bankrupts might petition the Chancellor as to their plight, but it had only empowered the Chancellor to order the commissioners to look into the matter: 14 Geo. III, c.77, s.59 (1774)

(17) 18 Geo. III, c.52, s.76 (1778), the Act applied only to bankrupts under commissions issuing on or before 28th of January, 1778.

effect only and on their expiration, the situation on bankrupts under new commissions reverted to its former uncertainty.

Even under these Acts, the Chancellor did not act solely on his own discretion. On petition being made to him by the bankrupt, the Chancellor made an order that the Commissioners certify to him the conformity or non-conformity of the bankrupt to the provisions of the bankruptcy statutes. If it was certified that the bankrupt had in all ways conformed, then the Chancellor might grant the certificate to the bankrupt.<sup>(18)</sup>

It was not until 1809 that a change was made when it was enacted that the certificate might be granted on the consent of

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(18) In *Morris v. Levy*, (1778) 2 Black W. 1188, the bankrupt had petitioned the Chancellor for his certificate, and, on order to certify, the commissioners certified the bankrupt's conformity with the statutes, for some reason however the certificate did not issue. This was brought under the provisions of 16 Geo. III, c.38, ss.68, 69. Later the bankrupt was arrested for a debt that could have been proved under the commission and by s. 68 of that Act, in such a case the bankrupt might make application to a judge for an order discharging him from such arrest. Against such order evidence might be given of concealment or non-conformity by the bankrupt. In this case, evidence was given that the bankrupt had not in fact helped the assignees to get in the estate, but that he had gone to Holland at a time when he was required. For this reason, on the grounds of non-conformity, aid was refused.

three parts in five of number and value of the creditors.<sup>(19)</sup>

The Creditors' Rights Inter Se

As the basis of the bankruptcy enactments was to provide for equality of the creditor, there was no room at this stage of the law for certain preferred creditors.<sup>(20)</sup> Only where the creditor had actual security for his debt was he saved the trouble of coming in under the commission, unless he wished to take his chance under the common law.<sup>(1)</sup> The creditor with mortgage or pledge might obtain permission for his security to be sold and to prove for the residue, but he could not retain a security and seek also to prove in the bankruptcy.<sup>(2)</sup> Lord Chancellor Hardwicke

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(19) 49 Geo. III, c. 121, s. 18.

(20) Only the king had a right of preference. See Anon (1745) 1 Atk. 262.

(1) See p. 549.

(2) See pp 556-7.



explained the position as follows:<sup>(3)</sup>

"... every creditor is to swear whether he has a security or not; if he has security, and insists upon proving, he must deliver up the security for the benefit of the creditors at large, ...."

It was thought at one time that the creditor who lent money to the bankrupt just prior to his breaking and when he was in extreme circumstances ought to be preferred above the others, but it did not pass into the general law.<sup>(4)</sup>

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(3) *Ex parte Grove* (1747) 1 Atk. 104 at 105. The distinction between the holding of a security and the person who had a mortgage is brought out to some extent in *Ex parte Bennet* (1743) 2 Atk. 527. The bankrupt, prior to failure, had given Bennet several bonds, entered into by others to the bankrupt, as security for debts he owed. Bennet sought to prove for debts due upon notes payable at a future date, given him by the bankrupt, who failed before the date of payment. The query was whether Bennet must surrender the bonds for the good of the creditors in general before being admitted to his debt. In discussing the position, Lord Hardwicke said: "As to the bonds delivered to Bennet by [the bankrupt] before his bankruptcy; if it had been a mortgage assigned to Bennet, I should have directed the mortgaged premises to be sold; and if the produce arising from the sale had not been sufficient, I would have ordered that Bennet should be admitted under the commission as a creditor for the deficiency.

The doubt is, whether he can be admitted to prove the whole sum, unless he will deliver up the bonds?" *Ibid.* 528. It was a doubt the Chancellor did not resolve, referring the matter back to the commissioners for them to certify what sums Bennet had received on the bonds.

(4) *Small v. Oudley* (1727) 2 P. Wms. 427 at 429. See p. 622.

The act of bankruptcy itself marked the magic moment when all payments to and from the debtor were to cease under pain of having to pay a debt twice or refund the money received. This however tended to work hardship, especially in the cases of persons paying the bankrupt after the act of bankruptcy but before they knew of it, since they came within the probability of having to pay again. A remedy to this was provided by 1 Jac. I, c.15, when it was declared that all payments of debts made bona fide to the bankrupt after the act of bankruptcy, but before the debtor knew of his creditor's bankruptcy, were good payments of the debt.<sup>(5)</sup> This did not include the creditor who received payment from the bankrupt for goods supplied after the act of bankruptcy and before notice, and it is not until 1746 that the legislature provided an indemnity for the creditor who bona fide received payment for goods or bills before notice of the bankruptcy of his debtor.<sup>(6)</sup> Notice

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(5) S. 9

(6) 19 Geo. II, c.32, s. 1 (1746)

of such bankruptcy had generally to be strictly proved by the assignees or commissioners,<sup>(7)</sup> but the issuing of the commission was public notice and no payments might be made or accepted after that time.<sup>(8)</sup>

Although payment, knowing of the bankruptcy of one's creditor, might mean paying twice, it was possible for the Chancellor to avoid the normal consequences of such action if he wished. In *Botham v. Harrington*<sup>(9)</sup> debtors, on the instructions of their creditor, whom they knew to be bankrupt, gave goods by way of payment to a creditor of the bankrupt. This method of payment

(7) *Bourne v. Dodson* (1740) 1 Atk. 154. Remarking on this provision and the state of creditors of the bankrupt receiving payment before notice of the bankruptcy Lord Hardwicke said: "Now it is certain, though the act of parliament of the 1 Jac. I [c.15, s.9] has provided an indemnity for debtors to a bankrupt who pay their money to him without notice of the bankruptcy, yet that statute does not indemnify a creditor of the bankrupt, unless it appears that he had no notice of the bankruptcy at the time of receiving his money. The courts of law have considered this latter case as a hard one, and always held the assignees to a strict proof of notice." Ibid. 157.

(8) *Collet v. De Gols* (1735) Cases T. Talbot, 65, see per Lord Chancellor at 70: "... a commission is a public act, of which all are bound to take notice...". In *Brooks v. Sowerby* (1819) 8 Taunt. 783, it was held that a payment of a debt to a bankrupt, after the issuing of a commission, though made without actual knowledge, was not protected under s. 9 of 1 Jac. I, c.15. In the course of judgment Dallas, C.J., said: "First, then, what is meant by the words 'become a bankrupt?' A party becomes a bankrupt by the act of bankruptcy, and not by the commission, by which, founded on the act of bankruptcy he is only found or declared to be a bankrupt." Ibid at 791.

(9) *Nott. Ch. Cas. (S.S.) II*, p. 348, No. 489 (1676).

opened a possible fraudulent way in which the creditor might receive his full debt at the expense of the bankrupt's debtor who might be forced to pay twice. An action was brought to recover the goods from the bankrupt's creditor. Lord Nottingham allowing the action set out the judgment as follows:<sup>(10)</sup>

"1. No man can safely pay a debt to a bankrupt or receive a debt from him knowing him to be a bankrupt.

2. Here the debt is neither paid to the bankrupt nor received from the bankrupt literally, but the debtor of the bankrupt pays his debt to the creditor of the bankrupt and pays by delivery of the goods to that value.

3. This is all one in equity as if he had paid the debt by ready money and is the bankrupt's payment, being by his directions.

4. Though there had been no directions from the bankrupt, yet it ought to be relieved in equity because the commissioners have no remedy in law by Trover for these goods which never were the bankrupt's, and if this way prevail it will become a common practice for one creditor to get in his whole debt.

5. Though the debt may possibly be recovered again by (the) commissioners from Taylor and Offely [the bankrupt's debtors] who have thus illegally paid Farrington [the bankrupt's creditor]

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(10) Ibid.

"by assignment of goods, yet it is more equitable to charge Farrington than to make them pay their debt twice.

6. Therefore, Farrington ought to account for what he hath received, deducting only his proportion as creditor."

#### Distribution and Allowances

Although the tendency to treat the bankrupt as a criminal is one of the major aspects of the early bankruptcy enactments, yet his rights to be informed of the manner in which his estate was being distributed, and to be paid any monies left over, were nevertheless protected.<sup>(11)</sup>

Distribution itself might take place four months after the granting of the commission,<sup>(12)</sup> and in any case a dividend was to be paid within twelve months of such date.<sup>(13)</sup> Twenty-one

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(11) 13 Eliz. I, c.7, s.4; 1 Jac. I, c.15, s.10. In the case of joint commissions, the joint debts were to be paid out of the joint estate and the separate debts to be paid out of the separate estates. Any surplus in either case might then be used to satisfy the joint or separate creditors. Ex parte Crowder (1715) 2 Vern. 706. As to joint commissions see p. 529.

(12) This was first provided for in 1 Jac. I, c.15, s.2

(13) 5 Geo. II, c.30, s. 33. By s. 7 of 13 Eliz. I, c.7 any surplus from liabilities under ss. 5 and 6 of that Act [see pp. 588-9] after payment of creditors was to be divided; one half to the Crown and one half to the poor in hospitals within the city where the bankrupt lived. Under s.7 of 1 Jac. I, c.15, any sums forfeited by virtue of the provisions of that Act were recoverable only by a creditor or creditors; such sum, after the deduction of the costs of the action, to be distributed among the creditors.

days' warning of the intended payment of such dividend was to be given to the creditors by way of notice in the London Gazette.<sup>(14)</sup>

Prior to the appointment of the assignees, the majority in value of the creditors, attending the meeting called for that purpose, might if they wished direct how, with whom and where, the monies received by the assignees from the bankrupt's estate should be paid in and remain, until the time for payment to the creditors.<sup>(15)</sup>

At the meeting for the payment of the dividend, the assignees were to present their accounts to the commissioners and creditors, together with details of the estate of the bankrupt still outstanding. If the major part of the creditors so wished, the assignees might be examined on oath as to the accounts. The commissioners were to make out an order for the payment of a dividend pro rata to the creditors, which order was to be filed with the papers of the commission. A duplicate of the order was to be given to the assignees, in which order was to be found details as to the

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(14) Ibid. Lord Nottingham had much earlier ordered that no distribution was to be made until after fourteen days' notice of the intended payment had been given. - Nott. Ch. Cas. (S.S.) I, p. 36, No. 74 (1674)

(15) Ibid. s. 32.

time and place of the making of such order, the total amount of money remaining in the hands of the assignees to be divided, and the amount in the pound then ordered to be paid to the creditors. A book of receipts was to be kept by the assignees, that the creditors might acknowledge payment. The order and the receipt were to provide an effectual discharge to the assignees for the sums then paid out.<sup>(16)</sup>

Within eighteen months of the issuing of the commission, notice was to be given in the London Gazette of the holding of a meeting for the payment of a final dividend. At this meeting creditors who had not yet proved their debts under the commission might come in and prove.<sup>(17)</sup> The assignees were to produce, upon oath, their accounts and a statement as to the balance of money remaining in their hands. An order, similar to that issued for the first dividend, was to be made by the commissioners for the payment of the creditors in proportion to their debts.<sup>(18)</sup> Any future estate of the bankrupt, later becoming available to the assignees, was to be realized as soon as possible after they

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(16) Ibid. s. 33.

(17) As to the rights of creditors coming in after the payment of the first dividend, see p. 552.

(18) 5 Geo. II, c.30, s. 37.

received it, and a payment was to be made to the creditors within two months of such conversion into money.<sup>(19)</sup>

From the gross estate received by the assignees there had to be paid numerous expenses and costs, and these charges seriously ate into the amount which could finally be paid over to the creditors.<sup>(20)</sup>

The costs of suing out the commission, although borne in the first instance by the petitioning creditor, were to be a first charge upon the monies received by the assignees.<sup>(1)</sup> The commissioners were to receive not more than twenty shillings each per meeting, and they were not to charge their expenses for food and drink to the estate. A commissioner disobeying this rule was to be discharged and forbidden to act again as a commissioner of bankrupts.<sup>(2)</sup>

The assignees were to recover from the estate all monies necessarily expended by them in the execution of their duties as assignees, which would include costs of all actions by them in

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(19) Ibid.

(20) For the way in which the estate otherwise available to the creditors, might be eaten up by the costs of the commission see p. 662.

(1) 5 Geo. II, c.30, s.25.

(2) Ibid. s. 42. As to the course the commissioners adopted in order to boost their earnings see p. 667



order to recover the bankrupt's property, or actions commenced on the directions of the creditors.<sup>(3)</sup>

Under 1 Jac. I, c. 15 witnesses required to attend before the commissioners were to receive such costs and charges as the latter thought right.<sup>(4)</sup> where the bankrupt, being in execution on mesne process, was brought before the commissioners for examination such costs as were incurred were to be charged to the estate.<sup>(5)</sup> Such charges as might be made by any solicitor, clerk or attorney employed under the commission were to be submitted to a Chancery Master, and only the amount so certified by him as due was to be paid to the claimant by the assignees. For settling the amount to be paid the Master was to receive the sum of twenty shillings.<sup>(6)</sup>

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(3) Ibid ss. 33 and 46. In *Ex parte Whitchurch* (1749) 1 Atk. 210, the assignees of the bankrupt commenced proceedings in equity without the consent of the creditors contrary to s. 38 of 5 Geo. II, c.30. The solicitor instructed in such proceedings tendered his bill to be taxed by a Master. The creditors now objected to such costs being allowed on the grounds that the assignees were not authorised to give instructions. It was held that although the solicitor had a personal action against the instructing assignee, he could recover nothing from the bankrupt's estate.

(4) S. 6

(5) 5 Geo. II, c.30, s. 6

(6) Ibid. s. 46.

Finally there were various allowances which might have to be made which in turn lessened the net estate available to the creditors.

A person who, at any time after the period in which the bankrupt might have surrendered himself,<sup>(7)</sup> made discovery of part of the bankrupt's estate, which was previously unknown to the assignees or commissioners, was to receive 5% of the net realisation of the estate so recovered. If the assignee and majority of creditors present at the meeting so wished they might increase this reward, and such 5% plus any further sum was to be paid by the assignees to the discoverer, the assignees being allowed this sum in their accounts.<sup>(8)</sup>

Where a bankrupt was required to attend upon the assignees after the granting of his certificate he was to be allowed 2/6d. per day.<sup>(9)</sup> But it is in the allowances to the bankrupt who conformed to the acts and whose estate realized a certain percentage return to the creditors over and above such allowance that trouble arose.<sup>(10)</sup>

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(7) Under s. 11 of 4.5 Anne, c.4, this discovery was to be made within sixty days after the time in which the bankrupt might have surrendered himself had elapsed in order that the discoverer might receive his 3% reward.

(8) 5 Geo. II, c.30, s. 20

(9) Ibid. s. 36.

(10) A bankrupt might only claim the benefit of these allowances if he had conformed and had not fallen foul of the provisions relating to the giving of portions and losing money at games under s. 12, see pp.638-9.

If the repayment to the creditors reached ten shillings in the pound, then the bankrupt to be allowed 5% of the net estate, but the bankrupt not to receive more than a total of £200. Where the creditors received 12/6 in the £1, the bankrupt was to be allowed 7½% with a limit of £250. The bankrupt who repaid at the rate of 15/- in the pound had an allowance of 10% of the net estate, with a maximum allowance of £300.<sup>(11)</sup> Where the bankrupt failed to reach the magic rate of return of 10/- in the £1, then his fate lay with the commissioners and assignees who might make such allowance as they thought fit, as long as such sum did not amount to more than 3% of the net estate.<sup>(12)</sup>

Although these allowances were obtainable by the bankrupt or his successors,<sup>(13)</sup> they could only be obtained after the

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(11) 5 Geo. II, c.30, s. 7

(12) Ibid. s. 8

(13) Ex parte Calcot (1754) 1 Atk. 209.

payment of the final dividend,<sup>(14)</sup> and after the bankrupt had obtained his certificate.<sup>(15)</sup> Thus, during the period of his examination and until such time as the above events had taken place, the bankrupt existed only through the kindness of his friends and family, or by the coudtesy of his creditors, for he might not keep back any part of his estate in order to feed or clothe his family during this period of despair.

In *Thompson v. Councell*,<sup>(16)</sup> a commission issued against the bankrupt on the 2nd of August. Four days later the bankrupt, possessed of six children, requested his sister-in-law, the defendant, to take such plate from his house as would enable her to raise £20, so that he might provide for himself and his family.

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(14) *Ex parte Stiles* (1758) 1 Atk. 208. Lord Hardwicke explained the reason for this as follows: "... till after a final dividend, it cannot be seen whether the bankrupts will be intitled to any allowance at all, for the act of parliament directs that the neat produce of his estate shall be sufficient to pay the creditors of the bankrupt, who have proved their debts under the said commission, the sum of 10s. in the pound over and above such allowance." Ibid at 209.

(15) *Ex parte Grier* (1744) 1 Atk. 207. This was on the reasoning that any money received by the bankrupt prior to his certificate might immediately be seized back again by the creditors, for they have a right to all moneys coming to him prior to the certificate. Ibid at 208.

(16) 1 T.R. 157 (1786)

The defendant did as instructed, giving the bankrupt the £20 plus a further £14 of her own money. Upon this the bankrupt and his family lived for some fifty-five days. The assignees now brought an action against the defendant to recover damages in that she had interfered with property that had rightly vested in them. It was held that the assignees were entitled to recover, and the helplessness of the court in such cases is reflected in the judgment of Lord Mansfield:

"This is a very cruel case; but if the assignees insist upon their claim, this Court cannot assist the defendant."<sup>(17)</sup>

#### Costs Under the Commission

The position for the payment of the commissioners and the manner in which they should hold their meetings was for a considerable time one over which there was little rule or order.

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(17) Ibid at 159. The situation was explained in a more legal, if less humane manner, by Buller, J.: "Supposing the bankrupt ought to be maintained out of his effects during his examination, yet this defendant cannot be justified in taking the property of A to maintain B." Ibid.

The matter of whether the commissioners should take fees and travelling expenses is brought before the Star Chamber in 1607. Lord Coke felt that they were entitled to these payments "yet he was sorrye they had taken anythinge". The Court however reached the clear decision that they were most certainly entitled to reward for their work, otherwise no commissions would be executed. The Lord Chancellor, far from feeling that the commissioners had acted corruptly, "sayde he was sorrye they tooke no more".<sup>(18)</sup>

Lord Nottingham did not regard the question of expenses in so lenient a manner, for he says that these expenses "often-times swallow a great part of the bankrupt's estate. Some excuse there may be for this where great frauds and concealments occasion many suits. But all appointments of meetings in taverns, and all expenses in entertaining the commissioners there, ought to be wholly discountenanced and disallowed."<sup>(19)</sup>

The position in the seventeenth century is disliked by creditor and bankrupt. The creditors of Richard Thompson and partners petition for the stopping of proceedings under the bankruptcy enactments and that their offer to accept 6s. 8d. in the £1

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(18) Hawarde p. 342. *Lewes v. Lany* (1607)

(19) *Mott. Ch. Cas. (S.S.)* I, cxx, n. 1. [citing Nottingham Practice, Bankrupts 17]

be allowed. This they say is all the estate will ever pay, for the commissioners have now sat for six or seven months and so far have discovered only enough estate to pay their own charges.<sup>(20)</sup> This, however, is only one side of the story, and when the bankrupts tell their side it becomes plain that both are agreed on the uselessness of the commissioners.<sup>(1)</sup>

The practice of the commissioners to call their meetings at taverns and to charge to the estate the total cost of their days entertainment was curtailed in 1705, when it was enacted that the commissioners should not take any monies whatsoever for their expenses in eating and drinking.<sup>(2)</sup>

This restricting of the commissioners' appetites did nothing to restrict the amount they charged as expenses generally under the commission. In 1687 Lord Chancellor Jeffereys considered that the charges of 2 /- per day or 10/- for half a day for each commissioner as being exorbitant. He went on to say that he was no friend of the commissioners, since in a case which had previously

(20) S.P. (Dom) 1677-8 p. 644.

(1) S.P. (Dom) 1673, p. 85.

(2) 4. 5 Anne, c.4, s. 21. This was later 5 Geo. II, c.30, s.42.

come before him, the charges and expenses of the commissioners had come to £400 whilst the estate had only been able to realise 7/- in the £1 for the creditors.<sup>(3)</sup>

In 1718 a petition to the House of Commons complains of the excessive charges and general mis-management and to some extent the position was attempted to be remedied by the legislature.<sup>(4)</sup> Although Lord Chancellor Jeffereys might have been horrified at the 20/- allowance to each commissioner for each meeting held.<sup>(5)</sup> In 1739 we find a petition to the Lord Chancellor to the effect that certain commissioners have taken more than the allowed 20/- and also charged up the estate with their food and wine bill, for which action they are removed.<sup>(6)</sup>

To explain how the commissioners managed to overcome this difficulty we must look at the scheme which existed in London for the appointing of commissioners. About 1714 there was established what became known as the London Lists of Commissioners, appointment to which took place as follows:<sup>(7)</sup>

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(3) Backwell's Case (1687) 2 Ch. Cas. 190 at 192.

(4) Jo. H.C. vol. 19, p. 128.

(5) 5 Geo. I, c.24, s.13, the provisions granting the commissioners 20/- each meeting were re-enacted in s. 42 of 5 Geo. II, c.30. See p. 657.

(6) Viner Abr. Creditor & Bankrupt. 'O' (3), p. 77.

(7) Cooper (C.P.) 'A Brief Account of some of the Most Important Proceedings in Parliament' (1828) p. 262.



"These Commissioners are appointed by the Chancellor verbally, and without any other formality than a direction to the Secretary of Bankrupts to insert their names on the list; they take oath on their appointment, and are of course removable at the Chancellor's or their own will or pleasure. Upon the death, surrender, or removal of any commissioner, the name of another gentleman is, by his Lordship's order, entered by the Secretary on the list. There are five commissioners in each list, and the London Commissioners are directed in rotation to the five gentlemen contained in the different lists. Three commissioners only attend and receive fees; a practice which is supposed to have had its origin in some order of the Great Seal, which is now lost."<sup>(8)</sup>

In 1739 there were ten such lists of commissioners in operation, in 1761 there were twelve lists, by 1780 there were thirteen lists and by 1828 fourteen lists representing some seventy commissioners were operating in the London Commissions.<sup>(9)</sup>

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(8) In Wood's Case (1725) Sel. Cas. Temp. King 46, where a commissioner acted both as a commissioner and clerk to the commission, receiving money for both positions, with the result that there was always four commissioners present; the creditors successfully petitioned for his removal.

(9) Cooper, p. 263.

Seventy commissioners all with a living to make, yet restricted to a twenty shilling maximum per meeting, ingenuity was called for, and it came:

"The commissioners soon discovered ways of augmenting their gains without subjecting themselves to the penalty of the act. They appointed a great number of meetings to take place at the same time, although they knew it would be impossible for them to dispatch more than a small part of the matters to be brought before them, and they adjourned from time to time the considerations of the different cases which the accumulations of the different business had prevented them from finishing. In this manner, meetings were multiplied without end, and upon all of them the commissioners received their fees.

The letter of the act was observed, the spirit violated."<sup>(10)</sup>

In this way it appears that a good commissioner could earn something like £300 a year, and to the many young unskilled men who came to make up the lists this no doubt represented a reasonable start. It has been calculated that the cost of the commission when in session was about two shillings per minute.<sup>(11)</sup>

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(10) Ibid p. 267

(11) Report of the Commissioners Appointed to Inquire into the Practice in Chancery (1826) - Appx. 'A' Evidence, p. 406, evidence of Basil Monta .

During the year 1826 expenditure under commission of bankrupts amounted to an estimated magnificent £84,777. 17. 9d, a sum made up as follows:

	£	s	d
Patentee <sup>(12)</sup>	16,176	11	5
Lord Chancellor	12,601	6	4
London Commissioners	28,000	0	0
Country Commissioners	28,000	0	0

It is difficult to imagine how twelve common law court judges managed to exist on a miserable £74,000.<sup>(13)</sup>

In the country the commissions did not work on lists as in London, and the practice of the petitioning creditor inserting the names of possible commissioners at the foot of the petition continued. This did not prevent the process being misused, and Lord Eldon in the course of castigating the bankruptcy laws<sup>(14)</sup>

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(12) The person holding the appointment or patent of the Subpoena Office. Every suit in Chancery was commenced by a writ of subpoena. It was the duty of such Patentee of the Subpoena Office by himself, or through deputies, to make out, write and engross all writs of subpoena sued out of the Court of Chancery, sealed with the Great Seal. See 'Reports of the Commissioners for Examining into the Duties, Salaries and Emoluments of the Officers, Clerks and Ministers of the Several Courts of Justice' (1816) p. 88.

(13) Coover, p. 327.

(14) Regulations in Bankruptcy (1801) 6 Ves. Jun. 1.

explained the behaviour under such commissions.

"As they are frequently conducted in the country, they are little more than stock in trade for the commissioners, the assignees and solicitors; instead of the solicitors attending to their duty as ministers of the Court for they are so, commissions of bankruptcy are treated as matter of traffic: A. taking out the commission; B. & C. to be his commissioners. They are considered as stock in trade; and calculations are made, how many commissions can be brought into the partnership. Unless the Court holds a strong hand over bankruptcy, particularly as administered in the country, it is itself accessory to as great a nuisance as any known in the land; and known to pass under the forms of its law."<sup>(15)</sup>

Lord Eldon made this speech on taking the Chancellorship in 1801, he was also the Chancellor who took £12,601. 6. 4d. in 1826, but that was the system, and one cannot blame a man for taking what was considered by his country to be his due.<sup>(16)</sup>

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(15) Ibid at 1, 2.

(16) Lord Eldon was not only well aware of the ridiculous situation which had been reached by this time, but also tried hard to bring about a change in that system. In the course of debate in the House of Lords over an Insolvent Debtors Relief Bill, he suggested that: "It would probably be found the best system to permit the statute of bankruptcy to be issued not merely against those who were traders, but against insolvent debtors generally". - Hansard 1st series XXIII, 324 - In this he was far ahead of the legislature. Lord Eldon made this suggestion in 1812, only in 1861 (24. 25 Vic, c. 134) were the trader and non-trader finally re-united.

It is not until 1831 that the Lord Chancellor lost his immediate right to hear bankruptcy cases.<sup>(17)</sup>

The Records of the Commission

The provisions for the keeping of the records and minutes of meetings of the commissioners for some reason escaped the legislature for a very long time. An order of the Lord Chancellor in 1674, that all commissions should be executed in one place certain, no doubt meant fewer documents being lost.<sup>(18)</sup> In 1680 the Lord Chancellor states that:

"... many complaints and petitions have been frequently made and presented unto his Lordship, occasioned by the ill management of commissions of bankrupts in and about the city of London and Westminster, and the counties adjacent, and more particularly of the losing and mislaying of such commissions, and the depositions and orders thereupon taken whereby great loss and prejudice hath happened to the subject:"

therefore a person is to be appointed to have custody of commissions and proceedings, such person to receive all the documents

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(17) 1. 2 Will. IV, c.56, ss. 1 and 2 (1831)

(18) Nott. Ch. Cas. (S.S.) I, p. 36, No. 74. An order "that records of Commissioners of Bankruptcy should be kept" had in fact been made as early as 1618. See Tudor and Stuart Proclamations, vol. I, p.144, No. 1221 - Aug. 1618.

"and see them to be safely kept in some public or convenient place, whereof all persons may have notice;..."<sup>(19)</sup>

At first depositions taken before the commissioners were held to be inadmissible in westminster Hall, and one plaintiff who relied on such depositions to support him had his claim dismissed.<sup>(20)</sup>

Some attempt to remedy this is made in the reign of George I,<sup>(1)</sup> when it is stated that on petition to the Lord Chancellor the proceedings of the commission, depositions taken and certificate given may be entered on record and a true copy given in evidence where required. The somewhat temporary nature of this enactment seems to have resulted in the complete lapse of this provision, for later it is stated that due to the death of clerks and secretaries to commissions quite often the proceedings of such commissions are lost or mislaid, and even where this is not so, still the proceedings and depositions in such commissions being not of record, cannot be given in evidence.<sup>(2)</sup> To remedy

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(19) Chancery Order 25 Mar 1680 - Beames (J.) 'General Orders of the High Court of Chancery' (1815) p. 255.

(20) Greenwood v. Knipe (1677) Nott. Ch. Cas. (S.S.) II, p. 570, No. 574.

(1) 5 Geo. I, c.24, s. 30.

(2) Preamble to s. 41 of 5 Geo. II, c.30.

this the Lord Chancellor is empowered on petition to "order such commissions, depositions, proceedings, and certificates, or other matters or things, to be entered of record". Such record may then be produced if necessary to prove the matters contained in it in any court of record. Similarly where a certificate was allowed and confirmed and entered on record, a signed and attested true copy of such certificate might be produced in any court of record:

".. and be, without any further proof deemed, adjudged, and taken, to be a full and effectual bar and discharge of and against any action or suit, which shall be commenced or brought by any Creditor or Creditors of such Bankrupt, for any debt or demand contracted, due or demandable, before the issuing of such commission, unless any Creditor or Creditors of the person that hath such certificate, shall prove that such certificate was fraudulently obtained;..."<sup>(3)</sup>

The Lord Chancellor is further empowered to "appoint a certain proper place near the inns of court", where the matters entered

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(3) Ibid. s. 41.

on record are to be kept and further to appoint a person to enter of record such matters and to keep them safe.<sup>(4)</sup>

#### Superseding the Commission

The right of the Chancellor to supersede a commission where it was being wrongfully carried on was one of the corner stones of the Chancellor's bankruptcy jurisdiction. Lord Nottingham was firmly of the opinion that "the Chancery may and ought to supersede a commission where injustice and indiscretion of the Commissioners is apparent".<sup>(5)</sup> The procedure was for the party wishing to have the commission superseded to make petition to the Chancellor setting out the facts relied on. The Chancellor might then allow a writ of supersedeas or

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(4) Still the loss of papers relating to commissions continues. In 1745 a petition before the Lord Chancellor is adjourned due to the want of papers concerning the commission which have been mislaid: *Ex parte Lindsey* 1 Atk. 220.

(5) *Nott. Ch. Cas. (S.S.)* I, cxvi.



direct that the issue as to the bankruptcy be tried.<sup>(6)</sup>

A commission might be superseded on petition by all the creditors if they have assented to a composition,<sup>(7)</sup> or on the bankrupt paying his creditors twenty shillings in the pound plus interest to the date of repayment.<sup>(8)</sup>

Prior to allowing a creditor to petition where his debt had not become due,<sup>(9)</sup> a commission issuing by virtue of such

(6) A good illustration of the procedure in practice is afforded in the case of one Gulston. Gulston having had a commission issued against him applied that it be superseded. At the time of the petition Gulston was out of the country in Barbados. Lord Chancellor Hardwicke decided as follows: "In consideration of Mr. Gulston's being out of the kingdom, I think it very proper to direct an issue to try if he was a bankrupt before the taking out of the commission. If he had been in England, I should have been of opinion to refer it back to the commissioners, to consider upon the evidence before them, whether they would declare him a bankrupt." It was ordered that the matter proceed to a trial at law in the King's Bench to decide whether Gulston was a bankrupt within the statutes of bankruptcy. *Ex parte Gulston* (1743) 1 Atk. 193 at 195. A little short of ten years later (so it appears) the matter was tried before Lord Chief Justice Lee, who certified that a jury had found that Gulston was not a bankrupt. The Lord Chancellor ordered a writ of supersedeas be issued and also made an order that the petitioning creditor pay the costs of the application in equity, and the taxed costs for the action at law. *Ex parte Gulston* (1753) 1 Atk. 139 at 140.

(7) See *Re Hubert and Nelson*, (1734) Davies, pp. 10-12.

(8) *Ex parte Rooke* (1753) 1 Atk. 244. And see *Bromley v. Goodere* (1743) 1 Atk. 75 at 80.

(9) 5 Geo. II, c.30, s. 22.

petition might be set aside on complaint by the bankrupt.<sup>(10)</sup> Commissions taken out 'fraudulently and maliciously' might be superseded by the Chancellor on complaint made to him by an aggrieved party, the petitioning creditor's bond being assignable to the complainant who might sue on the bond in his own name.<sup>(11)</sup> In *Smithey v. Edmonson*<sup>(12)</sup> the plaintiff brought an action against the defendant for having fraudulently sued out a commission against one Webb in order to delay the other creditors, which commission had been superseded, and another obtained by the plaintiff. The Chancellor ordered that the costs of the first commission, some £19, be paid by the defendant and he assigned the defendant's bond to the plaintiff but without assessing any damages for the fraudulent commission. It was contended that the bond was only intended to cover damages actually assessed, in this case £19 odd. Lord Ellenborough admitted that the Chancellor might assess damages

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(10) *Ex parte Mackerness* (1714) 1 P. Wms. 260.

(11) 5 Geo. II, c.30, s. 23.

(12) 3 East 22 (1802)

and assign the bond to recover the same to the injured party, but as the Chancellor had assigned the bond without assessing damages it must be taken that he found the damages to amount to the whole penalty of the bond.<sup>(10)</sup>

Where a commission was sued out by the creditor in order to force the debtor to come to a composition with him after which the creditor would allow the commission to lapse, the Chancellor might supersede such commission and grant a new one to the other creditors.<sup>(11)</sup>

Defects in the form of the issuing of the commission might lead to it being superseded, but mere clerical errors were not sufficient.<sup>(12)</sup> If the commission were in fact superseded for some defect of form, but there was no doubt as to the act of bankruptcy then the petitioning creditor was only to pay the costs of the action to supersede.<sup>(13)</sup>

(10) Ibid at 33. In *Re Lathrop* (1802) *London Chronicle*, vol. 91, p. 607, upon the bankrupt complaining to the commissioners that the sole reason for the commission was to deprive him of his property, the commissioners advised him to petition the Lord Chancellor. In "which case they had no doubt but that his Lordship would supersede the commission that was issued against him." Ibid.

(11) 5 Geo. II, c.30, s. 24. The creditor in such a case forfeited his debt, and such behaviour became an act of bankruptcy in itself. See p. 507.

(12) *Woolrich's Case* (1076) *Nott. Ch. Cas. (S.S.) I*, pp. 314-5, No. 454.

(13) *Ex parte Goodwin* (1740) 1 *Atk.* 100.

Under the early statutes if the bankrupt died, the commission abated, but by 1 Jac. I, c. 15, s. 12 it was enacted that after a commission had been sued forth and dealt in by the commissioners that the death of the offender was not to affect the commissioners and they were to continue to gather and distribute the estate.<sup>(14)</sup>

The death of the king was also a reason for the abatement of a commission, a situation which prevailed until the major reform under George II, when the law was altered so that no abatement of a commission was to take place by virtue of the king's death.<sup>(15)</sup> It was further provided that if it became necessary to renew a commission because of the death of a commissioner or some other cause, then the fees charged for such renewal should only be half the amount normally paid.<sup>(16)</sup>

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(14) The amount of dealing in the commission necessary to enable the commissioners to continue after the death of the bankrupt was very small. In *Warrington v. Norton* (1736) Cases T. Talbot, 184, a commission was issued at 11 a.m., the commissioners declared the debtor a bankrupt at 3 p.m., and at 6 p.m. an assignment of the bankrupt's property was made. It was then discovered that the bankrupt had died at 1 p.m. that day. Lord Talbot, holding that the commission might proceed, said: "...whatever is done in pursuance of the commission is a dealing in it if never so minute..". Ibid at 185.

(15) 5 Geo. II, c. 30, s. 45.

(16) Ibid. By 3 Geo. IV, c. 74, s. 1. a joint commission might be superseded as to one or more the bankrupts without prejudice to the commission.

CHAPTER 24THE WAY AHEAD

The arrival of 5 Geo. II, c.30<sup>(1)</sup> marked the end of the piecemeal attempts to produce bankruptcy legislation. This enactment, plus the seven other major statutes stemming from Henry VIII,<sup>(2)</sup> must now contend with all the difficulties which are bound to be found in a nation embarking on the building of an empire through the commercial ventures of its merchants. It is over ninety years before there will be any real attempt to consolidate and produce a complete bankruptcy code.<sup>(3)</sup>

Failure Under the Acts

Despite all the merchant activity of these early years there seems to be no acceptance of the need for clemency, nor of the fact that breaking is a necessary evil of trading.

In 1585 we hear of one Anthony Morley, who, tiring of being

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(1) 1731-2

(2) 34. 35 Hen. VIII, c.4

(3) 6 Geo. IV, c.16 (1825)

a land owner, goes into steel, erecting forges and furnaces at Merthyr Tydfil and Llanwonno. To improve his works he is forced to borrow, but after seven years of hard work, due to a number of bad debts owing to him, and the fact he now owes £600 he fails. "The Statute of Bankruptcy was applied mercilessly, all his property and the iron works - the latter alone were valued at a thousand pounds - were sequestered, and he died penniless."<sup>(4)</sup>

The need to borrow to support the various ventures brings with it the return of usury, this time to remain. The fact that such usurious debt would not support a commission, nor be enforced under it, does not lessen the effect of usury in being the prime cause in many failures.<sup>(5)</sup> The cries relating to "th' excesse of Apparrell in marchauntes' wyves & there daughters"<sup>(6)</sup> largely stifle the few who seek to show that trade necessitates losses. The position of the bankrupt is one of ever increasing ignomy, there must have been many merchants who would have given their all

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(4) Owen (G.) 'Elizabethan Wales' (1962) p. 162.

(5) See Wilson (T.) 'Discourse on Usurie' (1584) f. 31 b., where of usury he says: "And this is the occasion of divers bankruptes, of many decaied gentlemen, that are compelled for little to sell their landes awaye, and a number of honest occupiers, that by these meanes are utterlie undone, both they, their wives, and their children."

(6) Hawarde, p. 57.

to have been able to exclaim with Evelyn "This day I paid all my debts to a farthing, o blessed day."<sup>(7)</sup>

Disaster could strike in so many ways for the trader, plague, war, the influx of foreign traders, even the fire of London all helped to produce failure, yet it is not until the reign of Anne that for the first time there is machinery introduced whereby the bankrupt might shake off his old debts, and this was so dependent upon the goodwill of the creditors as to be almost rendered useless.<sup>(8)</sup> Prior to the passing of 5 Geo. I, c.24 bankrupts raised their voices against the fact that one or two creditors might effectively block any chance of the bankrupt ever gaining his certificate:

"The Act now depending, obliges all Persons who shall have Statutes awarded against them, to surrender Themselves and Effects, under the Penalty of Death: As Death is to be the Punishment of them who shall disobey the Law, it is most humbly hoped, That they who shall Fairly and Justly obey it, shall not be Punished in a much worse Manner, which they must

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(7) Evelyn's Diary - Edited by Bray (W.) (3rd edition 1827) vol. II, p. 64 - 9th June, 1653.

(8) 6 Anne, c.22, s. 2. This largely restricted the liberty first granted by 4.5 Anne, c.4, s. 8.

"inevitably be, if, after the delivering up their All, they must lose their Liberty likewise: for Whereas such who shall refuse to submit, and by that incur the Penalty of Felony, have a Chance of being acquitted at their Tryal; whilst such as are willing to submit to the Law, and deliver their Effects for the Benefit of their Creditors, may, by being restrained of their Liberty, Starve in Gaol; and their Families wanting Bread at the same Time: And all this is to be done, at the Pleasure of One, Two or three Creditors refusing to allow the Liberty of the said Bankrupt, notwithstanding he hath in all Things complied as the said Law directs.

As it frequently hath happened to be in the Power of One or Two Creditors preventing the rest of Receiving such Satisfaction as could be made them, by their Debtor, when they have been willing to accept of the same; so by the present Bill now depending, the Bankrupt may be deprived of his Liberty, by One or Two Persons refusing to Sign to his Discharge, without assigning any Just Reason for such his Refusal, to the intire Loss of the Bankrupt's Liberty."<sup>(9)</sup>

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(9) Broadside No. 277, Goldsmith Library, University of London, see Jo. H.C. vol. 19, p. 78.



The petition showed a great deal of sense, it hit at an evil which was still being talked about a hundred years later,<sup>(10)</sup> but the law was not to be hurried, when the gaols were full of ordinary debtors who might well remain there for eternity, the legislature was not going to improve the lot of the average bankrupt to the extent of permitting the Lord Chancellor to decide whether or not a certificate should be allowed.<sup>(11)</sup> It is small wonder that the failure of a trader is referred to as "That most dreadful of all human Conditions the Case of Bankruptcy,"<sup>(12)</sup> and only a few would say at the beginning of the eighteenth century that someone "had lately the Misfortune to become a Bankrupt."<sup>(13)</sup>

The early position of the commissioners seems to have been one of uncertainty and even less control,<sup>(14)</sup> In 1680

(10) See p. 699

(11) Some temporary relief was given in 1776 (16 Geo. III, c.38, s.69) and in 1778 (18 Geo. III, c.52, s.76) but these Acts were no more than a gesture and did little to aid the bankrupt. See pp. 647, 698.

(12) Steele (Sir R.) Spectator No. 428, Friday, July 11th, 1712. (1797 Edition, vol. 6, p. 180)

(13) Free-thinker No. 86 Friday, January 16th, 1718 (2nd Edition 1733, vol. II, p. 144)

(14) A Chancery Order of 1618 states that care should be taken that the same parties did not act as commissioners too often, but this did not have any lasting effect. See Beames 'Chancery Orders' p. 43, Order No. 96.

the Lord Chancellor states that he has received many complaints and petitions regarding the ill-management of the commissions and relating that there is much losing of commissions, depositions, etc.<sup>(15)</sup> The lack of enforcement of the taking oath by the commissioners is the subject of a petition to the House of Commons by the merchants and traders of London in 1719, where they state:<sup>(16)</sup>

"That through the excessive Charges of Commissions of Bankrupts, and proceedings, thereupon, in most cases of Bankruptcy, the Estate and Effects of Bankrupts' are swallowed up, and the Creditors become losers, most commonly very considerably: That the Commissioners nominated in these Commissions, being commonly Attornies, and persons of inferior Quality to those in Commissions of the Peace; and under no Obligation of an Oath, for the true and faithful Discharge of their Trusts; are apt to be very partial and dilatory in their Proceedings, out of sinister Ends of Gain to themselves; to the Prejudice of both Creditor and Debtor: And praying, That the

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(15) Ibid p. 255 Order of 25th March, 1680. See p. 670.

(16) Jo. H.C. Vol. 19, p. 128.

"Commissioners may be obliged to take Oath for the Purpose."

"Ordered: That the said Petition be referred to the Committee of the whole House to whom the Bill for the preventing Frauds committed by Bankrupts is committed."

This prayer of the merchants is answered, but they did not foresee the manner in which the commissioners might still manage to avoid the greater part of their duties.<sup>(17)</sup>

The bursting of the South Sea Bubble in 1725 meant economic misery and bankruptcy for many, the meagre protection given for those who held shares in the company would save only the gentlemen whose sole venture into commerce was by way of investment.<sup>(18)</sup> If merchants had cared to listen to this bursting bubble they would have heard it heralding the official arrival of an open season in mercantile failure through speculation.

It is ironical that the man who was to adjudicate more fully than any of his predecessors on the laws concerning bankrupts, should in fact have foreseen the total inadequacy of the

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(17) See 5 Geo. I, c.24, s.32, this was later s. 43 of 5 Geo. II, c. 30.

(18) For examples of such provisions see 9 Anne, c.15, s.45 (1710) - South Sea Corporation.

proposals for what became 5 Geo. II, c.30. Lord Hardwicke in a letter to Robert Dundas, Lord President of the Court of Session in Scotland in 1755 writes thus:

"..... about bankrupts your Lordship very justly observes that the principal mischief is the inequality occasioned, as the law now stands, in the distribution of the effects amongst the creditors. I don't at all wonder that, upon consideration, your Lordship should not approve of adopting the modern scheme of our laws relating to bankrupts into the law of Scotland. They are a great fund of profits to several officers belonging to the Great Seal; but I am firmly persuaded that they are the greatest source of fraud and perjury, that ever took its rise from the established law of any country. I had seen so much in my experience at the bar, that when I was Attorney General, I opposed our last Act concerning bankrupts, viz. 5th of his present Majesty, in the House of Commons."<sup>(19)</sup>

Whatever fraud existed before the Act, it could not rival that which came into being after its enactment. Yet in some

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(19) Yorke (P.C.) 'The Life and Correspondence of Phillip Yorke Lord Chancellor Hardwicke' (1913) vol. II, p. 546.

ways the legislature did try to introduce clemency into the former harshness of the laws, for at least they provided the machinery whereby the bankrupt might, under certain circumstances, obtain his discharge, they provided ways and means by which allowances might be made to the bankrupt who properly conformed. The fees of the commissioners were made certain and directives made as to the payment of expenses incurred during the course of the commission.

Goodinge, writing prior to 5 Geo. I, c.24 and in a vein largely in advance of his age, said:

"It is morally impossible to think that a Merchant  
can make a solemn Protestation in this sort;  
'I owe to no Body, and no Body owes to me'." (20)

Parliament to a limited extent accepted this, but when they thought of the bankrupt, they thought of a spendthrift speculator, allowing the odd reflection that some bankrupts were in fact honest. To this honest bankrupt they offered the prize of discharge, which, with great diligence and fortitude, he might attain. To deal with the fraudulent bankrupt the legislature looked back into history and discovered with Raleigh the

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(20) Goodinge, preface

sure cure for all his ills, the simple punishment of death.

### Capital Punishment

The provision of capital punishment for the fraudulent bankrupt made its first appearance with Anne,<sup>(1)</sup> was revived with George I,<sup>(2)</sup> confirmed and made permanent under George II,<sup>(3)</sup> yet in some ways it never really brought about the results which one might normally expect from so dire a threat.<sup>(4)</sup>

Blackstone tells us that by the mid-eighteenth century there were some one hundred and sixty crimes on the Statute Book for which the proper penalty was death,<sup>(5)</sup> history tells us that in fact only up to the mid-eighteenth century were the provisions strictly enforced.<sup>(6)</sup>

In the case of fraudulent bankrupts it has been estimated

(1) 4. 5. Anne, c. 4, s. 1

(2) 5 Geo. I, c. 24, s. 1

(3) 5 Geo. II, c. 30, s. 1

(4) No doubt many creditors feared that they might too easily find themselves in similar circumstances.

(5) Bl. Comm. IV, p. 18.

(6) See Radzinowicz I, pp. 149-164.

that there was certainly not more than ten prosecutions, and doubted whether the number of actual executions ever reached half that number.<sup>(7)</sup>

The first man to suffer death under these enactments appears to have been a tallow chandler named Town, who was executed at Tyburn, on the 23rd of December, 1712.<sup>(8)</sup> Town's story is one in which fate rather than man plays the major role. Town seeking to fly to Holland packed between his waist-coat and coat two bags containing between them eight hundred guineas. At Sandwich he went on board a packet-boat which was bound for Ostend, previously it had been his intention to sail for Amsterdam, but he arrived after the ship had sailed. It was an ill wind that blew for Town, he became sea-sick after the boat put out to sea and in leaning over the side of the vessel, the bags containing his money dropped into the sea, after which the vessel was driven back by storm and had to put into Sandwich. Before the vessel sailed again Town was arrested, and on being searched was found to have twenty guineas in gold and about £5. 7s. 6d. in silver. At his trial the evidence was rather

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(7) 'Evidence 1818' per Basil Montagu, pp. 20-1.

(8) R. v. Town - New Newgate Calendar vol. I, pp. 96-7.

overwhelming and Town was sentenced to death. He refused, contrary to the custom of the time, to acknowledge the justice of his sentence right up to the end. "He was exactly forty-one years of age the day of his execution; a circumstance which, with great composure, he mentioned to the ordinary of Newgate, on his way to the place of execution."<sup>(9)</sup>

In 1756 one Thompson was executed for not surrendering himself as set out in the Act,<sup>(10)</sup> but it is five years later that there takes place the execution of the most notorious bankrupt to suffer under the Act, one John Perrott. Perjury, fraud and fraudulent concealment, riotous living, and finally downfall brought about through the agency of a woman, all play their part in this colourful case, which had its end on the gallows at Smithfield at 11 a.m. on a sombre November morning.<sup>(11)</sup>

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(9) Ibid at 97.

(10) R. v. Thompson - see Gentleman's Magazine, vol. 26, p. 90, he was executed on Monday, 23rd February, 1756. For details of the circumstances leading up to Thompson's conviction and execution, see ibid pp. 118-9.

(11) Some facts of the case are reported in 2 Burr. 1122, 1215. A much more detailed account of the circumstances leading to Perrott's conviction and execution is to be found in the New Newgate Calendar, vol. 3, pp. 97-113, and reprinted in the appx. at pp. 794-815.



Others were condemned under the Act but it is not always certain whether or not the sentence was carried out,<sup>(12)</sup> probably the last man to be condemned to death was a George Page in 1819, his indictment charged "that the prisoner did not within the forty-two days prescribed by the Act, make any disclosure of his estate; and that he did feloniously make default".<sup>(13)</sup>

England was by no means the only country to punish fraudulent bankrupts in this manner, nor the only place where such measures were so little observed, a similar practice had been introduced a century earlier in France. By an Ordinance of 1536 corporal punishment of varying degrees had been introduced, and these measures were gradually increased until in 1609 fraudulent bankruptcy was made punishable by death. The measure relating to death was repeated in 1673 and again in 1716, but apparently

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(12) Montagu gives as persons executed under the Act, Thompson, Perrott, and someone at York. Town he says is a mistake because of the date, there seems to be no reason however why Town should not have suffered under the provisions of 4. 5 Anne, c.4, s. 1, which was continued from 1709 for the space of five years - 7 Anne, c. 25, s. 4 (1708) Montagu goes on to say that four others were tried for fraudulent behaviour within the bankruptcy enactments; two of whom were found guilty but not executed, and the other two being acquitted - 'Evidence 1818' p. 21.

(13) Gentleman's Magazine (1819) vol. 89, pt. I, p. 175 - Friday, February 19th.

it was not observed in practice.<sup>(14)</sup>

This lack of prosecutions seems to stem from the fact that, although creditors were prepared to keep a man without a certificate and imprisoned for very long periods, which would probably bring about death anyway, they were not prepared to be directly responsible.<sup>(15)</sup> "Thou shalt not kill" was remembered by the good Christian creditor in a Christian country, it conveniently did not mention allowing one's debtor to starve to death in gaol, that was the law.

The cries against this punishment were always there, but they lacked someone of sufficient standing to force them upon the legislature. In 1767<sup>(16)</sup> a carefully prepared study of punishment was printed in which the author suggested that the bankrupt might be kept in a state of comparative slavery in order, or, to work out his debts, eight years later, still campaigning that the death penalty in bankruptcy be abolished, he said:

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(14) Von Bar (L.) 'History of Continental Criminal Law' (C.L.H.S. vol. 6), p. 288.

(15) See 'Evidence 1818' pp. 17-19. In giving evidence Basil Montague cites a case where the bankrupt was shown to have been guilty of gross fraud and concealment of his goods, and yet the assignees refused to prosecute as they did not wish to hang the man. Ibid at 17.

(16) Beccaria Bonesana (Marquis C.) 'An Essay on Crimes and Punishments' (1767).

"It may be alleged, that the interest of commerce and property should be secured; but commerce and property are not the end of the social compact, but the means of obtaining that end; and to expose all the members of society to cruel laws, to preserve them from evils, necessarily occasioned by the infinite combinations which result from the actual state of political societies, would be to make the end subservient to the means, a paralogism in all sciences, and particularly in politicks. In former editions of this work, I myself fell into this error, when I said that the honest bankrupt should be kept in custody, as a pledge for his debts, or employed, as a slave, to work for his creditors. I am ashamed of having adopted so cruel an opinion. I have been accused of impiety; I did not deserve it. I have been accused of sedition; I deserved it as little. But I insulted all the rights of humanity, and was never reproached."<sup>(17)</sup>

By the beginning of the nineteenth century the reform

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(17) Beccaria (4th edition 1775) p. 145 fn.

movement was getting on its feet. Howard<sup>(18)</sup> and Neild<sup>(19)</sup> had travelled the prisons of this and other countries and their writings were beginning to have a disquieting effect upon their readers. People now felt that there was a great deal of difference between the honest and the fraudulent bankrupt, yet there are still the doubters. There are still those who say with true conviction that: "In a commercial country like ours, perhaps it is impossible that bankruptcies should be wholly avoided; but, out of a hundred, probably there is not more than one which is the consequence of unavoidable misfortune."<sup>(20)</sup> Only one in a hundred innocent, presumably the other ninety-nine should hang!

In 1818 there was reported to the House of Commons 'Evidence taken before the Select Committee Appointed to Consider of the Bankrupt Laws.'<sup>(1)</sup> This Committee had listened

(18) See Howard (J.) 'The State of Prisons in England and Wales' (4th edition 1792) vol. I, pp. 1-26.

(19) See Neild (J.) 'An Account of the Rise, Progress, and Present State of the Society for the Discharge and Relief of Persons Imprisoned for Small Debts Throughout England and Wales' (3rd edition 1808). James Neild carried on the work started by Howard of visiting prisons and publishing his findings through a society pledged to bring relief to debtors imprisoned for only small sums of money.

(20) Monthly Magazine (1805) vol. 19, pp. 538-540 at p. 538.

(1) The Committee was set up in 1817. See further p. 700.

to the opinions of commissioners of bankrupts, politicians and others who might be of help to them, the evidence received was overwhelming in its condemnation of the retaining of the death penalty. The committee reported to the House of Commons as follows:

"The law by which capital punishment is ordered to be inflicted upon fraudulent bankrupts, and upon those who do not surrender, is so severe, and so repugnant to the common sentiments of mankind, that it becomes totally inefficient in its operation; and hence the most flagitious individuals escape with impunity:<sup>(2)</sup> That it is the opinion of the Committee, the severity of the law against bankrupts, in the cases of non-surrender, or for concealment to the amount of [£20], has a tendency to defeat the object of the Legislature: it is therefore recommended, that so much of the 5 Geo. II, c.30, as subjects, persons found guilty of such offences, or either of them, to suffer as felons 'without benefit of clergy,' should be repealed; and that, in lieu thereof, the punishment of transportation for life, or for any period not less than fourteen years, should be enacted."<sup>(3)</sup>

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(2) Report of the Select Committee on the Bankrupt Laws - 1818, p. 7.

(3) Ibid p. 19.

In 1820 the capital provision of 5 Geo. II, c.30, was repealed and the fraudulent bankrupt became a potential commonwealth member.<sup>(4)</sup> Basil Montagu, a one time commissioner of bankrupts, who had worked tirelessly for the ending of capital punishment in such cases, writing one year after its repeal said:

"The law is abolished. The progress of knowledge and of Christianity has destroyed, and will continue to destroy these mistaken enactments; and the law, however reluctantly, must follow their commands."<sup>(5)</sup>

#### Reform's Long Road

Having travelled so far with the bankrupt it would be perhaps unfair to leave him completely stranded in 1732, with his years of toil ahead. The Act never really worked, but it did block the gap at a time when there was a desperate need

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(4) 1 Geo. IV, c. 115

(5) Montagu (B.) 'Thoughts upon the Abolition of the Punishment of Death in cases of Bankruptcy' (1821) p. 32.

to discourage the commissioner from overcharging, and the provision of a certificate was somewhat revolutionary in its own way. After all the general principle had always been that a man must pay his debts; it was on this principle that men rotted the eighteenth century away in debtors' prisons all over the country.<sup>(6)</sup>

The early fears felt over the possible misuse of the certificate were fully realised. In 1759 a petition before the House of Commons read:<sup>(7)</sup>

"That the Petitioners, and many others who have been found and declared bankrupts, having strictly conformed to the Laws made concerning Bankrupts, by the Surrender of their all upon Oath, for the Benefit of their Creditors, have, nevertheless, through the Misapprehension of some of their principal Creditors, been refused their Certificates, without any Probability of Relief, as the Law now stands; and that by such Refusal, several of the said Bankrupts have been necessitated to abscond, whilst others have been thrown into Prison; and that these

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(1) In 1792, a Committee set up to inquire into "The Practice and Effects of Imprisonment for Debt" in the course of their report to the House of Commons mentioned in their evidence the case of a woman who had died in the County Gaol of Devon, after being a prisoner, there for forty-five years for a debt of £19. - Jo. H.C. vol. 47, p. 647.

(2) Jo. H.C. vol. 28, pp. 430-1.

"unhappy Sufferers are under the particular Hardship of being incapable of Receiving any Benefit from the Law frequently made for the Relief of insolvent Debtors; and that the Power vested in Creditors for refusing Certificates to their Bankrupts, was, as the Petitioners conceive, upon a Presumption that such Power would be tenderly and but seldom exercised, and only in notorious Cases; but the great increase in the Number of Bankrupts within Two Years past, and the small Proportion of those who have been able to obtain the Certificates, make it more than probable, that the Power has been exercised for cruel and unjust Purposes, and contrary to the Meaning and Intention of the Legislature: and, as most of the Petitioners and their Fellow-sufferers must inevitably and speedily perish, with their desolate Families, unless timely relieved by the Interposition of Parliament...."

In reply the petition was submitted to a committee, who reported partly on the evidence of Edward Green, a former commissioner of bankrupts, who affirmed that the law, as it stood, brought hardship. He further pointed out that the bankrupt had to pay for the certificate out of his own pocket, which if



he had given up all his effects to the commissioners was impossible, therefore he suggested that the money for such certificate should come out of the estate or out of the allowance to be made to the bankrupt.<sup>(3)</sup> Evidence was given to show that out of 590 commissions granted between 1 January 1757 and 1 January, 1759 apparently only 285 certificates had been granted.<sup>(4)</sup> In the case of one bankrupt, whose creditor had elected to proceed at law instead of under the commission, it appeared that he had been taken in execution and imprisoned in 1744 and was still in prison in 1759.<sup>(5)</sup> The committee recommended the laws be altered, but before anything was done Parliament was prorogued and the matter was not raised again.<sup>(6)</sup>

Some slight relief was given in 1774 in order to aid bankrupts who were in prison, but who had not been guilty of fraud.<sup>(7)</sup>

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(3) Ibid p. 603

(4) Ibid

(5) Ibid p. 604.

(6) Ibid

(7) 14 Geo. III, c.77, s. 59 (1774) - persons made bankrupts prior to 25 March, 1772 might petition the Lord Chancellor as to their plight, and he might order the commissioners to look into the matter. The Lord Chancellor received no power to grant a certificate without the requisite consent of the creditors.

Two more extensive Acts followed in 1776<sup>(8)</sup> and 1778<sup>(9)</sup> under the provisions of which a bankrupt not guilty of fraud might obtain his release from prison and also obtain the benefit of a certificate from the Lord Chancellor although the consent of four-fifths in value and number of creditors had not been obtained. It was only in 1809<sup>(10)</sup> that the number of creditors required to sign before a certificate could be granted was reduced to three-fifths in value and number.

By the end of the eighteenth century feeling had changed, perhaps the growing numbers helped to show that bankruptcy was here to stay and that no amount of imprisonment would alter the fact. The idea of over 700 bankruptcies in 1788 may well have

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(8) 16 Geo. III, c.38, s. 69 - relating to bankrupts against whom a commission had issued on or before 22 January, 1776.

(9) 18 Geo. III, c.52, s. 76 - relating to persons against whom a commission had issued on or before 28th January 1778. The preamble to the section shows that it was not primarily the aim of the legislature to aid the distressed bankrupt: "...whereas many bankrupts having in all Respects strictly conformed themselves to the Direction of the Bankrupt Laws, have, notwithstanding, been unable to obtain their Certificates, and have, on that Account, been discouraged from exercising their Industry in the Pursuit of their several Occupations either living in the most unhappy and distressed Situations at Home, or seeking Relief in Foreign Countries, where they earn and secure themselves the Profit of an industrious Application to Business; some of whom have carried with them the Arts, Manufactures and Commerce of the Country, to the great Prejudice thereof: And whereas some Relief given in such particular Cases, might prevent the Evils arising to the Public, and be an Encouragement for such individuals to follow their different Occupations at Home:..."

(10) 49 Geo. III, c. 121, s. 18

shaken things up a little.

By 1817 the need for reform was clear even to the legislature, and a Select Committee was set up to 'Consider the Bankrupt Laws'. Before this Committee, men who had fought to have the laws changed were at last able to make themselves properly heard. The weight of their evidence in favour of reform was overwhelming and damning.

The state of affairs reached by this time in the holding of the commissions and the difficulties besetting bankrupt and creditor and commissioner alike are best set out in the evidence given by Archibald Cullen, himself a commissioner of bankrupts. In discussing the manner of holding meetings of the commissions he says:<sup>(11)</sup>

"The commissioners are the worst constituted court of justice that can well be imagined... We are (in London) seventy judges, distributed into fourteen courts, or lists.... There is no uniformity, no consistency of determination. The suitor has no certainty. He finds one law and practice in one list, and another in another: he finds every thing is to be argued upon first principles. Precedent

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(11) 'Evidence 1818', pp. 83-4.

"has no binding force upon us, and is therefore of no authority: we are not very much disposed to listen to it; we are apt rather to assert our own knowledge. This seems to be the natural consequence of such a number of independent jurisdictions. We are all supreme.

In the next place, any three out of the five in each list, being required to attend, the suitor is exposed, even in the same court, to a perpetual change of the judge; and this not only from one meeting to another, but even in the course of the same meeting. We assemble under a number, sometimes a great number, of different commissions at once: our attention is solicited at one and the same moment by many suitors, all equally pressing, and entitled to dispatch and decision upon their respective cases; and these often involving many nice questions of fact and considerations of law. One party gains the attention of a commissioner: he is instantly broken in upon by another party, perhaps by another commissioner; the half-heard case must be repeated; and the second judge soon in like manner, gives way to a third; and so the case, taken up by one after another, returns perhaps upon its steps, till after having as it were, circulated through the list, amid the eternal interruption of one commission by other business,

"- of each other by each other, - and of all by the public, it remains finally undetermined, unless the suitor, or his counsel or solicitor, undertakes the invidious task of asserting his right to the combined attention of three commissioners, (if three fortunately happen to be present,) or of breaking up the meeting for want of a quorum; in either of which cases, the functions of the list, in all commissions, are immediately suspended."

Merely obtaining a hearing was, however, only the start of the difficulties. Creditors suffered from the dilatoriness of the assignees in paying dividends although provision existed in theory to enforce quick payments.<sup>(12)</sup>

The system allowing for petition to the Lord Chancellor meant that matters were rarely settled by the commissioners, the volume of work became such that in 1813 a Vice-Chancellor was appointed to help the Lord Chancellor.<sup>(13)</sup> These so-called appeals became in fact nothing more than an original hearing, since the parties were in no way restricted to the evidence they

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(12) 5 Geo. II, c.30, see p. 654. See also the evidence of William Cooke given before the Select Committee, 'Evidence 1818' pp. 70-1.

(13) 53 Geo. III, c.24.

adduced before the Chancellor, but might introduce matters which had not been raised before the commissioners and introduce new evidence to support previous contentions.<sup>(14)</sup>

Basil Montagu, in his evidence given before the Chancery Commission in 1825 showed how the authority of the commissioners could be used in so arbitrary a way as to almost rob a man of his complete right to freedom.<sup>(15)</sup> This power to imprison the bankrupt if he did not make satisfactory answer to the questions put to him<sup>(16)</sup> may seem reasonable enough in itself, the manner in which it might be used in order to almost hypnotise the bankrupt into a state of abject fear is clearly set out by Archibald Cullen:<sup>(17)</sup>

"Mr. Justice Blackstone, when he said that after the abolition of the peine forte et dure, there was no such thing as torture in the English law, had forgotten the power of commitment by commissioners of bankrupt.

What is it but a species of torture (emphatically called the question) to wring a confession of supposed

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(14) See 'Chancery Commission 1826' Appendix 'A' pp. 426, 427, evidence given by Nathaniel Clayton.

(15) Ibid at 406.

(16) See pp. 577-588.

(17) 'Evidence 1818' p. 87.

"guilt, by the sufferings or the terrors of imprisonment?

I have seen bankrupts under examination, with the terror of commitment held out to them, so confounded that they have not known what they say; have answered distractedly and at random; and have declared to me, and with such agitation as convinced me of their sincerity, that they did not know how to answer, but that they were ready to answer in any way that would only save them being sent to Newgate."<sup>(18)</sup>

In 1823 an attempt was made to pass a bill which would reform and consolidate the entire of the bankruptcy law but it was not successful.<sup>(19)</sup> Two years later there was passed an Act of 136 sections which begins the modern law of bankruptcy as we know it today.<sup>(20)</sup>

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(18) In 1759, Samuel Johnson, criticising the laws against debtors, said: "The misery of gaols is not half their evil; they are filled with every corruption which poverty and wickedness can generate between them; with all the shameless and profligate enormities that can be produced by the impudence of ignominy, the rage of want, the malignity of despair. In a prison the awe of the publick eye is lost, and the power of the law is spent; there are few fears, there are no blushes. The lewd inflame the lewd, the audacious harden the audacious. Everyone fortifies himself as he can against his own sensibility, endeavours to practise on others the arts which are practised on himself; and gains the kindness of his associates by similitude of manners. Thus some sink amidst their misery, and others survive only to propagate villainy...". Idler, vol. 1, No.38 p. 216, January 6th, 1759. (1761 Edition).

(19) See Hansard (2nd series) VIII, cols. 705-6.

(20) 6 Geo. IV, c. 16.

The need to provide a separate building in which commissions might take place and creditors' meetings could be held, for those commissions sued out in the London area, was met in 1821.<sup>(1)</sup> Previously all such business had been carried out at the Guildhall.<sup>(2)</sup> Ten years later the bankruptcy jurisdiction was removed from the Lord Chancellor and given to a Chief Judge in Bankruptcy assisted by three other judges and six commissioners.<sup>(3)</sup> In 1869 there was established the London Court of Bankruptcy, with its own Chief Judge and judges; appeal lay from here to Lord Justices in Chancery, assisted usually by the Master of the Rolls, and ultimately to the House of Lords.<sup>(4)</sup>

It is, however, in 1861 the greatest step, in acknowledging

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- (1) 1. 2 Geo. IV, c, 115. This provision was more or less forced on the legislature, for the preamble states: "... the Business in Bankruptcy has of late Years greatly increased, and in consequence thereof proper and sufficient Accommodation Cannot now be furnished to the Commissioners for transacting such business." In future commissioners are to meet in a new building to be called "The Court of Commissioners of Bankrupt"; - *ibid* s. 2 -; and all meetings of creditors are to take place in the same building, - *ibid* s. 3. As the building was not ready at the time of the Act, provision was made for the necessary change to be made when the building was completed, *ibid* s. 2.
- (2) By virtue of ss. 26 and 33 of 5 Geo. II, c.30. See pp. 540, 548.
- (3) 1. 2 Will. IV, c.56, (1831)
- (4) 32. 33 Vic., c. 71



the necessity of machinery through which a man might bare his debts to the world and by so doing rid himself of them be he trader or non-trader, is taken.<sup>(5)</sup> From this time the Bankruptcy Laws apply equally to all men.

It has been the general purpose of this work to show some of the difficulties which have faced the trader or merchant in the paying or obtaining payment of his debts, and to illustrate that failure was and still is almost always connected in the minds of men with fraud.

The laws have alternated between the duty to enforce the payment of debts and the need to temper the winds to the now shorn lamb, it is an unenviable see-saw upon which the legislature finds itself constantly changing sides. Nor has this ceased to be so, even of the latest bankruptcy enactment<sup>(6)</sup> it has been said: "It is curious to observe that the most recent trend of our bankruptcy law has been to treat a bankrupt as suspected of fraud".<sup>(7)</sup> But this is, perhaps, too gloomy a view in the light of a more recent case in which the judge seriously

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(5) 24. 25 Vic. c. 134.

(6) 4. 5 Geo. V, c.59 (1914)

(7) Bewes (W.A.) 'The Romance of the Law Merchant', p. 62 (1923).

advised a hire-purchase debtor to go bankrupt.<sup>(8)</sup>

How long this approach will last is debatable. Already there is a noticeable growth in the population of the debtors' prisons. The era of the hire-purchase debtor has arrived, a new form of debtor perhaps, but he shares the same problem as any debtor of any age, he owes but he cannot pay. He can, however, subject to being able to raise the necessary fees, become a bankrupt; so that in time he will be able to start afresh. In 1732, to the majority of bankrupts, such a chance to start afresh was not impossible, merely improbable.

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(8) Daily Mail, Tuesday, April 17, 1962, p. 6. See also Ibid Wednesday, May 22, 1963, p. 11. Although the strict letter of the bankruptcy law still tends to place the bankrupt at a greater disadvantage than the average debtor, nevertheless he at least ceases to be harried by his creditors, and is very unlikely to be ordered to pay off the entire debt before his certificate will be allowed.

Writs to the Sheriffs Concerning the Statute of Acton Burnell

Calender of the Close Rolls (1279-88), p. 301 - 12 Edw. I, 24th July, 1284.

"To the sheriff of Essex and Hertford. The king sends to him concerning divers debts acknowledged or to be acknowledged before certain of the king's subjects appointed to take such recognizances, and orders the sheriff to cause execution of the king's writs directed or to be directed to be made to him according to the form of that statute. The like to the sheriffs of the counties of Lincoln, Middlesex, Surrey, Sussex, Northampton, Oxford, Cambridge, Huntingdon, Kent, Southampton and Hereford."

## A P P E N D I C E S

Writ to the Sheriff Where the Debtor has Lands in his Bailiwick

Calender of the Close Rolls (1279-88), p. 297 - 12 Edw. I - 11 May, 1284.

"To the Sheriff of Surrey. Whereas James de Kingeston, goldsmith, ought to have paid to John Fongoyne and Reymund de Belyn 40s. on Sunday in Mid-Lent last, and has not yet paid that sum and has no lands in the City of London from which the money can be levied, as appears to the king by the Letters of the Mayor of London and John de Banquell, the clerk appointed to receive the recognizances of merchants in that city in accordance with the Statute of Acton Burnell, sealed with the king's seal provided for that purpose and sent to him. The king orders the sheriff of Surrey to cause this sum to be levied from James's lands and chattels in his bailiwick and to cause it to be paid to John and Reymund."

Procedure under a Statute Merchant - S.C.L.M. (S.S. vol. 49) iii, pp.107-8.

Richard of Byfleet v. Richard of Willy (1327)

"Precept was made to the sheriff that the body of the aforesaid Richard of Willy, of his county, if a layman, etc., should be taken and (kept) safely in prison, etc., until he shall have (fully) satisfied Richard of Byfleet as to the aforesaid forty pounds. So that the same Richard of Willy during one quarter of a year from the time when he shall have been taken should live in the King's prison of his own substance and should have all his goods and chattels, lands and tenements at that time delivered up so that by himself and his, etc., he should be able to satisfy the aforesaid Richard of Byfleet in respect of the aforesaid debt, if, etc. And if the same Richard of Willy within that quarter (of a year) had not satisfied the aforesaid Richard of Byfleet in respect of the aforesaid debt, then he (the sheriff) should cause, by extent, etc., to be delivered to the before-mentioned Richard of Byfleet, all the goods and chattels, lands and tenements which the aforesaid Richard of Willy had on the day on which, etc., namely, on the Sunday next before the Feast of S. Martin in Winter, in the fourth year of the reign of the said King the father, etc., to whose hands soever, etc., (unless they had descended to any heir within age, etc.) to be held to him and his assigns, according to the form of the Statute, etc. until, etc. So, however, that the same Richard of Willy after the aforesaid quarter of a year, etc., do live (as above). And if the aforesaid Richard of Willy should not be found in his bailiwick or (should be) a clerk,

etc., then he should cause all the goods and chattels, and also all the lands and tenements which he had in his bailiwick on the day of the recognition aforesaid and after to be delivered without delay to the same Richard of Byfleet, to be held as his free tenement, etc., in the form aforesaid, until full satisfaction should be given to the same Richard of Byfleet in respect of the aforesaid debt, together with the damages, etc. And in what manner, etc., he should make the King to know, here, at this day, namely in 15 days from the Day of S. Michael, wheresoever, etc.

At which day the sheriff returned that the aforesaid Richard of Willy is of the liberty of the Bishop of Winchester of Farnham, and has nothing, etc., without the same liberty: whereupon he sent precept to William the Parker, bailiff of the same liberty, who gave him answer thereof. And the same sheriff answered nothing further. Which return, indeed, is reputed insufficient. Therefore the aforesaid sheriff, namely Nicholas Gentil, in mercy, and he is affeered by the justices at half a marc."

Certificate into Chancery that Debtor has Lands in another Bailiwick.

Chancery Files, 415. (1293) - Bland, p. 161

"To the reverend and discreet and their dearest Lord J. d. Langton, chancellor of the illustrious King of England, Robert le Venur, guardian of the city of Lincoln, and Adam son of Martin of the same city, clerk, deputed to receive cognisances of debts, greeting. With all reverence and honour we make known to your reverend discretion by these presents that Simon le Sage of Scarborough and William Kempe of the same town, of the county of York, and each of them for the whole sum, acknowledged before us that they owe to William le Noyr of Lincoln 28s. sterling to be paid to him or his attorney at the feast of St. Michael in the twenty-first year of the reign of King Edward, according to the form of the statute of the said lord the King published at Westminster. And because aforesaid Simon and William have not kept the term of the payment at all, we beseech your reverend discretion humbly and devoutly, that you will order a writ to be sent to the sheriff of York to compel the same Simon and William to pay the said money according to the form of the statute aforesaid. May your reverend discretion prosper long and well. Given at Lincoln on Friday next after the feast of St. Martin in the year aforesaid."



Action against Sheriffs of London for releasing a Prisoner from custody and Production of Writ by Sheriffs stating Prisoner is a Clerk in Holy Orders. S.C.L.M. (S.S. vol. 49) iii, pp. 23-4.

re Honey Lane, Servat v. Sheriffs of London (1308)

"Reginald of Thunderle and William Cosin, Geoffrey of the Conduit and Simon Bolet, late sheriffs of London, Nicholas Pycot and Nigel Drury, now sheriffs of London, were to answer William Servat in a plea of trespass.

And whereupon he (William) complains that whereas a certain Ralph of Honey Lane, son of Elias of Honey Lane, had been taken and arrested in London and delivered into the prison of Newgate in the custody of the aforesaid Reginald and William in the 34th year of the reign of the father of the now King, at which time they were sheriffs of London, for £60 in which the same Ralph is held to the said William Servat by the Statute of Acton Burnell put forth for the debts of merchants, and afterwards he was delivered into the custody of the said Geoffrey and Simon, Nicholas and Nigel, for their time, to remain in the said prison for the same debt, the same sheriffs, namely each of them in his own time, permitted the said Ralph to go out of that prison. So that the same Ralph by the authority of the office of them the sheriffs and without warrant or any satisfaction being made to the said William in respect of the debt abovesaid is delivered from the same prison; to the loss of him, William Servat, one hundred marcs. And thereof he produces suit, etc.

And the aforesaid Reginald and the rest come and defend, etc.

And the aforesaid Reginald and William say for themselves that they had in their custody in the prison aforesaid the body of the aforesaid Ralph for the debt abovesaid. And that at the time when they were removed from the bailiwick they delivered him to the beforementioned Geoffrey and Simon, who succeeded them in the same bailiwick by indenture made between them. And the same Geoffrey and Simon well acknowledge that they received him, Ralph, into custody for the debt aforesaid by delivery from the aforesaid Reginald, and William; but they say that they delivered him to the aforesaid Nicholas and Nigel, now sheriffs, by indenture made between them. And the same Nicholas and Nigel well acknowledge that they had him in their custody for the debt aforesaid; but they say that they delivered him and permitted him to depart from the prison aforesaid by virtue of a writ under the (King's) great seal which they showed before the Barons in these words:

Edward by the Grace of God King of England, etc., to the sheriffs of London, greeting. Whereas according to the form of the Statute put forth concerning the recognition of debts for merchants, clerks ought not to be taken or imprisoned for their debts recognized by them according to the form of that Statute. And the venerable father Richard bishop of London by his letters patent directed to us expressly it is testified that Ralph, son of Elyas of Honey Lane of London, who for certain debts recognized by him to divers merchants according to the form of the Statute aforesaid and not paid is taken, as it is said, and detained in our prison of Newgate, is a clerk and held to be a clerk, wearing the tonsure and clerkly habit, we not willing that the

before-mentioned Ralph should be unduly oppressed, contrary to the form of the Statute aforesaid, order you that you cause him, Ralph, to be delivered from the prison aforesaid without delay (if he is detailed in the same on that occasion and not on another) not molesting him contrary to the form of the same statute or pressing him in any wise. Witness myself at Westminster, the 10th day of November in the first year of our reign.

And because of this they say that they did no injury, etc.

And hereupon William Servat seeks that his letter concerning the aforesaid £60., by which the body of the said Ralph was taken for the debt aforesaid and which remains with the said Reginald and William Cosyn may be restored to him, that by it he may be able to recover his own. Therefore it is said to the same Reginald and William, who well admit that they have the said letter in their possession, that they are to restore it to the said William Servat, etc.

Afterwards on the Morrow of S. John the Baptist next following, the aforesaid letter concerning the Statute aforesaid was restored to the aforesaid William Servat in the full Exchequer."

## Le Moyne v. Priorel

De Banco Roll, Lincs, M. 14 Edward I (1286) - S.C.L.M.(S.S. vol. 49), p. 9

"Precept was made to the Sheriff that he should cause all the goods and chattels of John Priorel in his bailiwick (except the oxen and horses of his plough), and likewise the half of his land, by a reasonable price and extent, to be delivered without delay to William le Moyne of Ranelagh, knight, until thirty and four pounds, sixteen shillings and eightpence be levied therefrom, which the same John before Richard de Beaufow, late mayor of Lincoln, and Ralph, son of Martin, the King's clerk, recognized that he owed to the same William, and ought to have rendered the half to him at the Feast of S. Peter's Chains, in the thirteenth year of the King that now is, and the other half in 15 days from the day of S. Michael next following, and has not yet rendered to him, etc. And how, etc., he should make known here at this day.

And the sheriff now reports that he had delivered to the aforesaid William half of the land of the aforesaid John, which is extended at four pounds by the year, to be held from the Feast of S. Michael last past until the aforesaid money be levied therefrom by the form of the Statute, etc. Therefore (he is to hold etc.).

And precept is likewise made to the sheriff that he should have here, at this day, four pounds to be rendered to the aforesaid William, which he has made up from the lands and chattels of the

aforesaid John in his bailiwick, as he reported at another time to the Justices here, etc. And the sheriff did nothing therein. Therefore, as before, precept is made to the sheriff that he have them here in the Octaves of S. Hilary by John de Lovetot, etc. And to the sheriff be it, etc."

GRANT OF LETTERS OF MARQUE AND REPRISALS (Patent Roll, 26 Henry VI,  
m. 27) (1447) - Bland pp. 190-2.

"The King to all to whom, etc., greeting. John Hampshire and Henry May, gentlemen, have shown to us that, whereas they, with twenty-nine persons, merchants and mariners, our lieges, in the month of December in the twenty second year of our reign, in a ship called Clement of Hamble, came out of our ducy of Normandy sailing to our realm of England, there came upon them thirty mariners of Brittany and took and carried away the goods and merchandise of the aforesaid John and Henry and other our lieges aforesaid to the value of 1336 marks, and their bonds, indentures and bills making mention of debts to the sum of 700 marks, and beyond this likewise took and carried away the whole tackling of the ship aforesaid and all their victuals found in the same ship, and inhumanly stripped the same John and Henry to their shirts and certain of our other said lieges as well of their shirts as of their other garments, and abandoned and left the said John and Henry and our other lieges above-said in the ship aforesaid, bereft and spoiled of all manner of tackling necessary and requisite for the safe conduct of the same ship, in the midst of the sea, in which ship the same John and Henry and the rest of our lieges aforesaid, labouring in tempest and various storms of the sea for three days and three nights together, and despairing of their life in regard to all human aid, and putting all hope and trust of their salvation wholly in God and the glorious Virgin Mary, at length,

after the days and nights aforesaid were past, they arrived in port, at least a place of safety, by God's help; and although at the instance of the aforesaid John and Henry we have oft fitly requested our cousin the duke of Brittany by letters of our privy seal that he would cause the same John and Henry to be provided with due and just restitution to be had in this behalf, yet the same John and Henry, using all diligence with due and speedy suit made to the same our cousin in this behalf for three years and more, have not yet obtained and cannot in any wise obtain any restitution thereof, to the gravest expense and no small damage and burden to the same John and Henry; wherefore they have humbly and instantly made supplication to us that we would graciously deign to provide for relief to be made to them in this behalf: We, considering that justice is and has been against all conscience denied or at least delayed to the same John and Henry diligently suing for their right, and willing to make provision that justice or at least the execution of justice perish not in this behalf, as far as in us lies, by the inspiration of piety, therefore, graciously inclining to the supplication of the same John and Henry most benignly made to us in this behalf, have granted to the same John and Henry marque and reprisal, so that they, by themselves or their factors, attorneys or servants having or to have sufficient power from them, and, if the same John and Henry perchance die in the meantime, by their heirs and executors, may take and arrest the bodies, ships, vessels, goods, wares and merchandise of any subjects soever of the aforesaid duke, wheresoever they may be found within our realms, lordships, lands, powers and territories, as

well on this side as beyond the sea, by land, sea or water, within liberties and without to the value of the said 2036 marks, and lawfully and with impunity detain the same until full satisfaction shall have been made to them of that sum and of the whole and entire tackling of the ship aforesaid and of the victuals or of the true value of the same, and of the damages, costs, and outlays and expenses which they have reasonably sustained and will sustain on our behalf, and, for default of such satisfaction, that they may give, sell, alienate them and dispose and order thereof as with their own goods, as it shall seem to them best to be done, without hindrance, disturbance, vexation or annoyance at the hands of us or our heirs or the officers or ministers of us or our heirs whomsoever. And we give to all and singular our admirals, captains, castellans and their lieutenants and deputies, sheriffs, mayors, bailiffs, constables, searchers, wardens of seaports and other maritime places, masters and mariners of ships and other places whatsoever, and other our officers, ministers, lieges and subjects whomsoever, as well on this side as beyond the sea, by land, sea or water, wheresoever they be stablished, that they be intendant, counselling, aiding and respondent in the premises to the same John and Henry or their factors, attorneys, deputies of servants having or to have sufficient power from the same John and Henry, and, if they die as is aforesaid, then to their heirs and executors, as often as and when they be duly requested by the same John and Henry or either of them or the others aforesaid or any of them on our behalf.



In witness, etc. Witness the King at Westminster, 26 September. By  
writ of privy seal and of the date, etc."

## THE ELECTION OF THE MAYOR AND CONSTABLES OF A STAPLE TOWN

(Chancery Files, 582), (1358)

"To the reverend father in Christ William by divine permission bishop of Winchester and Chancellor of the illustrious lord the King of England and France, his humble mayor and constables and the whole community of merchants of the staple of the lord the King at Westminster, greeting with all reverence and honour. Let your reverend lordship deign to know that on the feast of the Translation of St. Thomas the Martyr in the 32nd year of the reign of the aforesaid lord the King of England after the Conquest, all the merchants, as well alien as denizen, who frequent the said staple, being assembled for the election of a mayor and constables of the same staple for the coming year, as custom is, beginning at the feast of St. Peter's Chains next coming, with unanimous assent and consent we elected Adam Fraunceys to be mayor, and John Pyel and John Tornegeld to be constables of the staple aforesaid for the coming year. May your lordship fare well through time to come. Given in the said staple of Westminster the last day of July in the 32nd year of the reign of King Edward the Third after the Conquest of England."

(Ratified by the Crown on July 16 - Pat. Supp. 22m. 12).

[Bland, pp. 184-5]

Select Cases in Chancery (S.S. vol. 10) pp. 8-10. No. 8 (1388)

The Petition of John Milner

"To my most honoured, most gracious and most  
reverent Lord, the Chancellor of England,

Beseecheth humbly one John Milner of Takeley in the County of Essex, and sheweth how he was taken and imprisoned at the suit of Sir Nicholas Brambre of London, in which prison he was constrained to account where he was not accountable by one Nicholas Leche, steward to the said Sir Nicholas Brambre, auditor of the same account; in which account he was charged with £36 at the suit of the said Sir Nicholas; and then the said Sir Nicholas, in the presence of my Lord of Nottingham and Nicholas Exton, then Mayor of London, pardoned to the said suppliant all manner of actions, through which pardon the said suppliant had a writ of Privy Seal of our lord the King directed to the said Mayor of London for his deliverance; And, my lord, before the Privy Seal came to the Mayor, one Nicholas Leche of London, steward to the said Nicholas Brambre, came to this same suppliant, saying to him that he would never come out of prison unless he would confess the said debt to be due to him, and in case he would do this, then the said suppliant should be delivered that same day on paying to the said steward 40s. for the whole sum; Upon this promise, the said suppliant was brought to the Counter of London, and there by the evil design and coercion of the said Nicholas Leche, the said suppliant acknowledged the said £36 to be due to the said Nicholas Leche; And when this

acknowledgment was made, the said suppliant was brought to prison again, and there has dwelt and still dwelleth and will dwell until the said £36 be paid, if he have not God's aid or yours: Whereupon, my most honoured, most gracious and most reverendlord, may it please your most gracious lordship to send for the said Nicholas Leche and for me also, who am a suppliant and a prisoner, and to examine us both before you, and to search out the truth of this matter, and thereupon to do what law and right demand; for God and in way of charity."

(fn. 3. The cancellation of the cognovit, obtained by fraud and false pretences, is here the ground for the Chancellor's interference.).

"Richard (etc.), to the Sheriffs of London, Greeting: We command you, firmly enjoining you that all other matters laid aside and all excuse whatsoever wholly ceasing, you do have before us in our Chancery on Monday next, wherever it then shall be, John Milner of Takeley in the county of Essex, now detained under arrest by you in our prison of Newgate, as it is said, together with the cause of his arrest and detention, And this under the peril which may ensue, you shall in no wise omit, bringing with you this writ. Witnessed ourself at Westminster, November 19th, in the 12th year of our reign (1388).

Indorsed. The answer of Thomas Austyn and Adam Carlisle, the Sheriffs:-

The execution of this writ appear in the schedule sewn thereto.

Before the coming of the King's writ directed to us and

sewn to these presents, the within written John Milner was seized and committed to the King's prison of Newgate at the suit of Nicholas Brambre, knight, in a plea of account on the receipt of £100, in the King's Court before William Venour, late one of the Sheriffs of London; And also at the suit of Richard Asshewell in a plea of debt of 40s. in the same Court; And also the said John Milner was detained in the said prison for £37. 16. 9d. which Nicholas Leche recovered against him in a plea of debt in the same Court. Nevertheless we will promptly have the said John Milner before you in the Chancery as is enjoined in the said writ and as the said writ requireth."

Calendar of the Plea and Memoranda Rolls of the City of London

Edited by Thomas (A.H.) (1364-1381) p. 175-177)

5 August 1374

Robert de Langedon v. John Stratton

"Robert de Langedon, Serjeant-at-arms of the King, by Ralph Coo his attorney, offered himself against John Stratton, horse-dealer, in a plea of debt on demand of £260. The defendant had been attached to appear by certain rents stopped in the hands of his tenants, John Sendale, John Cook, Henry Lakenham, John Grauncourt, Henry Cook, William atte Hill, Robert Hornere, Roger Begge, Richard Reve, Agnes de Ely and Robert de Blithe, to a total amount of £27. 18. 8d. As the defendant made four defaults and did not submit himself to justice, the plaintiff prayed that the moneys thus stopped should be levied from the tenants and delivered to him under security according to the custom of the City. Thereupon came Sir Thomas Fitz Hugh, clerk, Ralph Whaddon, clerk, and Simon Rodesdale, clerk, who said that they were tenants in fee simple of the tenements, from which the rents were claimed, the defendant and his wife Isabel having conveyed the property to them by feoffment at a date prior to the levying of the present plaint, wherefore they demanded that the rents should be de-arrested. They proffered the deed of feoffment which was dated 21 June 1374.

The plaintiff replied that the defendant, before the levying of the plaint, had fled to Westminster in order to exclude him from his action, and at the time the plaint was levied he was seised of the tenements, and that the interveners had no interest in the

property except at the will of the defendant, nor did they derive any profit therefrom except for the use of the defendant, whereof he prayed verification etc.

The said Thomas, Ralph and Simon pleaded that they were enfeoffed simply for their own use and benefit for ever, and prayed that it might be inquired of by a jury.

Afterwards a jury of John Hydenham and others of the venue 'del Bayly' outside Ludgate found a verdict that the feoffment took place before the levying of the plaint, but that the defendant on delivering seisin expressly laid down that the said Thomas, Ralph and Simon should derive no profit therefrom except for his own use and that they should re-enfeoff him when required.

Note that previous to the taking of a verdict the Court examined Thomas Fitz Hugh at the request of the plaintiff, and the said Thomas swore that he was enfeoffed together with the others but not to derive any benefit therefrom; he did not know what was to become of the profits, and he had not bought the tenements nor paid anything for them.

After two adjournments for consultation the Court ordered the tenants to appear with the stopped rents for delivery to the Plaintiff, and the defendant was again summoned by distress on three occasions. At the request of the plaintiff the annual value of the tenements was ascertained by an inquest of twelve jurors, the amount being returned at £11 clear per annum. Several further distresses were necessary to force the tenants to appear and it appeared on

examination that portions of the tenements had been sublet and deductions in the rents made for repairs carried out by the tenants. Ultimately 4s. was paid by one of the tenants, but this sum was returned to him on an agreement being arrived at between the parties."



Calendar of Letter Books K. f84b. pp. 116-117.

12. Feb. 8 Hen. VI. (A.D. 1429-1430)

Property Given by Deed or Gift

"Ordinance by the Common Council that thenceforth no one wishing to claim any property as his own by deed or gift of a defaulting debtor should do so by his own hand alone, as hitherto accustomed, but should call at least six other trustworthy persons to support his claim; and further, that any one wishing to convey his goods to another for reasonable and just cause shall come into the Court of the lord the King or other public place before the Mayor and Recorder, or one of them, and at least one Alderman, and there make oath that the conveyance is not for the purpose of defeating his creditors, and the deed shall be placed on record. The grantee, in case the property should be afterwards attached as belonging to another, may then prove his ownership on oath by one hand only, as formerly accustomed, provided the property be not in the hands of the donor's wife (*donatoris uxoris*) or servant, when seven hands shall be necessary; or the ownership may be tried by a jury if a plaintiff wishes to prove that the ownership was with the aforesaid donor (*in prefato donante*) at the time of attachment. No one shall be allowed to impugn the record enrolled of fraud or collusion, but the Mayor, Recorder, and Aldermen shall exercise caution before admitting a document for enrolment."

Rot. Parl. VI, pp. 110-111

Parliament 14 Edw. IV (1474)

Petition for Aid against Debtors who have Fled to Sanctuary

Item, dicto Sexto die Junii, quedam alia Petitio exhibita fuit prefato Domino Regi, in presenti Parlamento, per Communitates Regni Anglie in eodem Parlamento existentes, ex parte Ricardi Welby, Johanne uxoris ejus, and Willielmi Dunthorn, communis Clerici London', sub hac serie verborum.

"To the right wise and discrete Commens in this present Parlement assembled; Sheweth and compleyneth unto your right discrete wysdomes, Richard Welby, Jane his wyff, and William Dunthorn, commyn Clerk of the Citee of London, the said Jane and William beyng the Executours of the Testament of William Haddon late of London Draper, nowe dede; that where a full lawdable Estatute afore this tyme is made and ordeyned, ayenst such persones as were endetted to the Kyng's Lieges, and by fraude went to seyntuaries, and nowe by like fraude and disceit, dyvers persones endetted to dyvers of the said Lieges, aswell by contractes had, as by dyvers other suerties made by dyvers obligations and otherwise within this Reame, and after the forseid contractes, obligations and suerties so made, the same persones so indetted, ayenst all conscience, to th'entent to defraude and utterly exclude the persone or persones to whome they be so endetted, make or doo make by covyn and subtiell meanes, feoffementes of their Londes and Tenementes, and also makes Giftes and Grauntes by covyne, aswell by their Dedes enrolled as otherwise, of their Goodes and

Catelx to such persones as they trust bene of their subtiell assent and covyn, and after that departes into parties not knowen to the said Lieges, to whome they been in maner aforeseid indetted, or elles into seyntuaries, or such places as the said Lieges to whome they bee so endetted dar not or may not sue their actions accordyng to the Kynge's lawes ayenst theym, nor have any perfite recovery of their seid Dettes, nor where the persones of the said Dettours can not be had by wey of any execution, and so by the said subtiell meanes, lyfyn and contynuyn in habundaunce of goodes and havour, to their sinister pleasure, to the grete hurte of dyvers the Kynge's Liege people, and ayenst all right and conscience: and in especiall nowe late, were Thomas Marshe, Citezein and Sharman of London, and James Fynche, Citezin and Sharman of London, men of notable lyvelode and goodes, uppon substanciall and rightwys groundes and causes, be bounden by IIII their severall dedes, obligations, and either of theym in the hoole, in dyvers sommes conteyned in the same obligations, amountyng in the hoole some to the somme of CCCLI <sup>l</sup>i. XIX <sup>ss</sup>s. II d., to be paied at severall daies specified in the same obligations to the said William Haddon; the which William Haddon, made his Executours Jane late wyf to the said william Haddon, nowe wyfe to Richard Welby Esquier, and the forseid William Dunthorn, and died; and the said Thomas Marshe and James Fynche, perceyvynge the said obligations were their Dedes, and the somes in theym conteyned due to be paied, subtielly ymagynyng to desceyve and defraude the said William Haddon and his said Executours, of the payment of the sommes conteyned in the said obligations, by

sinistre meanes, and subtiell ymaginations and covyn, made severall feoffementes of all yeir said Londes and Tenementes to dyvers persones, to have and occupie to the use of either of theym, and in like wise made giftes, aswell by their severall Dedes enrolled as otherwise, to dyvers persones of all their goodes, and after that withdrewe theym selfe, and yet doith, to parties secrete and unknowen to the said Executours of the same William Haddon, and there abide and lifes at their pleasure, with the profittes of their said Londes and Tenementes and Goodes, so that the said Executours may have no effectuell recovery ayenst the said Thomas Marsshe and James Fynche, nor either of theym, of the said sommes conteyned in the said obligations, nor of any parcell of theym, withoute especiall remedie thereuppon may be provyded and had.

Wherefore pleas it your said wysdomes, consideryng the premisses, in exalting of trougth and rightwysnes, and in subduyng of sinister subtiell ymaginations and covyn, to pray the Kyng our Sovereigne Lord, that he, by the advis and assent of the Lordes Spirituelx and Temporelx in this present Parlement assembled, and by auctorite of the same, ordeyne, establishe and enacte, that the said Executours, and if either of theym dye, he or she that shall overlyfe, may have in the Chauncery, uppon the said obligations, a Writte or Writtes ayenst the said Thomas Marsshe and James Fynche, or either of theym, direct to the Shirrefs of London for the tyme beyng, where the said Thomas Marsshe and James Fynche have been moost inhabitaunt and abidyng, and there yet holden their howses, commaundyng the same Shirefs by the

same Writte or Writtes, to make open Proclamation within the same  
 Citee, that the said Thomas Marsshe and James Fynch, and either of  
 theym, appiere in their propre persones or his propre persone, afore  
 the Juges in the commen Benche, at the day of the retourne of the  
 same Writte or Writtes, uppon the payne to be condempned in the  
 somme or sommes conteyned in the said Writte or Writtes. And if at  
 the said day or dayes conteyned in the said Writte or Writtes, the  
 said Thomas Marsh and James Fynche, in their propre persones appiere  
 not before the same Juges in the same Bench; then the said Executours,  
 she, he or they, of theym that then shall overlyfe, uppon the said  
 defeaute of apperance there, shall have Jugement to recovere ayens  
 hym or theym so not apperyng, the somme or sommes conteyned in the  
 said obligation or obligations, specified in the said Writte or  
 Writtes, with their resonable costes and damages in that behalf. And  
 if the said Thomas or James, or either of theym, at the day or daies  
 of the retourne in the said Writte or Writtes, in their propre persones  
 or his propre persone, appiere afore the same Juges in the same Bench;  
 that then the said Executours, or either of theym that then shall  
 overlyfe, shall there declare ayens hym or theym so appieryng, by and  
 uppon the same obligations or obligation, and he or they so apperyng,  
 to aunswere afore the said Juges every day of his or their apperaunce,  
 hangyng the said Action or Actions, in their propre persones or his  
 propre persone, not makyng Attourney for theym ne for any of theym.  
 And if after the same declaration the said Thomas and James, or aither

of theym, in the Action or Actions of the same Writte or Writtes, in any wise be condempned; then the said Executours, or either of theym that then shall overlyfe, shall have uppon the same condempnation, ayens hym or theym so condempned, execution of the Lands and Tenementes, which he or they so condempned had at the tyme of the makyng of the said obligations, or any tyme sith, which have been put in feoffement or made graunte of to his or their use, or by covyn as is aforeseid; and of all his or their Goodes and Catelx so condempned, which he or they so condempned had the said tyme of the makyng of the said obligations, or any tyme sith, and made gifte or graunte of by covyn as is aforeseid; and also of all the Londes and Tenementes, Goodes and Catelx, which or they so condempned shall have at the tyme of the said condempnation; and also of all the Londes and Tenementes, Goodes and Catelx, put in gifte or feoffement to their use or either of their use, sith the tyme of the makyng of the said obligations; and also of his or their body or bodies so condempned, to the tyme that the said Executours, or either of theym that then shall overlyfe, be fully satisfied and content of the somme or sommes wherein the said Thomas Marshe and James Fynche, or either of theym, then shall be condempned, with the resonable costs damages in that partie; and also the said Executours, or either of theym that then shall overlyfe, to have like execution uppon, the said recovery by defaute ayenst the said Thomas Marshe and James Fynche, or either of theym; And your said Compleynantes shall especially pray to Almighty God for the preservation of your prosperite and increse in vertue.

Responsio. Soit fait il est desire."

Calendar of Entries in the Papal Registers relating to Great Britain and Ireland - Papal Letters 1484-1492, vol. xiv. p. 35. (1960 edn.)

"18 Mar. 1489/90 - St. Peter's Rome.

. To John, archbishop of Canterbury, Mandate etc., .....

The Pope has learned that there are divers secular and regular places in England which enjoy such immunity that any criminals who commit any homicides etc., even public robbers and highwaymen and traitors, etc., resort thither and dwell therein, and cannot be brought out and molested in their goods and persons, whence follow continually very many evils and defrauding of creditors, and who at times, after going out to perpetuate some evil deed, return to their place, as they see that they are safe from punishment by justice. The Pope, therefore, wishing the said immunity to be modified, orders the above archbishop to investigate such immunities etc., and grants him faculty, also motu proprio to take two bishops and two abbots, and to modify, restrict, limit, and correct the said immunities, by whatsoever authority granted or confirmed, even if by papal authority, especially in respect of those things which shall seem to them to be prejudicial to peace and good manners, and to offend in any way against the common weal and the royal majesty. The Pope further decrees that copies of these presents, subscribed by the hand of a notary public, and bearing the seal of the archbishop or any spiritual court, shall have the same judicial validity as these presents themselves."

(Note to the above: "A Bull of Innocent VIII on the same subject, dated at St. Peter's Rome, on 8 Id. Aug. anno 3 (6 Aug. 1487) is exemplified

in a Bull of Alexander VI dated 5 July 1493 (the original of which is in the Public Record Office, Papal Bulls 4(9), whence printed in Foedera under the latter date.) The above bull itself, *Romanum decet*, is not in Foedera).



Sanctuarium Dunelmense et Beverlacense (Sur. Soc.) Vol. 5 (1837), p. 86  
 Petition of one Robert Tenant, accountant, for sanctuary at Durham,  
 28 August, 1519.

"I ask gyrth for Godsake and Saint Cuthbert's, for saveguard of my lyf and for saveguard of my body from imprisonment concernyng suche danger as I am in enenst my lord of Northumbreland, for, declaracion of accompts, for the whiche myn answer was to master Palmys, master Stable Survier to my lord Walter Wadland Auditor William Worme gentilman Usher and another moo of my lord's servantts, that was sent to Ripon to examyne me in the presence of master Newman precedent of the Chapitor of Ripon, that if it wold pleas my lords good lordship to let me have almaner of suche books of my delyvered to me as belonged to my charge so that I myght perfyte them and make them up there whiche I wold doo in as convenient hast as I couthe possable and that done declare accompt within the said sanctuary. And if it were founde that I were in any maner of dett to my lord uppon the determynacion of my accompt I shuld ather content the same, or elles fynd seuritie, orells if I couth fynde no seuritie, I wold submitt me to my lord, to the whiche Mr. Survier demaunded of me whatt time and space I wold desire to have for the perfyting of my bookes, and I answered that I couthe sett no day, but as sone as I possible myhht, for the which cause I aske gyrthe for Godsake and Saynt Cuthbert's,..."

Select Cases on the Law Merchant II, pp. 109-110

PLEAS AT WESTMINSTER BEFORE THE JUSTICES OF THE LORD KING OF THE BENCH  
OF THE TERM OF S. MICHAEL IN THE 33rd YEAR OF THE REIGN OF KING HENRY  
THE SIXTH. (1455).

"The lord King sent to the steward and to the bailiff of the liberty of the abbot of Westminster of his town of Westminster, and also to the keepers of his court of Pie Poudre and of the fair there, and to every one of them, his close writ in these words: Henry by the grace of God, King of England and France and Lord of Ireland, to the steward and bailiff of the liberty of the abbot of Westminster of his town of Westminster, and also to the keepers of his court of Pie Poudre and of the fair there, and to every one of them, greeting. It has been shown to us on behalf of Peter Weston of Petworth in the county of Sussex, gentleman, that whereas he and every one of our lieges in coming towards our court of the Bench to prosecute or defend any plea there, sojourning there and returning thence towards their own places, ought and were accustomed to be under our protection according to the liberties and privileges of the same court in use from a time of which the memory does not exist, yet certain malevolent persons, scheming to oppress him, Peter, in many ways, less than justly, procured that the same Peter (as he was coming towards our court aforesaid to answer William Huly'n', citizen and fishmonger of London, on a certain writ of ours concerning a plea of debt against him, Peter, lately obtained and lately directed to the sheriffs of

London, which writ indeed was returnable and was returned before our justices at Westminster in three weeks from the Day of S. Michael last past) should be arrested by our ministers and detained in our prison under your custody, to the no small cost of him, Peter, and to the manifest enervation of the liberties and privileges of our court abovesaid, for which he has supplicated us for a remedy to be provided for him. And because we wish what is just and consonant with reason to be done to the same Peter, and the liberties and privileges of our court abovesaid to be inviolably observed, we order you and each one of you that you have the body of the aforesaid Peter detained in our prison under your custody, by whatever name the same Peter may be called, together with the date and cause of his being taken and detained, before our justices at Westminster on Tuesday next coming, that the same justices, having seen the causes aforesaid, may be able to do what should be done according to the liberties and privileges aforesaid. And you are to have here this writ. Witness J(ohn) Prysot, at Westminster, the 25th day of October in the thirty-third year of our reign."

Rot. Parl. VI, pp. 191-2, No. 35

17 Edward IV (1477)

Petition of the Commons Concerning the Arrest of John Atwyll,  
a member, During the Continuance of Parliament

"To the Kyng oure Sovereigne Lord; Prayen the Comons in this present Parlement assembled. That where of tyme that mannys mynde is not the contrarie, it hath been used, that the Knyghtes of the Shires, Citezeins of Citees, Burgies of Burghes, and Barons of v Portes of this your Reame, called to any of the Parlementes of your noble Progenitours or yours, amonges other Libertiees and Fraunchises, have had and used Pryvylege, that any of theym shuld not be empled in any action personell, nor be attached by their persone or goodes in their comyng to any such Parlement, there abidyng, nor fro tneens to their propre home resortyng; which Liberties and Fraunchises, your Highnes to your Lieges, called by your auctorite Roiall to this your high Court of Parlement, for the Shires, Citees, Burghs, and v Portes of this Reame, by your auctorite Roiall, atte comensement of this Parlement, graciously have ratified and confermed to us your said Comens, nowe assembled by your said Roiall commaundement in this your said present Parlement. And it is so, Sovereigne Lord, that where oon John Atwyll, one of the Citezeins of the Cite of Exeter, comen to this present Parlement, and here contynielly attendyng upon the same, sithen the commensement therof, oon John Tayllour, callyng

hym Merchaunt of the said Cite of Exetur', by vertue of viii dyvers feyned enformations made in your Eschequer, hath condempned the said John Atwyll, duryng this present Parlement, by the defaute of aunswere of the said John, in viii li., the same John dayly attendyng uppon the same Parlement, and not havyng knowelege of the said condempnations; uppon which condempnations, dyvers and severall Writtes been directed to dyvers Shirefs of this your Reame, some of Fleri facias, and some Capias ad satisfaciend', so that the said John Atwyll may not have his free departyng from this present Parlement to his home, for doute that booth his Body, his Horses, and his other Goodes and Catalles necessarie to be had with hym, shuld be put in Execution in that behalfe, contrarie to the Pryvilege due and accustomed to all the Membres usuelly called to the forseid Parlementes.

Be it therfore ordeigned, by the advis and assent of the Lordes Spirituelx and Temporell in this present Parlement assembled, and by the auctorite of the same, that the said writtes of Executions, and every of theym, to be had uppon the same, in no wyse to be executour nor hurtful to the said John Atwyll his heires nor executours, nor any of theym; and that the chief Baron of the said Eschequer for the tyme beyng, have poiar by this Ordenaunce, to graunte withoute denyer to the said John Atwyll, his heires and executours, and every of theym, such and also many Writtes of Supersedeas uppon this Ordenaunce, to every such Shiref or Shirefs of this Reame to be directe, to surcesse of any maner of Execution in that behalfe to be made or had, as to the said John Atwyll, his heires and executours, and every of theym,

shal be requisite: Savyng alwey to the forseid John Tayllour, his  
forseid Jugementes and Executions, and every of theym, to be had and  
sued atte his pleasure ayenst the said John Atwyll, at eny tyme after  
the ende of this present Parlement; the Ordenaunce notwithstondyng.  
Responsio: Le Roy le voet."

## Petition of John Pottock

Chancery Bundle XI, No. 160 - Barbour pp. 186 - 187

To the right Reverent Fader in God the bisshop of Bathe Chancellor  
of Englund.

(After 1432)

"Humely (sic) besechith youre poure Oratour John Pottok  
that where he solde certeyns goodis and catalles to Harry Brome  
be the handes of oone Margrete Wylton for x li. For the which  
the sayd Harry was bound in an obligation to your sayd besecher  
the which sayd Margrete lost the forsayd obligacion: That it please  
to your gracious lordship consciensly to consider the premyse and  
(that) your sayd besecher be cause that the sayd obligacion is loste  
hath noo remedie atte the commune lawe to recover the sayd some  
and over that of your good and gracious lordshyp to graunt your  
sayd besecher a writte under a certeyne peyne agenst the sayd Harry  
to apeyr in the Chauncerye at the xv<sup>me</sup> of Pasch' that next comyth,  
there to fore yow to be examyned upon the sayd mater as right and  
consciens requiren at the Reverence of godd and in weye of Charitee.

Plegii de proseguendo:

Hugo atte Water.

Johannes Corff."

The Case of the Carrier who Broke Bulk

Anon v. Sheriff of London (1473)

(Select Cases in the Exchequer Chamber (S.S. vol. 64) II, p.30  
at p. 32)

Easter Term in the thirteenth year of Edward the Fourth  
Before the King's Council in the Star Chamber.

"And to the Chancellor it was moved by some that this matter  
ought to be determined at common law and not here (before that council).

The Chancellor : This suit is taken by an alien merchant who has  
come here under a safe conduct: he is not bound to sue under the law  
of the land to await trial by twelve men and other formalities of the  
law of the land, but he ought to sue here: And in the Chancery it  
shall be determined in accordance with the law of nature, and, for  
the speeding of merchants, there should be suing there from hour to  
hour and day to day. And he said further that merchants shall not  
be bound by our statutes where the statutes are introductive of a  
new law but only where they are explanatory of an old law of nature.  
And since they have come into the kingdom, the King for this reason  
has jurisdiction over them to put them to stand at right etc. But  
this shall be according to the law of nature which by some is called  
the law merchant, which is law universal throughout the world."

(As to the safe conduct of alien merchants see pp.155, 201-2).



## Petition of 'Rauf Bellers'

Chancery Bundle IX No. 335 - Barbour 'The History of Contract', p. 182

To hise fulgraci~~us~~ Lord the Chaunceller of England

(About 1432)

"Rightmekely (sic) besechith Rauf Bellers that for as moche as William Harper of Mancestre and Richard Barbour weren endetted to the seyde Rauf in certain sumes of mone without specialte to be payed unto the seyde Rauf or hise certain attorne at certain dayes past at the wheche dayes and longe aftir the seyde William and Richard weren required by the seyde Rauf to make hym payment of the seyde sumes, to the wheche request the seyde William and Richard wolde not obeie in any wyse soo that the seyde Rauf, consideryng that (the) seyde William and Richard wolde make hor lawe in that partie agens faithe and good conscience, sued to the Archebisshop of Yorke, at that tyme chaunceller of England, for remedie in that caas, apon the wheche suggestion the seyde chaunceller graunted under certain payne writtes severally direct unto (the) seyde William and Richard to apere afore hym in the chauncery there to be examyned apon the seyde matere; by force of that oon of the seyde writtes the seyde Richard apered in the seyde chauncerie and there agreed with the seyde suppliant and the seyde William myght nat befande soo that the writ direct unto hym stode in none effect: wherefore liketh to youre graci~~us~~ lordeship to graunte a writ under a certain payn direct to

the seyð William to aper afore yowe in the chauncerie there to be  
examyned apon the matere aforeseyd for goddis luf and in werk of  
charite."

Proceedings in Chancery, in the reign of King Edward VI - I, cxxxi

Cutbert Savell, gent., v. William Romsden

To set aside a deed obtained by fraud, and for an injunction to stay proceedings.

"To the ryght honorable Sir Willyam Pawlet, of the most honorable ordre of the gartre, knyght, lorde Seynt John, lorde keeper of the Kyngs majesties greate seale, lorde presydent of his graces moste honorable counsell, and lorde grete master of his majesties moste noble household.

In moste humble wise, sheweth unto your good lordship, your dayly orateur Cutbert Savell, gent, that where your said orateur was by good and just tytle seased of and in the rectorye or parsonage of Myrfelde, in the countie of Yorke, with all the glebe lands, tythes, and other comodyties to the same perteyning and belonging, as of fee, by dyscent from Thom's Savell his father, and so being thereof seased your said oratour having grete neede of money for certeyn his necessarie affayres, the last day of June last past made meanesto oon Willyam Romsden, gentylman, (who pretendyd grete frendship and famylyarytee towards your said oratour), to borowe of hym the sume of xx li, to be repayd unto the same Romsden or his executors, in the feaste of the natyvitee of Saynt John Baptist next ensuyng, who, for all his sayd pretensyd amytee, wold in no wise lend to your said oratour the said sume of xx li, onlesse he wold be bounden to

pay to the same Romsden, at the seid feaste of the nativitee of Seynt John Baptist, xxiiij li, so that he wold have iiij li by wey of interest or usurye for the forbearing of the seid xx li; neverthelesse your said oratour, regardyng the grete necessitee that he was in, dyd thereunto assent and agree, whereuppon the seid Romsden sodenly caused to be made and ingrossed certeyn wrytings bytwene them, comprehending that your said oratour, for the sume of jc li., whereof he had in hand receyved xxiiij li, had bargeyned and sold, gyven & graunted to the same Romsden and his heires forever, the said parsonage with all advantages, glebe, and other profitts to the same belonging, with a clause of redempcycon therof by the payment of the said xxiiij li at the seid feaste; which wrytyngs your said oratour, havynge an especyall trust and confidence in the seid Romsey, thinkyng that the said Romsden should have no more profytt than the seid iiij li. for the forbearyng of his seid xx li, which is after the rate of xx li in the hundred pounds, where in deade by vertue of the seid wrytyng he the seid Romsden should and myght also perceyve, have, and take the yerely profitts of the seid parsonage or & besydes the seid iiij li., thinkyng also, at the leaste to have receyved of the said Romsden the said xx li., uppon thinsealyng and delyverye of the seid wrytings, dyd them enseale, and as his deade delyver to the seid Romsden; uppon the delyvery wherof the seid Romsden sodeynly & dysceiptfully, unknowing to your said oratour, departed out of the cytee of London (where all thise contracts were made) home into Yorke shire, without contentacyon or payment made to your said oratour of the said xx li.,

by meanes wherof your seid oratour doth not only susteyn grete losse by reason of non payment of the seid xx li., but also is lyke to lose all his tythe corne, and heye of the said parsonage to be perceyved this present sumer, contrary to the true intent and meanyng of the said bargeyn, and to thutter undoing of your said oratour, onlesse your good lordships lefull favour be unto hym shewed in this behalf; in tendre consyderacon wherof it may please your said lordship to graunt unto your said oratour the Kyng's gracyous write of Sub-pena, with an injunccyon therin to be conteyned, dyrected unto the said William Romsden, comaundyng hym by the same, not only that he in nowise intremytt with the occupying, takyng, or perceyving of the seid tythes or other profits of the said parsonage, but to suffre your said oratour to contynewe his just possessyon therof without interupcon of the seyde Romsden, or any other by his consent or procurement; and also personally to appere before your said lordship in the Kyngs hyghe court of the Chauncerye, at a certeyn day and uppon a certeyn payn by your said lordship to be lymyted, to thintent then and there to make answer to the premisses, and to stand to your honorable ordre therein to be takyn, and he shall dayly pray to God for the presvacyon of your good lordship long in honour."

Case of Granting a Sub Poena - Easter 22 Edw. IV (1482)

(Select Cases in the Exchequer Chamber (S.S. vol. 64) II, pp. 53-4, No. 17)

"In the Exchequer Chamber before the Justices of both Benches several serjeants and apprentices being present there) the Archbishop of York (Thomas Rotherham) being then the Chancellor of England, asks advice of the justices touching the granting of a sub poena. And he says that a complaint was made to him setting forth how a man was obliged to another in a statute merchant, and the recognisor had paid the money, and he has no release and notwithstanding this, the recognisee sues execution. And he (the Chancellor) says that the recognisee will not deny if he were examined that he has been paid. Say my lord, (The C.J.K.B. is probably thus addressed) ought I to grant a sub poena.

Fairfax (J.K.B.) It seems to me that it was quite against reason to grant a sub poena and then by two testimonies to make void a matter of record; for where he is obliged in such form, he is not under an obligation to pay without acquittance or release. For instance, if a man is obliged in an obligation, he is not obliged to pay this duty unless the obligee shall make acquittance, and so it seems to me that it is his folly.

The Chancellor says that it is the usual course in the Chancery to grant a sub poena against an obligation,...

Huse, the Chief Justice of the King's Bench ... it is a lesser evil

to cause those to pay back what by negligence etc., than by two testimonies in the Chancery to disprove matter of record or matter in specialty, when it is his negligence and he is not obliged to pay before he has the plaintiff's acquittance or his release. And I say this for law and such is the law.

The Chancellor .. And... the Chancellor agrees to the statute because it was matter of record....."

This case is also recorded in YB pasch. 22 Edw. IV. pl. 18

In the Reign of King Richard II. John Bief v. John Dyer  
[Calendar of Proceedings in Chancery, I, xi]

Plaintiff being bound to Robert Goldsmith in an obligation for the sum of sixty shillings, Defendant obtained payment from him by means of a forged power of attorney and acquittance, whereby the Plaintiff was obliged to pay the same sum over again to the obligee, and put to great costs, and when he called on Defendant at his house, he locked him in and attempted to murder him.

"To my very honourable and very gracious Lord the Chancellor of England, humbly beseecheth your poor orator John Bief of Foulmer, That whereas he was bound by obligation to Robert Goldsmyth parson of the church of St. Austin in London, in sixty shillings to be paid to him at the feast of the nativity of our Lord last passed; of which it somehow happened that by speeches, words, or other manner knowledge shewn or spoken, one John Dyere of Haverhill having full knowledge of such debt and of the term of the same, of his wicked imagination and evil conceit, made a letter of attorney in the name of the said parson and a sealed acquittance, the said parson knowing nothing thereof, and came to the said John Bief against the term of the said payment, demanding the said sum shewing the letters aforesaid; the which John Bief nothing knowing or supposing of any such evil purposes paid the said John Dyer the sixty shillings aforesaid, whereupon the said parson afterwards by default of payment at the said term sued the



said John Bief in the Hustings of London, so that he was on the point of being outlawed, if he had not been put to great costs and expences, and beyond his paid the said sixty shillings again to the said parson. And since that the said John Bief went to the house of the said John Dyer to speak to him of this matter, the which John Dyer seeing and knowing the said John Bief [to be] in his house came out of his upper chamber running to the doors of his said house, and forthwith fastened them and drew a long dagger to kill and murder the said John Bief in his said house for his money aforesaid, if it had not been the mercy of God that he graciously escaped by his good defence. And moreover the said John Dyer lieth in wait from day to day to kill the said John Bief for the cause aforesaid. May it please your very gracious Lordship to grant a writ directed to the sheriff of Suffolk, to cause to come, and to have the said John Dyere before you on a certain day under a good penalty to answer to the matter aforesaid, and to find good surety to the said suppliant, for [the love of] God and in work of charity.

Indorsed, Pledges to prosecute

Nicholas Brakkele	)	Have undertaken for the within-written
	)	
John Hore esquire	)	John Bief to make satisfaction to the
	)	
John Stapilford	)	within-written John Dyere under penalty
	)	
	)	in the Statute thereupon edited contained,
	)	
	)	in case that he shall not prove the
	)	plaint within-written."

Select Cases in the Council of Henry VII (S.S. vol. 75) pp. 61-62

Chittok v. Copuldyke (1489)

"To the most Reverend ffadre in God John Archebisshop of Centerbury  
and Chancellour of England.

In full humble wyse complenyng shewith unto your good and  
gracious lordship your pour Oratour and bedman John Chittock  
Citizen & Draper of London that wher in the parliament holden at  
Westmr the third yere of the most noble reigne of the kyng our  
soverayn lord that now is amonges odr the same our soverayn lord of  
his noble and blyssid disposicon remembryng how that

(the petition follows this with an almost complete copy of the Act  
pro Camera Stellata which having stated the misdeeds etc., of the  
sheriffs states that because of such 'the lawes of the lond in exec-  
ucion may take litell effecte to the encres of murdres robries perjuries  
and unsuerties of all men lyvyng and losses of ther londes and goodes  
to the greate displeasur of all myghty god..')

And so it is good lord that oon John Cuppuldish late shirif of  
lyncolnshir not fering the ponyshment of the seid Statute ne of dyvers  
& many estatute made agen Shiriffs for mys returnes But in contempt  
of the kyng our soverayn lord & his lawes in Michell terme the iiii  
yer of our said soverayn lordis most noble reign returned a writ of  
Capias Utlagatum to hym directed oute of the comyn place returnable  
Crastino Animarum by the which he was commaunded to have taken  
Thomas Smyth of Eklyngton in the seid Countie merchaunt of the staple  
of Calais owtelawed among odr byfor the Justices of the seid place

At the sute of your supleaunt of a ple of Dette which writ by your  
supleaunt was delivered to Thomas Totoffte depute to the seid Sheryff  
at louthe in the seid Countie to be executed and the same Thomas  
Smyth then being there present and for the due execucon the same  
your supleaunt delyvered to the same deputy 20d & promysed to pay  
hym iiii Noblies (£1. 6. 8. ib p. 62 fn. 1) mor at the day of returne  
of the same writt And so the same depute resceyved the seid XXd And  
at the day of returne returned upon the same writt that the same  
Thomas Smyth was not founde within his Baillewick wher as in trowthe  
he was accompanied with your seid supleaunt & the seid depute to the  
aforeseid Sheriff at the delivere of the seid writt Please it therfor  
your good lordship the premises considered to graunt your supleaunt  
A writte of subpena directed to the said Shiriff comaundyng hym by  
the same to apper before your seid lordship & such odr lordes & noblis  
as by the seid Acte of parliament in this kynges dayes made (is  
directed) ther to be examynd upon the premisses and further to do &  
persyve as shall then be ther thought Accordyng to the kynges lawes  
And this for the love of god & in the wey of Charyte And your sup-  
leaunt shall pray god for the preservacon of your seid lordship

Thomas Reynold de london yoman  
pleg de pros                      Wills White de london grocer."

A writ is issued that the defendant is to appear but nothing  
more is heard.

(fn. 6. p. 61 - Crastino Animarum is 'the day after All Souls day,  
3 November. This was a dies communis or return day, on which writs  
were returnable in the Common Pleas. Reeves, English Law (1787) ii.58.').

In the Reign of King Edward IV

Geffrey Blower v. Richard Luke

To obtain an acquittance made and sealed on an award between the  
Plaintiff and Richard Scardeburgh

[Calendar of Proceedings in Chancery II, 11]

"To the most reverend fader in God, and full gode and gracious lord,  
the archbishop of York, prymat and chaunceller of England.

Besecheth mekely your most gode and gracious lordship of your  
contynuell orateur Gefferey Blower of London, mercer, tenderly to  
consider, that where as late certayn maters of controversie weren  
had and moved bytwene hym on Doctor Scardeburgh, which maters  
afterward by their comon assent were putte in the awarde & arbitre-  
ment of Richard Luke clerk, and John Colred, indifferently chosen  
to determyne and make and ende and accorde of maner of maters  
bytwixt theym had and moved, which, amonge other thyngs, awarded  
that the seid parties alternatly shuld seell acquitaunce, and so  
they did accordyng to the same; and so the said award putte in  
wrytyng, and it is so that bothe the seid awarde, and also the  
acquytaunce which perteyned unto your seid orateur, remayned still  
in the handes and kepyng of the seid Richard, and yet do; and your  
seid orateur often tymes hath desyred the seid Richard to delyver  
hym the seid acquytaunce, which so to do at all tymes hath utterly  
refused, and yet doth, ayenst all right and conscience; whereof he  
hath no remedy atte comen lawe, in as moche as he hath not the seid

awarde to shoue. Wherfor pleas it your seid most gracious lordship, the promissiez consydered, to graunte a writte subpena to be direct unto the seid Richard, comaundyng hym by the same to appere afore the kyng in his chauncerie at a certayn day and undre a payn by your lordship to be lymet, there to be compelled to do accordyng to right and conscience, for the love of God and in the way of charyte.

Edmundus Warter de London, gentilman, &

Pleg de pros

Wills Fode de London, gentilman.

Indorsed.

Answer of Richard Luke

Richard Luke answer and sey, howe that I and John Colrede, haberdassher, wer present in the tavarne callyd Seint Johnes hedde, witynne Lodgate of London, on the xviij day of Apryll the yer of our Lord M CCCClxx., calyd thydur by mayster Rychard Scarburgh clerke, and Geffrey Blower merser, and by them we wer desyryd to make an arbytracon bytwyxt them indyferently apon certen sommys of money in varyaunce beyng be twyxt them, wharof the parcell were conteyned in a byll drawen & made by the sayde master Richard Scarburgh out of a booke of accompte which was thenne layde ther afor us, of the which somes of money conteynid in the sayde bille we wer desiryd by them to allowe & disallowe what we coude tynke to be don by our

discrecons; then I the seyde Richard Luke askyd the seyde maisters Richard Scarburgh and Geffrey whedur they wer accordyd upon all wodur parcell and somes of money conteynyd in the sayde book of accompt, and they seyde ye, and thenne we the seyde arbitrons wente to arbtrite the seyde bill of parcell; and for certen consideracons us thenne mevyng, we yave out this sentence by mouthe, that for moderacon of the somes conteynyd in the seyde bill the Geffrey schulde make ij obligacons, oon simple and the other with a condicon to paye or dyscharde the seyde maister Richard Scarburgh aftur the forme of the seyde obligacons with the condicon of that on; & sooe the hole account made & takyn, hit muste ned folough that the seyde Geffrey schulde paye for his partte to John Neve, mercer of London, in parte of payment of a C li. that the seyde maisters Richard and Geffrey stode boundyn ynne to the same John Neve, & the forseide maister Scarbrough schulde payde the remlande of the same C li.; also we awardid the seyde maister Richard & Geffrey to enseale aquitansus generall, edur of them to other; the which aquitansus were sealid & in owr presence deliverde, & then be both ther assents they wer put in my kepyng till the sayde Geffrey and maister Richard had performyd our award; & into the tyme I undurstond the said Geffrey have performyd his parte of our seyde awarde I intende not to make delyvere of the aquitons."

## Punishment of the Pillory, for forging a Bond.

I Richard II. A.D. 1377. Letter-Book H. fol. lxx. (Latin)

"John Roos, Esquier, was attached to make answer to James de Pekham, in a plea of conspiracy and falsehood; whereby, by Gilbert de Meldeburne, his attorney, he made plaint that the said John, and one John Ormesby, on the Tuesday next after the Feast of our Lord's Nativity [25 December], in the 50th year of the reign of King Edward the Third, grandsire of our Lord the King now reigning in Neugate, in the Parish of St. Sepulchre, in London, conspired between them to make a certain false bond, bearing date in London; by which it was alleged that Lora, now wife of the said James, before her marriage, had acknowledged that she owed to the said John Roos, and was bound unto him, in the sum of 1200 l. sterling, to be paid to him at the Feast of Easter then next ensuing; and on the same Tuesday wrote the bond in form aforesaid, and sealed the same. And by force of the said bond, the same John Roos, on the Thursday next before the Feast of St. James the Apostle [25 July], in the first year of the reign of King Richard, in the Parish of St. Martin Vintry, in London, caused the said James bodily to be arrested by John Dyne, serjeant of one of the Sheriffs of London, in virtue of a certain plaint of debt against the said James, and Lora, his wife, in the Court of John de Norhamptone one of the Sheriffs of London. And upon the said arrest, he was imprisoned in the Compter of the same Sheriff in Milkstret, in the Parish of St. Mary Magdalen, in London, and was



there in prison detained for the three weeks then next ensuing. And at the end of the said three weeks the same John Roos did not prosecute upon his said false plaint; the said James having been falsely imprisoned in form aforesaid, and to his damage to the amount of 1000 l., etc.

And the said John Roos, being questioned and examined upon the matters aforesaid, before Nicholas Brembre, Mayor, and the Aldermen, on the 19th day of October, in the first year, etc. here in full Husting, acknowledged the conspiracy, falsity, making, and sealing of the said bond. And because that the said false bond was not then here in Court, that the same John Roos might be put to acknowledge or repudiate the same, but was in the hands of Walter Sibyle, as it was said, the same John Roos was committed to the Prison of Neugate, until the Court should be more fully advised as to rendering judgment in this behalf.

Afterwards, on the 27th day of October in the year aforesaid, John Aubrey roduced here in Court a certain bond, which he said was the same that had been made in form aforesaid. Whereupon, the same John Roos, who had been brought here on the same day by the Keeper of the Gaol of Neugate, being asked if the said bond was the same that he had acknowledged, as having been made by conspiracy between him and John Ormesby, said that he was a layman, and in no way literate, and knew not whether it was the same or not. Wherefore, precept was given to John Botelesham, serjeant of the Mayor, to summon here twelve reputable men of the venue of the Parish of St.

Sepulchre aforesaid etc., on the Wednesday next after the Feast of St. Lucy the Virgin [13 December].

And the jury, so summoned, appeared by Thomas Kyngesbrugge, John Kanynges, and ten others, who said upon their oath, that the said bond, produced here by the said John Aubrey, was the same bond that the said John Roos and John Ormesby made by conspiracy and falsehood between them aforethought etc.

Afterwards, on the Thursday next after the Feast of St. Lucy the Virgin, the said John Roos was brought here, in presence of the said Mayor, Recorder, and Aldermen; and it was awarded that the same James should recover, as against him, his damages, taxed by the Court at 10 pounds. And further, for the conspiracy, deceit, and falsehood aforesaid, in order that the great and other persons resorting to the City might not see forgery, so detestable and so horrible, unpunished; and also, that those who came after might beware of such forgery and the like, and according to the custom of the City of London in like cases provided, it was adjudged that the same John Roos should be put upon the pillory, with the said false bond, cancelled, tied about his neck. And he was afterwards to be sent to prison, until he should have satisfied the party complainant as to the damages aforesaid."

Paston Letters ed Fenn iv p. 131-5. Letter XXXXVIII

James Gresham to Margaret Paston 1463

"To my right worshipful Mistress, my Mistress Margaret Paston,  
at Caister.

PLEASE it your good mistressship to weet, that a Fieri Facias  
is come out of the Exchequer for Hugh Fenn to the Sheriff of Norfolk  
to make levy of two hundred marks (£133. 6. 8d.) of the proper goods  
and chattels of my master, as Executor of Sir John Fastolf, of which  
Fieri Facias we sent my master word, which sent us word again by  
Berney that we should let the Sheriff understand that my master never  
took upon him as executor, and so for that cause that writ has no  
warrant to take my master's goods; and also that my master made a  
deed of gift of all his goods and chattels to master Prowet and Clement  
Paston and others, so that my master hath no goods whereof he should  
make levy of the aforesaid sum; and if the Sheriff would not take  
this for none answer that then my master would he should be letted  
(hindered) in master Prowet's and Clement Paston's name; nevertheless  
we spake with the Sheriff this day, and let him understand the causes  
aforesaid, and he agreed, so that he might have surety to save him  
harmless, to make such return as my master of his counsel could desire,  
and because my master wrote by Berney that he would not find the  
Sheriff no surety, we would not appoint with him in that wise; and  
so we took advice of Thomas Green, and because the Under Sheriff shall

be on Monday at Potter) Heigham, by Bastwick bridge end, he and we thought that it was best that master Prowett should meet with the Sheriff there, and require and charge him that by colour of the aforesaid Fieri Facias that he make no levy of any goods and chattels of the said master Prowet and Clement Paston against the said John Paston, letting him weet that such goods, as the said Paston had, be now the said Prowet's and Clement Paston's by virtue of a deed of gift made to them almost two years ago; and if the Sheriff will be busy after that to take any chattel that he be letted in master Prowet's name and Clement Paston's by Daubeney and others; which business of the Sheriff shall bee on Tuesday or Wednesday, and as we understand at Hellesdon, wherefore ye must send thither Daubeney with Peacock, and they may get them there more fellowship by the advice of master Sir John Paston."

14 Edw. IV, 1474 - Rot. Parl. VI, pp. 103-4, No. 26

Petition of 'Henry Neuton'

"Item, dicto nono die Maii, quedam Petitio exhibita fuit prefato Domino Regi, in presenti Parlamento, per Communitates Regni Anglie in eodem Parlamento existen', ex parte Henrici Neuton, Servient' ad Clavam Roberti Billesdon, unius Vicecomitum Civitatis London', in hec verba.

To the right wise and discrete Commens in this present Parlement assembled; Sheweth unto youre grete wisdomes and discretions, Henry Neuton, oon of the Sergeants at Mace of Robert Billesdon, oon of the Shirrefs of the Cite of London. That where as oon Thomas Buysshop, Grocer, was late withholden in prison at London, in the Counter of the seid Robert Billesdon, set in Bredestrete of London, by vertue of II pleynts of dette taken ayenst hym afore the same Shirref; that is to sey, oon at suyte of William Lynnesse of the Dioc' of Lincoln, Administratour of the Goodes and Catalles that late were William Liksmythe's, late of London Grocer, that died intestate, of the somme of XIII li; and that other of theym, of the somme of XXVI s. VIII d., at suyte of William Sandes, Grocer; whereuppon oon Thomas Gibbes, oon of the pety Capitaynes in the Viage late purposed into the parties of Burgoyne by the Kynge's high commaundement, consedered with the seid Thomas Buysshop, of their untrouthes purposyng to gete hym

oute of prison, surmytted that the seid Thomas Buysshop shuld be  
 reteyned with the seid Thomas Gibbes, to doo service in the seid  
 Viage in his company in the parties aforesaid, labored in such wise  
 to the Right Reverent Fader in God the Bisshop of Duresme, Chaunceller  
 of Englund, that the Kyng's Writte was direct to the Maire and  
 Shirrefs of London, William Stokker Knyght, and the seid Robert,  
 then beyng shirrefs of the same, commaundyng theym by the same  
 Writte, to have the body of the seid Thomas Buysshop, and the causes  
 of his takyng and witholdyng in prisone, afore the Kyng in his  
 Chauncery, the Wedynsday the VI day of Aprill, the XIII th yere  
 of his moost noble reigne: At which day, accordyng to the seid  
 commaundement, the seid Henry, as Mynister unto the seid Shirrefs,  
 brought the seid Thomas Bisshop, with the causes of his takyng and  
 witholdyng in prisone, before the seid Chaunceller, to his place  
 called Duresme's Inne, beside Charyng Crosse in the Counte of Midd';  
 wheruppon for dyvers considerations movyng, the seid Chaunceller  
 there remitted the seid Thomas Buysshop ageyn, and commaunded the  
 seid Henry to bryng hym down ageyn into the seid Countour. And  
 incontynent in the Halle of the seid Chaunceller, within his seid  
 place, the seid Henry being in Godd's pease and the Kynge's, entendyng  
 safely to have conveied the seid Thomas Buysshop into London ageyn  
 unto the seid Countour, into the said Hall then come the seid  
 Thomas Gibbes, accompanied with other mysdoers of his affinite to  
 the nombre of XX persones, to the seid Henry unknowen, defensibly  
 arraied for the werre, and then and there with force toke and rescued

the seid Thomas Buyssshop oute of the warde and keypyng of the seid Henry, and the seid Thomas Gibbes, then and there with a Swerde yave unto the seid Henry II grevous wondes, of the which by grete space he stode in jeopardie of his lyfe, to his damages of C Marcs, wherthorough the seid Henry was at that tyme of noon power to attaigne unto the recovere of the seid prisoner, by cause wherof he stondeth in grete jeopardie of losse and charge in that partie, withoute youre favourable help to hym be shewed in this behalf. And over this, the seid Thomas Gibbes; then and there with grete fury and violence caused his seid misgoverned Feliship to take and lede away with theym oon William Grey, Fuller, and brought hym to the house of the same Thomas Gibbes, in the parisshe of Seint Martyn in the Feld, beside Charyng Crosse in the Counte of Midd', and hym there kept in prison, and put hym in fere of his lyfe, till he for his delyveraunce made a fyne with theym of XX s., and spent amonge his Felisship XXVI s. VIII d. ayenst his wille, and made unto the seid Thomas Gibbes for doute of his deth an obligation of x li., that he shuld never fro thensforth vex, sue nor trouble the seid Thomas Gibbes, nor noon of his seid Felisship for that cause, to his utter undoyng, withoute youre seid help to hym be shewed in that behalf.

Wherefore please it youre discrete wisdomes, the premisses tenderly to considre, and that it may like you to pray the Kyng our Liege Lord, that he, by th'advise and assent of the Lordes Spirituelx and Temporelx in this present Parlement assembled, and by auctorite of the same, to ordeyne, establissh and enacte, that neyther the

seid Shirrefs nor other of theym, nor the seid Henry, be in any wise chargeable or charged, by encheson or cause of eny escape of the same Thomas Bisshop oute of the kepyng of the seid Shirrefs, or of the seid Henry, or of eny of theym, or by encheson or cause that the seid Shirrefs, or the seid Henry, or any of theym, suffred the seid Thomas Buysshop to goo at his large oute of their or eny of their kepyng; and that aswell the seid Shirrefs as the seid Henry, and every of theym, be utterly quyte and discharged of all actions, suytes and quarelles, which may be taken or sued ayenst the same Shirrefs or other of theym, or ayenst the same Henry, for eny escape or goyng at large of the seid Thomas Buysshop oute of the kepyng of the seid Shirrefs, or of the seid Henry, or eny of theym. And over this, that the forseid obligation of x li. made unto the forseid Thomas Gibbes, by the forseid William Grey, be voide, and of noon effecte ne force; and that the seid William Grey, be utterly quyte and discharged of all actions, suytes and quarelles, which may be taken or sued ayenst hym for the same. And for als moche as the seid rescuse recondez aswell to the disobeysaunce of the Kyng's Highnes, as to the reproche of his seid Chaunceller, beyng the Kyng's chief Juge within this his Reame, and unpunysshed wold gretely enbold such Riotours hereafter to offende in like fourme; that by the auctorite aforeseid it be ordeyned, that the forseid Thomas Buysshop and Thomas Gibbes, and either of theym, in their propre persones, within VI wekes next suyng after their next arrivale into this Reame of Englund, appere afore the Justices of the Kyng's Benche for the tyme beyng, and fynde sufficiant suerte, after the discretion of the



same Justices, to appere in the same Benche at such day or dayes as the same Justicez shall lymytte, to answer to the forseid rescous, and the other offences doon to the seid Henry and William Grey, and either of theym, in and uppon all such actions as eny of theym wille sue by Writte or Bille in the same Benche, or elles to stand convicte of the same rescous, and every other offences perteynyng the premisses, and to make grete fyne in that behalf, and to have imprisonment, as to the Kyng's Highnes shall be thought convenient. And if the seid Thomas Buysshop and Thomas Gibbes, or either of theym, not as is aforeseid, but make defaute; th t then such processe uppon this Acte be made oute of the seid Benche ayenst theym or hym not apperyng by Capias and Exigend', as usuelly is used in the same Benche, uppon rescousses retourned by Shirrefs and other Officers into the same Benche. And yf the seid Thomas and Thomas, or either of theym, appere in the same Benche as is aforeseid; that then he or they apperyng, fynde sufficient suerte to abide the ende of the plee uppon every suite sued there, ayenst theym and every of theym, by the said Henry, or William Grey, and to satisfie such damages as in that partie shall happen to be demed, taxed or lymyt: And that no protection nor essoyn, be allowyd in eny such suite for the seid Thomas and Thomas, or either of theym."

Responsio: Soit fait come il est desire.

Ordinance for the abolition of the Debtors' Prison at Ludgate

Riley pp. 673-674.

7 Henry V. A.D. 1419. Letter-Book I. fol. ccxxviii.

"WHEREAS the commendable intentions and charitable purpose of those who have been governors and presidents of the City of London heretofore, have ordained a prison, called 'Ludgate', for the good and comfort of poor freemen of the same city, who have been condemnèd; to the end that such poor prisoners might, more freely than others who were strangers, dwell in quiet in such place, and pray for their benefactors, and live upon the alms of the people, and, in increase of their merits, by benign suffrance, in such imprisonment pass all their lives, if God should provide no other remedy for them; - now, from one day to another, a thing to be deplored, the charitable intentions and commendable purposes aforesaid are frustrated and turned to evil, inasmuch as many false persons of bad disposition and purpose, have been more willing to take up their abode there, so as to waste and spend their goods upon the ease and licence that there is within, than to pay their debts: and, what is even more, do there compass, conspire, and imagine oftentimes, through others of their false covin, to indict good, reputable, and loyal men, of the same city and other districts, for certain felonies and reasons, of which they never have been guilty, but whereby the said men are oftentimes in danger of being ruined in body and in goods; just as of late it befell, when Roger Olyver and Roger Lawsell, with certain other

prisoners, their accomplices, in the said prison, caused to be indicted John Lane and John Gedney, who of late were severally Sheriffs of the same city, Robert Arnold, William Bourtone, and certain others of the most substantial citizens of the said city, with other persons, to the number of sixty and more. Therefore, William Sevenok, now Mayor, and the Aldermen and Sheriffs, with the assent of the Commons, wishing to provide some especial remedy in this behalf, so far as they may, considering that the foundation of this enormous crime of false compassing, conspiring, and imagining the said indictments, was laid and commenced within the said Prison of Ludgate, and that the liberty of the said prison is rather the cause and occasion of the non payment of people than the payment, and so, against that good policy in the cause of which every prison was first founded and ordained, have ordered and established, on the first day of June, in the 7th year of the reign of King Henry, after the Conquest the Fifth, that the said Prison of Ludgate shall be abolished and disqualified as a prison, and that all the prisoners therein shall be removed and safely carried to Neugate, there to remain, each in such keeping as his own deserts shall demand, according as, and for the time which, the law of the land shall give to him."

This removal lasted less than five months.

Ordinance for the re-establishment of the Debtors' Prison at Ludgate. (Riley p. 677.)

## Ordinance for the Re-Establishment of the Debtors' Prison at Ludgate

7 Henry V. A.D. 1419. Letter-Book I fol. ccxxxviii.

Riley, p. 677

"WHEREAS through the abolition and doing away with the Prison of Ludgate, which was formerly ordained for the good and comfort of citizens and other reputable persons, and also, by reason of the fetid and corrupt atmosphere that is in the hateful gaol of Neugate, many persons who lately were in the said Prison of Ludgate, and who in the time of William Sevenoke, late Mayor, for divers great offences which they had there compassed, were committed to the said gaol (of Neugate), are now dead, who might have been living, it is said, if they had remained in Ludgate, abiding in peace there: -- and seeing that every person is sovereignly bound to support, and be tender of, the lives of men, the which God has bought so dearly with His precious blood; -- therefore, Richard Whityngton, now Mayor, and the Aldermen, on Saturday, the 2nd day of November, have ordained and established that the said Gate of Ludgate shall be a prison from henceforth, to keep therein all citizens and other reputable persons, whom the Mayor, Aldermen, Sheriff, or Chamberlain of the City, shall think proper to commit and send to the same. Provided always, that no one shall be Warder of the same prison unless he be a man good and loyal, and one who has found sufficient sureties yearly to the Sheriffs of London that he will well and lawfully keep the prisoners there, and well keep the Sheriffs and the City harmless in all things which pertain unto the safe-keeping of the prisoners and Prison aforesaid."

Ordinance for the Guarding and Governing of the 'Gate of Neugate'

Calendar of Letter-Books K pp. 124-7. 23 Feb., 9 Hen. VI (A.D. 1430-1)

"Ordinances made by the Mayor, Aldermen, Sheriffs, and Commonalty in Common Council assembled for guarding and governing the gate of Neugate, lately rebuilt out of the goods of the late noble merchant Richard Whityntone, to the following effect :-

First, that in order to diminish the number of officers in the Compters and in Ludgate and Neugate who waste the alms of the poor prisoners, and also to curtail the charges made by porters of the Compters, it is decreed that thenceforth all prisoners who wished and ought to live by the common alms of the people should not remain in a Compter for more than a day and a night, but should be removed by the Sheriffs and their clerks to the said gate, there to remain as prisoners until lawfully delivered, viz., freemen of the City and other honest persons in chambers which have chimneys and privies near the Hall and fountain on the north part of the prison, and the free and other honest women in the like chambers on the south; that strangers (foreigns) and others of inferior condition shall occupy less convenient chambers, whilst felons and others suspected of great crimes be safeguarded in the basement cells and strongholds on the south part of the prison, and not allowed any intercourse with other prisoners.

Also, whereas the common people suffer from the importunity of a number of persons daily soliciting alms for the prisoners, who

profit little thereby owing to the large payment demanded by those so soliciting, it is decreed that in future only two couples of prisoners should solicit alms, one by the river side and the other on land, each couple having a box and saucer so marked that they may be recognized as belonging to the prison.

Also, whereas the Keepers of the prisoners and their servants often appropriate the alms given to the prisoners, it is ordained that the said boxes be sealed by one of the Sheriffs or the Chamberlain for the time being, and that their contents be used for paying the collectors and buying food and other necessaries for the prisoners every month or quarter of a year under the supervision of one of the Sheriffs, the Chamberlain, or some other trustworthy person appointed by the said Sheriff and Chamberlain.

Also, it is forbidden that any officer or servant of the prison sell any manner of victual, charcoal, candles, &c. (except beer, in manner as prescribed), but the prisoners may buy their victuals where they please; and that no officer, under colour of his rent, take more for 'le Tappehous' than in the old gaol, as that would be contrary to the expressed intention of the founders of the new gaol.

Also, it is decreed that no Keeper or servant of the prison shall prevent any free man or woman from having and using their own bed, if they have one, without any charge, nor shall they take more than a penny a night for a bed with blankets and sheets, as is done in hostelries, nor more than a penny a week for a couch, or more than fourpence towards the maintenance of the prison lamps for the whole

time the prisoner may be there, and if it happen that such things be provided by some charitable person, the Keeper or his servant shall charge nothing.

Also, inasmuch as the said prison is sufficiently strong, it is ordered that the Keeper and his officers shall not put any free man or woman in irons, if imprisoned for a debt of less than 100s., on their finding surety for good behaviour; but in graver cases the Keeper may take a reasonable fee for removing irons, as accustomed in other prisons of the King.

Also, it is ordained that the Keeper or any of his officers shall not take for the delivery of any prisoner, unless committed for felony, more than eightpence, and in case of felony more than 2s., provided always that no one committed by the Mayor, Aldermen, or Sheriffs for punishment shall pay anything for lamps, couches, fees, or suettes<sup>(1)</sup> at his coming in or going out.

Also, inasmuch as the basements and dark places often cause infection, it is ordained that the Keeper and his officers shall allow all freemen of the City and other honest persons, on their finding sufficient surety for good behaviour, to go every day, at convenient times, for devotion and recreation to the Chapel and the two spacious and well-lighted chambers on each side of the Chapel, and the women to the large chamber near the Hall on the south side, without demanding any payment, but desiring them to pray devoutly for the souls of the said Richard Whityngtone and Alice his wife.

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(1) As to whether this word related to 'customary fees' or 'surety' or both see Stewart-Brown (R.) 24 E.H.R. pp. 506-10 (1909) 'Suede de Prisone'.

Provided always that, inasmuch as the repairs of the said gate belong to the Keeper for the time being, no one shall occupy a tower or chamber in the tower, nor be allowed to walk on the leads or in the passages of the said gate, unless he come to some reasonable agreement with the Keeper to contribute towards such repairs.

Also, whereas by charter the custody of the said gate, as of all other gates and posterns of the City, appartains to the Mayor (Aldermen) and Commons, it is ordained that the Keeper be yearly elected, and that he find surety for the Sheriffs for safeguarding the prisoners, and also find surety for the Chamberlain for carrying into execution the above articles."

In 1434 the keepers of the Compters and of the gaols of Ludgate are sworn as follows :

"To provide their prisoners with a peck of coal, full and heaped up, for a halfpenny, a half bushel for a penny, and a bushel for two pence; also with a gallon of the best ale, costing the said Keepers 3 halfpence, for two pence and no more, and that ale that costs more shall not be allowed their prisoners."

Cal. Ltr. Bk. 'K' p. 183.



Calendar of the Plea and Memoranda Rolls 1301-1412. pp. 158-9

John Walpole v. John Bodesham

In the Chamber of Guildhall before Nicholas Twyford, knight, Mayor,  
the Sheriffs and Aldermen - 27 Nov. 1388.

"Proceedings on bill of John walpole, tailor, formerly a prisoner in Ludgate, who complained that the keeper, John Bodesham, and his clerk William Rounde, had ruled the prison extortionately and evilly, viz. when alms of 100s. or 10 marks were received for the deliverance of poor and feeble prisoners, they put down in the calendar of deliveries the names of their own servants and officers of the prison who were at large, so that they might receive the alms, thus depriving the poor prisoners of their deliverance; and further, the common-alms box was shared out in the keeper's own chamber against the wishes of the prisoners, and he chose three or four prisoners as he pleased, to share out the alms and do with them as they wished, whereas the box ought to be shared out in the presence of all the prisoners in their common room; and lately, when the prisoners had raised a great clamour against this unjust division of the alms, he had allowed them to divide the alms themselves, as was right and reasonable, but being angry because he could not have control of the box, he had forbidden the usual begging by two prisoners outside the prison of alms for the sustenance of the prisoners; and when the plaintiff prepared a bill of complaint to the mayor, containing all these matters,

the officers of the prison delayed it for three weeks, so that when it reached the mayor, it found him too busy to deal with it; and then the keeper, to punish the plaintiff for his share of the bill, put him in the stocks and in irons for five weeks to the great damage of his legs and limbs, during which time, when a grant of 40s. was made for his deliverance, the keeper heard of it and detained the money and by evil suggestion to the mayor had him transferred from Ludgate to Newgate, thus depriving him of his deliverance, and moreover he told charitable people that the plaintiff had been indicted, and he also detained his clothes and other things, of all of which matters and many others the plaintiff would inform the Mayor and Aldermen by word of mouth, if they would graciously listen to him."

The plaintiff was awarded £30 damages by a jury for the bodily trespass against him, but the plaintiff continued to press for trespass committed against him by the defendant, but he requested leave to amend his bill which was refused, this he continued to press with the result that it is later decided that the verdict of the jury was 'taken inadvisedly' and that the bill be quashed. *ib* p. 160. In 1395 the plaintiff is still trying to have his bill heard and is committed to prison for harassing the Mayor, two years later he is released on finding sureties for £100 for his good behaviour. *ib*. pp. 229,230.

The Granting of 'Godespans' to the Poor Prisoners of the Fleet

Calendar of the Patent Rolls. 1354-1358 p. 515

28 February, 1357, Westminster.

"On behalf of the poor prisoners in the king's prison of the Flete supplication has been made to the king that, whereas they are so impoverished that having nothing to live on they will soon perish of hunger unless succoured, the king will order the pence called 'Godespans' paid by merchants, denizens and aliens, to the collector of customs in the port of London over the purchase of wools, hides and woolfells, which the collectors have been wont hitherto to distribute to divers poor people at their will, as is said, to be assigned to them in aid of their sustenance, and he considering that the pence are received rather at his disposal than at that of his ministers and that bestowal of alms turns out more to the merit of the givers where the need of the recipients is greater, and turning the eyes of compassion on the misery of the said prisoners, especially because they are in custody not for criminal cause or any misdeeds against the peace, grants that all the said pence called 'Godespans' received by the collectors of customs there shall be assigned, during pleasure, towards the sustenance of such of the Said prisoners as are so poor as to have nothing else to live on. The keeper of the Flete shall receive the same by indentures and shall shew the part of such indenture remaining with him to the treasurer immediately after receipt of the money, and divide the money among the prisoners at the discretion of such treasurer or his deputy in this behalf according to their indigence,

and if any remain over this shall be converted in aid of the chaplain to celebrate divine service in an oratory by the prison for the souls of the king's progenitors and for those who confer the pence, at which masses those prisoners who are deprived of the liberty of attending other churches may attend; and it is not the king's intention that any prisoners who have faculties or friends whereby they could be maintained, shall participate in the pence in any wise."

Action Upon Usury (Early Chancery Proceedings, 64.291) (Bland, pp. 201-2)

"To the right reverend father in God, the Bishop of Lincoln and  
Chancellor of England.

Right humbly beseecheth unto your lordship your Orator William Elryngton of Durham, mercer, that whereas he now 4 years past and more had for a stock of one Richard Elryngton the sum of £30 wherefore your said Orator was by his obligation bounded unto the said Richard in £40 and odd silver; which sum of £30 your said Orator should have to be employed in merchandise, during the space of 7 years, yielding yearly unto the said Richard, for the loan thereof £4 of lawful money of England, and at the 7 years' end to yield whole unto the said Richard the said sum of £30; whereupon your said Suppliant occupied the said sum by the space of 2 years, and paid yearly unto the said Richard £4; and after that your said Orator, remembering in his conscience that that bargain was not godly nor profitable, intended and proffered the said Richard his said sum of £30. again, which to do he refused, but would that your said Orator should perform his bargain. Nevertheless, the said Richard was afterward caused, and in manner compelled, by spiritual men to take again the said £30, whereupon before sufficient record the said Richard faithfully promised that the said obligation of £40. and covenants should be cancelled and delivered unto your said Orator, as reason is. Not is is so that the said Richard oweth and is indebted by his obligation in a great sum of money to one John Saumpill, which is now Mayor of Newcastle,

wherefore now late the said Richard, by the means of the said mayor, caused an action of debt upon the said obligation of £40. to be affirmed before the mayor and sheriff of the said Town of Newcastle, and there by the space almost of 12 months hath sued your said Orator, to his great cost, and this against all truth and conscience, by the mighty favour of the said mayor, by cause he would the rather attain unto his duty, purposeth now by subtle means, to cast and condemn wrongfully your said Orator in the said sum of £40., to his great hurt and undoing, without your special lordship be unto him shewed in this behalf, wherefore please it your said lordship to consider the premise, t ereupon to grant a certiorari, direct unto the Mayor and Sheriff of the said Town, to bring before you the cause, that it may be there examined and ruled as conscience requireth, for the love and in way of charity."

French Merchants plea to Charles IX in 1564[from Ms. at Registre de l'Hotel de Ville, H. 1784, page 268 et seq., National Archives]

"Item le marchand angloys, bourgeois de Londres a ce privillège que quand il a achepté de la marchandise d'un marchand francoys ou aultre, et a intention de faire banqueroutte, quand il est saisy des biens et marchandises, il se peut retirer en sa maison dans cour haulte, ou salle se fermant par devers luy, ou en sa boutique mesme, pourru que l'huis ou simple barrière soit ferme avec un locquet et que de la rue le sergent ne le puisse toucher des sa masse; et ne le peut-on inquieter ni luy demander aucun compte pour les dite marchandises ni mesme l'appréhender ni s'adresser à sa personne, nonobstant que le pauvre Francoys destruiect et ruyné voye en la boutique ledit Angloys banquerouttier, sa femme ses facteurs et serviteurs, lesquels vont vendont publiquement les dites marchandises devant le Francoys mesme qui les aura vendue, sans que icelluy marchand francoys puisse faire arrest sur les dites marchandises ny aucuns biens meubles ou immeubles.

Et sy d'aventure, ledit Angloys banquerouttier est apprehendré hors des sa maison et constitutue prisonnier, il y a une certaine prison particulliere pour les dites bourgeois banquerouttiers, où ils ont liberté par permission d'aller chacun pour faire leurs affaires par toute la dite ville, a leur vollunté, prenant un serviteur de la dite prison, pour le salaire duquel ils baillent au geollier un sol tournois

(3881) un gros (H. 1784) par jour, et cependant ne se peuton  
adresser à leurs biens, ny mesme à leurs marchandises vendues."

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3881 & H. 1784 refer to Mss. in which the extract is to be found -  
the extract may also be found in Ms. 3881, fonds français, ancien  
141 de la collection Baluge, Bibliothèque Nationale pages 19 et  
suivantes.



Thomas Tribe v. John Webber, &c. (1744)

Easter Term 17th Geo. 2 In the Common Pleas

"This was an Action on the Case for 1000 l. brought by the Plaintiff, as Assignee under a Commission of Bankruptcy issued against Robert Burchall, and now the Matter came to be heard before the Court, upon a Point reserved at the Nisi Prius.

The Case was this,

Robert Burchall using the Trade of a Scrivener, on the 23d of June 1740, was arrested upon a Writ returnable in three Weeks after Trinity, at the Suit of Plaintiff Tribe, and at the Return thereof, put in Special Bail; and being indebted to the Defendant John Webber Esq; in the Sum of 365 l. 18 s. on the 27th of January following pays him 347 l. and on the 13th of April 1741, surrenders himself to Prison, and there remained for three Months, by which he became a Bankrupt; and in August 1741, Burchall pays Webber the further Sum of 18 l. 18 s.

And the Question was, Whether Burchall should be deemed a Bankrupt from the Time of the Arrest, or only from his surrendring himself to Prison. If from the Time of the Arrest, then both the Payments made by him were void; but if from the Surrender, then the Payment was bad as to the 18 l. 18 s.

Mr. Serjeant Birch, on the Part of the Plaintiff, argued, That by the Statute of 21 Jac. I. cap. 19. which enumerates the several Acts of Bankruptcy, goes on and says, "Or being arrested for Debt, "shall, after his or her Arrest, lie in Prison for two Months, or

"more, upon that or any other Arrest or Detention in Prison for Debt;  
"or being arrested for the Sum of 100 l. or more, shall escape out  
"of Prison, or procure his Enlargement, by putting in common or hired  
"Bail, shall be accounted and adjudged a Bankrupt to all Intents and  
"Purposes, and in the said Cases of Arrest or lying in Prison for  
"such Debt or Debts, or getting forth by common or hired Bail from  
"the Time of his or her said first Arrest."

That the Time of Bankruptcy, which by the 1 Jac. cap. 15. was left uncertain; is by this Act fully explained to be from the Time of the first Arrest, that this Act was made to remedy the Defects of former Laws; and if these last Words were to be rejected, the Doubt and Uncertainty of the former Act would still remain; and this would not answer the End for which it was made.

By same Statute 21 Jac. I. Sect. I. All Acts made against Bankrupts, are to be beneficially expounded for the Relief of Creditors.

That will be for the Relief of others, which prevents any Preference.

Bankrupts are supposed to be bad Persons; and if Bankruptcy should commence only from the Time of the Surrender, it would be in their Power to defeat Plaintiffs of their Debts, by putting in Bail on the first Arrest, and then paying away his Effects, as far as they would go, to other Creditors, in Preference to the Plaintiff, whereas the Act intended an Equality. But an Arrest comes on a Man unawares, and if the Bankruptcy was to commence from thence, it would prevent any intended Fraud, and give the Bankrupt no Opportunity to cheat his Creditors.

It will be objected, That an Arrest, and giving Bail, may be private; and that it would be hard if Tradesmen, who are supposed not to have Notice of it, should be injured, by giving him Credit after his Arrest. But the Reason is much stronger in other Cases; as where a Man denies himself to some of his Creditors, and afterwards appears on the Exchange; for that Denial is an Act, which none but those Creditors can be presumed to know; but the Arrest is to be discovered by searching the Judges Bail Book, or the Sheriff's Office.

In Came and Coleman, Salk, 109, it was determined, that Bankruptcy must be from the Time of the first Arrest on which he lies in Prison, and not where he puts in Special Bail; for that (the Book says) would be mischievous, and no Man could pay or receive from a Tradesman.

Tribe's Arrest was the first, and he put in Bail, and after surrendered, on which he becomes as much a Prisoner from the Arrest by Relation, as if no Bail had been put in. For the Act does not say, that the two Months Imprisonment shall be immediately following the Arrest; neither does it mention any thing of Bail.

By the I Jac. I cap. 15. sect. 14. there is a Proviso, that no Debtor shall be endangered for the Payment of his or their Debts, truly and bona fide, to any Bankrupt, before he shall understand or know that he is a Bankrupt.

And by 3 Keble 190 & 298. Payment to a Bankrupt, without Notice of Bankruptcy, is good.

So that this Case of Came and Coleman is not well taken, for the Bankrupt may, 'tis plain, receive, though he cannot pay, after Act of Bankruptcy is committed.

The Case of Duncomb and walter is differently reported, 1 Ventris 370. from what it is in 3 Lev. 57. in the former it is said, that Bankruptcy shall not relate to the first Arrest, but yielding to Prison. It is there objected, that this Relation should not prejudice Strangers. But in Lev. the Question was, whether the Arrest being at the Suit of an Executor before Probate, was after made good by Probate, and held to be good against the Bankrupt, but not as to make void the Debt paid to Walter.

But in Smith and Stacey's Case in Salkeld,

Holt Chief Justice said, he was not satisfied with the Judgment in Duncomb and walter, and inclined that J.S. was a Bankrupt from the Time of the first Arrest, and not from the Render only. And said, that if H. is arrested at the Suit of A. and puts in Bail, and that pending is arrested at the Suit of B. and goes to Prison, and lies two Months, he is a Bankrupt by first Arrest by A.

Mr. Serjeant Willes for the Defendant.

A Bankrupt is a Man of broken Fortune and Credit, and the several Laws which are descriptive of Bankrupts, shew what Overt Acts shall be an Evidence of a Man being under those Circumstances; as departing the Realm, suffering himself to be outlawed, arrested, and lying in Prison for two Months, &c. The Question will be, Whether Mr. Burchall

was in that Condition at the Time of the Arrest, or not?

He did not surrender till ten Months after the Arrest, but gave Special Bail; therefore his Credit was not gone. A bare Arrest is not Evidence of Bankruptcy, for that may be and yet nothing may be due, or there may be mutual Debts.

A Merchant of great Fortune may contest a Policy of Insurance, and to that End may suffer himself to be arrested; so that it is no Evidence of low Circumstances. The Statute does not consider it in that Light, The lying in Goal, and not the Arrest, is an Argument of Poverty.

It is not right, in general, to prefer one Creditor to another, though in some Cases it may be justifiable; but if a Person should give an undue Preference, it would injure himself; for then, upon Examination, Commissioners may refuse to give the Bankrupt his Certificate.

On the other Side, greater Inconveniences would happen: If a Merchant worth 100,000 l. sued on a Policy for 500 l. giving Bail to contest the Debt; Witnesses go abroad, by which the Cause is kept from Trial for three or four Years; and in the mean Time, by the Loss of his Ships, Fire, or other unavoidable Misfortune, he is reduced to a low Condition, arrested, and lies in Prison, on such last Arrest, for two Months, should be deemed a Bankrupt from the Time of the first Arrest, and all his Dealings intermediate be invalid; and if for ten Months, why not for ten Years?

A Man may be arrested, and others may know it, yet not believe

his Circumstances bad; but otherwise, if he lies two Months in Prison.

The 21 Jac. cap. I. says, Or being arrested for Debt, shall after lie in Prison two Months, or more, upon that, or any other Detention, shall be adjudged a Bankrupt from the first Arrest.

This two Months must be immediately from the Arrest, otherwise, the Statute would have said, or being surrendered shall lie, &c.

By the 13 Eliz. cap. 7 sect. 1. A Man's yielding himself to Prison, is an Act of Bankruptcy, without lying there two Months, because it is a Confession of Inability; but a Surrender is not so, for the Act has afterwards given him two Months to pay his Debts.

There are two Acts to make a Bankruptcy in this Case, viz. Arrest, and lying in Prison.

If a Man arrested at the Suit of A. cannot get Bail, and goes to Goal, and after B. charges him, A. at the End of one Month releases him; yet if he lies another Month at the Detention of B. it shall be a Bankruptcy from the first Arrest.

There are no Cases parallel to this, except three,

Came and Coleman, Salkeld 109.

Duncomb and Walter, 1 Vent. 370. - 3 Lev. 57.

Hill and Sish, Shore 512.

These are three uniform Cases uncontradicted. Indeed there is a Case in Salkeld, where it is said, Holt, Chief Justice, inclined to think against the Judgment of Came and Coleman; but this was an obiter Saying at the Nisi prius, and he did not determine the Case; and therefore that could have no Weight.

As to the Words Paying and Receiving in Came and Coleman, it seems to be a Lapsus Calami of the Reporter.

Willes, Chief Justice. There are Inconveniences on both Sides in this Case, and therefore I was willing to put such a Construction upon the Act as would occasion the least Mischief. - If the Bankruptcy is to have Relation to the first, Fraud may be committed on putting in Bail, but it would be difficult to obtain the Certificate, and so the Bankrupt himself would be injured by it; and a Man may do Frauds before Arrest, if he thinks proper.

But, on the other Hand, supposing a Man is arrested, and a great many Years after is arrested and put in Prison, all his Dealings in the mean Time must be void, if the Construction of the Act which the Plaintiff contends for, be right; for then, if a Man puts in Bail, he must be a Bankrupt from the Arrest, though he does not surrender himself till seven Years after.

Duncomb and Walter is reported in Levinz, Ventris and Raymond.

In the first it is nothing to the Purpose; the Case being only, if any Arrest made good by Probate, or not.

In Ventris it is said Bankruptcy shall have Relation to going to Prison.

In Raymond there are some Discourses between Counsel, with an Adjournatur. But I can pick out no Reasons from them.

In Shore there is a solemn Judgment, Case in Point.

Came and Coleman says, Bankruptcy shall be from the Time of

the first Arrest on which he lies in Prison. And as to the Mischiefs he mentions might happen by paying or receiving from a Tradesman, if it was not so, it is a Mistake as to the paying, for a Man may safely pay to a Tradesman before Notice of Bankruptcy, after Act committed, though he cannot receive from him.

As to the Case of Smith and Tracey, reported in Salkeld, that was only an obiter Opinion at the Nisi Prius, and there the Commission was taken out before the Bankruptcy; so that there was no Determination on that Point.

The Words in the Act, Or shall procure his Enlargement, by putting in common or hired Bail, are, by 10 Ann. c. 15. s. 1. repealed; so that now the putting in hired Bail is no Act of Bankruptcy; by which it is plain, that bare Arrest and putting in Bail, are not considered as Acts that hurt a Man's Credit.

The Act of Parliament must mean, that where there is a Lying in Prison for two Months upon the Arrest, the Bankruptcy shall not be from the End, but the Beginning of the two Months, i.e. from the Arrest.

Upon the whole, I am of Opinion, that as to such Payments as were made between the Arrest and the Surrender, they are good Payments to the Defendant; and that the Plaintiff shall take a Verdict for the [£18. 18s.] paid after the Bankrupt's surrendering himself to Prison." Mr. Justice Abney and Mr. Justice Burnet were of the same opinion.



A close warrant directed to Elizabeth Peart [ 20th June, 1613]

"We greete yow well. whereas wee did formerly direct our letters to yow and diverse others, the creditours of W lter Morrel of Hatfield, in the county of Hartford, clothier, either to subscribe unto such a rateable composition for your particular debt, as the greata number of his creditours had already donne for theirs (and that for the reasons in the said letter specified), or else to your personall apparance heere before us, to shewe unto us the occasions of your refusall, whereunto neverthelesse yow have shewed so litle conformity as neither to subscribe, as all the rest of his creditours have donne in generall (yourself excepted), neyther yet by your aparance to make knowne unto us the groundes of your denyall; wee do heereby lette yow knowe that wee do take your neglect in ill part, and seeing yow continue to prosecute him with extremity, wee do commaund yow, all excuses and delays sett apart, to make your speedie repaire before us of his Majestie's Councell, to give us heerein that satisfaction which wee did formerly require at your handes.

And heereof yow are not to fayle, as yow will answere the contrary. From etc. - Lord Archbishop [of] Canterbury, Lord Privie Seale, Earl of Shewsbury, Lord Louche, Sir Julius Ceasar."

Acts of the Privy Council, 1613-1614, pp. 102-103 - 26th June (1613)

New Newgate Calendar Vol. 3, pp. 97-113

John Perrott

(A Bankrupt)

Executed in Smithfield, November 11, 1761, for concealing part of his effects

"John Perrott was born at Newport Pagnal, in Buckinghamshire, about sixty miles north of London, in the year 1723, being about 38 years of age at his death. His father died when he was seven years old, and his mother about two years afterwards, leaving him a fortune of about 1500 l. After the death of his parents, he was, by the direction of a guardian, placed in the foundation school of Golsborough, in Northamptonshire, where he continued five years: he was then, being about fifteen years old, put apprentice to his half-brother at Hampstead in Hertfordshire, where he served out his time. In the year 1747, he came to London, and began to trade for himself in foreign white lace, but kept no shop. In the beginning of the year 1749, he took a house, and opened a warehouse in Blow-bladder-street. About the year 1752, he removed from Blow-bladder-street to Ludgate-hill, where he opened a linen draper's shop, and dealt in various other articles, stiling himself merchant. From the time of his opening this shop, till the year 1759, he returned annually about two thousand pounds; and was remarkably punctual in his payments. Having thus established his reputation, and finding that no credit which he should ask, would be refused him, he formed a scheme of abusing

this confidence, which he began to put in execution by contracting for goods of different sorts, to the value of 30,000 l. the greatest part of which, amounting to the value of 25,000 l. he actually got into his possession.

In pursuance of his project, it was necessary to convert these goods into ready money as soon as possible; he therefore employed one Henry Thompson (who had for three or four years acted as his agent, or broker) to sell them for ready money. Thompson, at this time, kept a little house in Monkwell-street, near Wood-street, whither the goods were sent in the dusk of the evening, and whither he invited some of the principal traders to look at them, as goods consigned to him from the places where they were manufactured. Perrott always set a price upon them, which Thomson shewed to his chapmen, who usually fixed another price at which they would buy; at this price Thomson was always ordered to sell, though it was frequently fifteen and twenty per cent. below prime cost.

When he had thus converted the goods he obtained upon credit into money, and before the time when he was to pay for them arrived, he summoned his creditors together, who accordingly met on the 17th January 1760, at the Half-moon tavern, in Cheapside; where he acquainted them that he was unable to pay the whole of what he owed, referring himself intirely to their pleasure, and promising to acquiesce in all such measures as they should propose, to pursue their own benefit and security.

This conduct, and these professions, had so plausible an appearance, that Perott's creditors conceived a favourable opinion of him,

notwithstanding the loss they were likely to suffer: it was, however, determined, that a commission of bankruptcy should be sued out against him, and Perrott having agreed, to cause himself to be denied the next day, to a person whom his creditors were to send to demand money, as the common and most ready foundation of commissions of bankruptcy: such a commission was issued against him on the 19th of January, the second day after meeting, and Perrott being found and declared a bankrupt, surrendered himself as such.

The 26th of the same month, the 4th of February, and the 4th of March, were appointed for his appearance before the commissioners, to make a full disclosure of his estate and effects.

On the 26th of January, he did not appear, and though he appeared on the 4th of February, and was sworn, he declared that he was not prepared to make a full discovery of his effects, and requested to have time limited for that purpose enlarged, which request was granted.

But two of Perrott's creditors, having been at this meeting chosen assignees of his estate, they found upon an inspection of his accounts and affairs, such a deficiency and confusion, as gave them just reason to suspect his integrity; and it was now thought necessary to examine him as soon as possible. He was accordingly summoned before the commissioners on the 26th of February, and then being hard pressed, he acknowledged that he had bought goods since the year 1758, to the amount of 20,000*l*. and sold them himself, or by Thomson, for ready money at fifteen or twenty per cent. under prime

cost; and that about five years before, he hired a house in Hide-street, near Bloomsbury square, at 30 l. per ann. rent, and furnished it at the expence of about 130 l. that it was for a lady, and that he lived in it for about a year and a half, and then quitted it, and sold the furniture. And he swore also, that he had not since that time, any other house or lodging, or paid for the lodging of any other per on.

An examination which produced such proof of the bankrupt's misconduct, greatly increased the suspicions of his creditors, that more knavery was intended; and it appeared that though he had kept regular books from 1752 to 1757, yet that at the end of that time they were in some confusion, and afterwards in total disorder. Neither were any traces to be discovered of accounts between him and Thomson, notwithstanding the very large transactions between them, which was another reasonable cause to suspect fraudulent designs.

These transactions between Perrott and Thompson, were thought sufficient reason to summon Thompson before the commissioners; and, on the first of March he appeared, and deposed that he had sold goods for Perrott to a great value, at 15 to 20 per cent. under prime cost, and that he was ordered by Perrott not to declare the goods were his.

It was also discovered, during this examination of Thompson, that on the third day after the commission was issued, Perrott sent to him by his apprentice a paper parcel, sealed with three seals, desiring he would take care of it; that he accordingly locked it up in his bureau; and seeing Perrott a day or two afterwards, was told

by him, that it contained papers relating to private transactions between him and one Holt, of Newport Pagnel, in which his creditors had no concern: and that on Wednesday the 29th of February, the day after his first examination, Perrott redemanded this paper parcel, and again received it from Thompson, who never knew its contents.

In the mean time Perrott knowing himself justly suspected, and apprehending that his creditors would now insist on his making a final discovery, on the 4th of March he applied to the lord keeper by petition, without the intervention or assent of his creditors, for enlarging the time limited for such discovery: and when the commissioners met on the 4th of March, he caused them to be served with the lord keeper's order for enlarging it forty-six days.

In the mean time, further information having been received of Perrott's particular connections, it was thought proper to examine one Patrick Donelly, a peruke-maker in Bell-yard, near Temple-Bar, upon whose examination it appeared, that Perrott, about a fortnight after the commission issued against him, sent to him two large boxes, and one hair trunk, which he said contained wearing apparel, and desired that they might be kept for him till he could procure lodgings for himself; that in about a week these boxes were carried to the last house in a court in Queen square, Holborn, which was kept by a woman, whose name was Ferne.

In order to pursue the track thus gradually found, Mrs. Ferne was examined the 28th of March by the commissioners, who met for that purpose; when, she declared upon her oath, that she had known

the bankrupt about a year, and that he had never put into her possession any bank notes, cash, or any other effects whatsoever, belonging to him, and that she did not know of any effects he had. Perrott himself being also examined at the same time, admitted his acquaintance with Mrs. Ferne, but swore that he had deposited no part of his property with her, except some wearing apparel; and that the parcel, sealed with three seals, which he told Thompson contained accounts of private transactions between him and one Holt of Newport Pagnel, contained nothing but letters from the fair sex, which he had since destroyed.

His creditors, however, still continued to treat him with great lenity; and Perrott, in order to facilitate his obtaining his certificate, formed a design of sacrificing one of them to the rest.

He was indebted to Mr. Edward Whitton of Northampton, in 4100 l. and Mr. Whitton having expressed himself with some warmth of resentment, upon hearing Perrott was become a bankrupt, at the very time when he pretended to derive great advantages from his business, in order to cajole Whitton to advance him more money, under the pretence of enlarging it: Perrott conceived a project, by which he could at once take off the weight of Mr. whitton, as a creditor, and by lessening the loss of the rest, dispose them to treat him more favourably.

When Mr. whitton, therefore, appeared to claim his debt of 4100 l. Perrott pretended that no more than 15 or 1800 l. was legally due to him, the rest of his demand being accumulated by usury and extortion;

for that Whitton, whose debt was money lent, not only charged ten per cent. interest for the original loan, but had also charged interest upon interest, at the same rate.

It is a sufficient refutation of this wicked calumny, in which the most flagitious injustice was complicated with the basest ingratitude, to say that the commissioners, after the most scrupulous and deliberate enquiry, allowed the whole of Mr. Whitton's debt, to the satisfaction of all the other creditors of Perrott's, though in direct opposition to his own solemn and repeated declarations upon oath. It should not, however, be concealed, that to this very Mr. Whitton, Perrott was principally indebted for his introduction into trade, for his support in the course of it, and for the credit he afterwards obtained; that he declared to several persons, that whenever he wanted money, he could have it of Mr. Whitton, his dearest and most valuable friend, at four per cent: that Perrott, to ingratiate himself farther with this gentleman, made a will about the year 1757, in which he gave 2000 l. and made Mr. Whitton his executor, though he was not then worth one shilling; and stiled him his best and dearest friend, in letters written so lately as 1758, to induce him to sell out stock at considerable loss, and put the money into his hands, upon pretence that his profit would enable him to pay lawful interest for it, and replace it whenever it should be required, at whatever price.



On the 19th of April, 1760, the forty-six days expired, which Perrott had, by petition procured to be added to the time limited for the disclosure of his estate and effects, and finish his examination.

On this day, therefore, he appeared before the commissioners, and exhibited, upon oath, an account of his effects, which, after giving him credit for all the money he had paid, and making debtor for all the goods he had sold, from his first entering into trade, to his bankruptcy, left a deficiency of no less than 13,513 l. He was therefore required to declare upon oath, what was become of that sum, to which he replied, 'That he lost 2,000 l. on goods which he had sold in the last year; 1000 l. and upwards, by mournings; and that for nine or ten years, he was sorry to say, he had been extremely extravagant, and spent large sums of money'.

As Perrott, during this examination, had also sworn that he never gamed, and as the vast sum unaccounted for, came into his hands only in the last year, it appeared scarcely possible that it should, in that one year, be dissipated by any species of extravagance; if not dissipated, it was concealed, and Perrott, therefore, was the same night committed to Newgate, for 'not having given satisfactory answers on his examination'.

In Newgate he was constantly visited by Mrs. Ferne, who was always elegantly dressed, and came in a chariot, or post-chaise, attended by a servant in livery, or a maid-servant, or both.

They used frequently to dress a chop themselves, and Perrott

condescended to clean his own knives; yet his folly and improvidence were so great, that, at this very time, he indulged himself and madam with green pease, at five shillings a quart.

After he had continued in Newgate six weeks, he gave notice to the commissioners, that he would give a more satisfactory account of the deficiency in his estate, and being therefore brought before them on the 5th June, 1760, he gave in, upon oath, the following account:

(see p. 815).

To this account he added the most solemn asseveration upon oath, that he had not concealed any part of his estate and effects whatsoever.

With this account the commissioners being equally dissatisfied they sent him back to Newgate, and some time after, he petitioned the Lord Keeper to be discharged; but his lordship, upon hearing the last deposition which Perrott thought fit to annex to his petition, read, thought it so infamous, that he would not order any attendance upon it.

As the creditors had now no doubt of the concealment of great part of Perrott's estate, they advertised a reward of twenty per cent. for such part of it as should be discovered.

In consequence of this advertisement, one Sarah Reed came before the commissioners, on the 20th June, 1760, and deposed, that she lived with Mrs. Ferne, as a servant, in the house of one Mrs. Trowers, in Brunswick-row, Queen-square, till the then

last October; that Perrott there became acquainted with Mrs. Ferne, and soon after took to Derby, and at her return made her a present of ten guineas in a purse.

That the deponent in February, 1760, went to pay visit to Mrs. Ferne, and was backwards and forwards about a fortnight; that, during this time, Mrs. Ferne being about to go out, returned in great haste to lock a bureau, saying there was five hundred pounds in it, which the deponent believes to be Perrott's property, because Mrs. Ferne had been frequently so distressed for money, as to employ the deponent to pawn her wearing apparel, to discharge her rent. That about this time, one Catharine Bowen, then servant to Mrs. Ferne, told the deponent, that Mrs. Ferne had given her a parcel of papers, and desired her to hide them, which she did, behind the pictures and glasses in Mrs. Ferne's apartments, that were so given her to hide because Perrott's assignees were expected to search the rooms. She deposed also, that about a week before Perrott and Ferne were summoned to their examination, she went up with Catharine Bowen into the garret, where Bowen took up a cushion that lay in a great chair, and took out a packet of papers sealed with three seals, and tied with pack-thread, which papers Bowen said she believed to be bank notes, and replaced where she found them. That after Perrott and Ferne were gone before the commissioners, she and Bowen went to look for the papers, and they were gone; and upon going to Mrs. Ferne's dressing-room, found it locked, which it never used to be, and of which she took the greater notice, as

she, Bowen, had received orders, that if any persons should come to search the apartments, they should be shewn those of Perrott only, and not those of Ferne.

However strange it may appear, that a person entrusted with bank notes to a great value, should give them to a servant-maid, to hide under cushions, and behind pictures, and without any apparent motive, not only risque the loss of such notes by the dishonesty of the servant, but trust her with a secret of equal importance, by telling her they were secreted from a search expected to be made by injured creditors of a bankrupt, yet there was no reason to doubt but that this witness had seen a paper parcel, sealed with three seals, which appeared to have been secreted, or that that this parcel was any other than that which Perrott had entrusted to the care of Thompson, and concerning which he had already given different and inconsistent accounts.

In order to trace this important parcel still further, Catharine Bowen was also summoned, and examined; and though she denied that Mrs. Ferne ever gave her any papers to hide, or that she ever pretended she had so done, yet she admitted that as she was brushing a chair in the garret, she found such a paper parcel, which she put there again, that she was then alone, and that about a week afterwards, the same parcel was found out by Sarah Reed, but she knows not by what means; that they conversed together about it, and said to each other, that they believed it contained something of value: that she and Reed went up to look for it some time

afterwards, and it was gone; and going to seek farther in Mrs. Ferne's dressing-room, they found the door locked, which was unusual.

These dispositions of Reed and Bowen sufficiently coincide to leave no doubt of a concealment, nor of the place where it was made; yet these circumstances were not sufficient to enable the assignees legally to avail themselves of the powers with which they had been invested, to apply for search warrants, or prefer bills of indictment.

Nothing farther was therefore done in the course of the proceedings, except making an order for the dividend of five shillings in the pound, till the September following when Perrott caused himself to be brought up by a Habeas Corpus before Lord Mansfield, in order to be discharged; but his lordship, after having examined the affair, declared that the commissioners had done wisely and honestly, in committing the bankrupt to prison; and that there he should remain till he had answered the questions they propounded to him to their satisfaction.

Perrott, however, on the 17th day of December following, petitioned the Lord keeper a second time, alledging that he had finished and signed his final examination, as by law required, before such question had been propounded; and that, having sworn he had made no concealment, the commissioners had no right to confine him.

When the matter of this petition was heard before the Lord

Keeper, he directed that the validity of the warrant upon which Perrott was committed, which was a question of law, should be determined in the court of King's Bench.

This point was accordingly argued before the court of King's Bench, before which Perrott was again brought by Habeas Corpus, and the court was unanimously of opinion that the warrant was legal, and therefore remanded him to prison.

On the 13th of March, the Lord Keeper dismissed the petition, and declared himself to be of the same opinion with the court of King's Bench.

Perrott hoped to prove, that, by the laws in force, concerning bankrupts, the commissioners were obliged to receive as true, whatever the bankrupt should please to swear at his final examination, and that they have afterwards no power of commitment; but finding himself disappointed, he submitted himself to another examination; and being brought before the commissioners on the 21st of March, and asked the same question, he gave an account of his becoming acquainted with one Sarah Powell, otherwise Taylor, about six years before, with whom he continued an intimate acquaintance till he became a bankrupt, but who died soon after, as he was informed about ten months ago, while he was a prisoner in Newgate. And he delivered in an account, upon oath, of his having remitted to this woman from Christmas 1758 to Christmas 1759, though she was, during that time, by his own account, dying of a consumption, and was, for that reason, in the country, sometimes at Weybridge,

in Surrey, and sometimes at Bath, no less than five thousand pounds, in cash and bank notes, which he received of Thompson for the goods that he employed him to sell; at the same time confessing that, before this time, she had never cost him more than one hundred pounds a year.

When he was asked, whether this woman, whom he supplied with o less than five thousand pounds in one year, kept any carriage, he said he could not tell. When he was asked, by what servants she was attended, he answered by a man and a maid, whose names he never knew; and he also declared, th t though he saw her, after her return from Bath, and perceived she was passed hopes of recovery, he never asked how she intended to dispose of her effects, nor did he desire any person to attend her as a physician or apothecary, in her last illness, or even knew by whom she was attended; that he visited her at her lodgings in streets, the names of which he has entirely forgot; and that he directed many letters to her he does not know where: but he said, that the paper parcel with three seals contained several of her letters, which he had since burnt; and that he did not disclose these particulars befor , because it was her dying request that he should not.

As it was impossible to believe that Perrott, who, when this woman was in health and s\_irlits, never spent more upon her than one hundred pounds in a year, should, when she was languishing in a consumption, and after his connection with Mrs. Ferne, send her

so large a sum as five thousand pounds, and as his account was in every other respect incredible, even to absurdity, the commissioners sent him back to Newgate, for the same reason as they first committed him.

Not, however, to suffer the incredibility even of this account to rest upon its own extravagance and inconsistency, an enquiry was made after this Sarah Powell; and it was discovered, by information of undoubted credit, that her true name was Rachael Sims; that she was the daughter of a tradesman at the Devizes in Wiltshire, and had been in keeping, and was deserted, when she first became acquainted with Perrott; that she took the name of Powell, because Perrott's linen was marked with a P; that he also went by the name of Powell, and passed for her husband at many houses and lodgings, in town and country! that she contracted a habit of drinking, which was the cause of her death; that she had just reason to complain of Perrott's parsimony; and that, when she died, she did not leave money enough to bury her.

Perrott, however, scrupled not, upon the merit of the answer, false and incredible as it was, to cause himself again to be brought by Habeas Corpus into the court of King's Bench to be discharged; nor did the court make any scruple to order him back from whence he came.

But Perrott was not yet discouraged, and hoping for better success in another court, he brought an action into the Common



Pleas against the commissioners, for false imprisonment.

In the meantime a reward of forty per cent. was offered by advertisements, often repeated, for the discovery of any part of Perrott's estate, but without effect. It happened however, that as Mr. Hewitt, one of Perrott's assignees, was walked one morning last June, upon the terrace in Lincoln's-Inn gardens, he observed a woman leaning over the wall, who had something so disconsolate and forlorn in her appearance, that he could not resist his curiosity to speak to her. Upon enquiring what was the cause of her present apparent distress, she told him that she had been turned out of her service, by one Mrs. Ferne, and that she knew not where to go. The name of Ferne immediately rendered his curiosity interested in a high degree, and he sent her to Mr. Cobb, who was clerk under Perrott's commission, to get her examined.

The examination of this woman, whose name was Mary harris, was taken before justice Fielding, on the 23d of June, 1701, and was to this effect: That she had known Mrs. Ferne about four years; that when she first knew her, she was just come from the service of Mrs. herman, at the Tea-chest, in Watling street, and lodged at one Jefferson's, a grocer, in Shire-lane, Temple-bar, where the deponent also lodged, and was her bedfellow; that her parents were poor people, who had had a little farm in Derbyshire, of about thirty pounds a year; and that Ferne herself was without

money, and in great want of cloaths and other necessaries; that in February then last, (Feb. 1761) Ferne called upon the deponent, at her lodgings, and invited her to come to see her; that she went to see her the next day, and agreed to live with her as a servant.

That accordingly she went into her service on the 5th of March, and continued in it, till the 4th of June following: That during this time she had frequent discourse about one John Perrott, a bankrupt, and frequently saw a number of bank notes in her possession, to the amount of four thousand pounds. That she told her all her fortune was owing to a person whose picture she shewed, which she afterwards knew to be that of Perrott. That she went daily with her mistress to Newgate, where she often heard him and her mistress discourse how they would live when he got his discharge.

Once in particular, her mistress told Perrott, that the house of Sir John Smith, Bart. in Queen-square, was to be sold, upon which Perrott said, "My dear, have you a mind for it?" She replied, "Yes, I can get it for eight or nine hundred pounds." And he answered, "My life, if you have a mind for it, I should like it above all places in the world"; and in consequence of this conversation Ferne went and bid nine hundred and fifty for the house, and took the half of a bank note of one thousand pounds, to pay for it, though she did not buy it, and told the deponent that the other half of the note was in the hands of Perrott, and that she frequently cut bank notes, and kept half, and gave Perrott half, who kept an

account of them.

In consequence of this information, Ferne's apartments, which were very extensively furnished, in particular, with a chamber organ, were searched by virtue of Fielding's warrant; and, at the same time, Perrott's rooms in Newgate, by virtue of a warrant from the commissioners.

In Ferne's possession were found the half of four bank notes, amounting in all to one hundred and eighty-five pounds, and the corresponding halves were found at the bottom of Perrott's trunk, hid, or sewed up very carefully in a piece of rag, together with the signed moiety of another bank note for one thousand pounds.

Upon this discovery, Ferne was carried before the justice, and examined, concerning the bank notes, when she insisted they were her own property, and received from gentlemen, as a gratuity for favours; but these very notes were, by the indefatigable diligence of those concerned, traced back into money paid to Thompson, for goods which he sold on Perrott's account.

After some subsequent examinations of Mrs. Ferne, and of one Martin Matthias, and one Pye Donkin, who acted as attornies for Perrott, which examinations all tend to prove that Perrott had deposited notes to a great value in Ferne's hands, and to expose the shameless perjury of Ferne, all proceedings were suspended till the trial in September, 1761, when it being proved, that the notes found in the possession of Ferne and Perrott, were the produce

of Ferrott's estate, he was convicted, and received sentence of death.

From the time of his having been charged with a capital offence, he was put into irons; yet he seemed healthy and cheerful, and expressed great confidence of being acquitted.

After his conviction, he was removed from his chamber to a cell, where he contracted a cold and hoarseness, and became fretful, querulous and impatient. He had, however, even then formed a scheme of escaping from prison; and a party of sailors were hired to come and rescue him in the day time, when brought down from the cells to the chapel, by securing the turnkey at the gate, forcing the keys from him, and then carrying off the prisoner. To facilitate the execution of this project, Ferrott complained that the public prayers were not so frequent as they ought to be, and was very zealous to attend oftener at chapel; but some intelligence having been given to Mr. Akerman, that a rescue was intended, orders were sent down, that he should be more closely confined, and not permitted to be out of his cell any longer than he continued at chapel; the Ordinary also received a hint, not to visit him more than once a day in the day time, and at uncertain hour.

He was often urged to make a full disclosure of his effects, great part of which were still concealed, but he obstinately refused it, saying, he was to die, and that was atonement sufficient for the wrongs he had committed.

Then he was told the dead warrant was come down, he did not express such agony of confusion and terror, as is generally

expressed on the occasion, but said, "the will of God be done." He performed such devotion, and heard such instructions, as are common to persons in his unhappy circumstances.

He was in consequence of his own request, visited the day before his death by his assignees, to whom, however, he refused to answer particular questions relating to his estate, giving as a reason, that he had received the Sacrament. This reason for answering no questions, seems to prove that he had secretly determined not to disclose his estate by answering truly; because, in this case, he avoided the crime of falsehood by being silent, though otherwise his answer would have coincided with every part of christian duty, and his having received the Sacrament, would rather have been a reason for his answering them not.

On the morning of his execution, he confessed the justice of his sentence, and acknowledged the injury he had done to his benefactor Mr. Whitton, and asked his forgiveness; he expressed great solicitude about what should become of his body, desiring it might be buried in the church of the place where he was born. To this he added another request, which was much more rational; he desired that the time might be enlarged in the chapel, and shortened at the place of execution. He was in the chapel therefore from eight to three quarters after nine; the next half hour was employed in knocking off his irons, about ten minutes more were spent in taking leave of his fellow convict, one Lee, who was condemned for forgery; and about a quarter after ten, he appeared pale and trembling at the door of the dress yard, and was immediately put into the cart.

As he was executed in Smithfield, his journey was not far, yet he often looked round with a kind of wild eagerness and despair, common to those in his situation, who consider every thing they behold, as an object, which they shall behold no more.

When he stood up under the gallows, he expressed yet greater horror and despair, but soon recovered some degree of fortitude: and when the ordinary first came into the cart to him, he found him looking about enquiring after his hearse, which he was soon satisfied was at hand; he then sent a red checked handkerchief to Lee, by a person present, saying, he had promised it for a token; this, however, the wretch who received it, never delivered. After this, his mind seemed more composed, and some prayers being repeated, in which he seemed to join with great ardour, he was about 11 o'clock turned off.

He appears, by two letters, which are printed in the account of him, published under the ins ection of his assignees, to have an inelegant, an illiterate, and in every respect a corte ptible low understanding; yet, as is very common with such characters, he had a kind of low cunning, which like that of a lunatic, is always employed for an ill purpose; and which, not being sufficiently uniform in itself, and extensive with respect to its objects, is always ultimately disappointed."

Fitting-up my warehouse in Blowbladder street, and furnishing the same	L	100
Rent and boy's wages during my stay there		100
Travelling expenses during the same		100
My own diet during that time		125
Cloaths, hats, wigs, and other wearing necessities		<u>200</u>
	L	<u>625</u>
Fitting up my house on Ludgate-hill	L	100
Furnishing the same		200
Housekeeping during my stay there, with rent, taxes, and servants wages		2,700
Cloaths, hats, wigs, shoes, and other wearing apparel during my stay there		720
Travelling expenses during my stay on Ludgate-hill		360
Horses and keeping them, saddles, bridles, and farmer's bill during my residence on Ludgate-hill and Blowbladder-street		575
Tavern expenses, coffee house expenses, and places of diversion during the above time		920
Expenses attending the correction I had with the fair-sex		5,500
Paid Mr. Thomson for selling goods by commission		300
Forgave him a debt in consideration of his trouble and time, in getting bills accepted, &c.		30
Lost by goods and mourning		<u>3,000</u>
Total L.		<u>15,030</u>

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1731-2

BANKRUPTS

## C A P. XXX.

An Act to prevent the committing of Frauds by Bankrupts.

WHEREAS Commissions of Bankrupt have been issued against several Persons not long before and since the Expiration of the Statute made in the fifth Year of His late Majesty's Reign, intituled, *An Act for the better preventing Frauds committed by Bankrupts*, and such Persons have been declared Bankrupts by the Commissioners by such Commissions authorized, and yet several of such Bankrupts, by reason of the Expiration of the said Statute, have not only refused to surrender themselves to the Commissioners, and to discover and deliver up their Estate and Effects to the said Commissioners for the Benefit of their Creditors, but have carried away and concealed the same in such Manner, that the said Commissioners have not been able to seize the same, to the manifest Wrong and Injury of their Creditors, and to the great Discouragement of Trade: And whereas many evil-minded Persons have, since the Expiration of the said Statute, bought and taken upon Trust and Credit divers great Quantities of Goods, Wares and Merchandizes, and have thereby, and by their extravagant Manner of living and otherwise, contracted great Debts, and having gotten such Goods and Effects into their Custody, have sold or pawned the same for less than the Value thereof, and thereby raised ready Money, and have withdrawn themselves from their usual Places of Abode, with their Effects, into secret Places, in order to oblige their Creditors to accept of such

Compo.



' Composition for their respective Debts, as such evil-minded  
 ' Persons think fit to offer, or have carried away their Effects  
 ' beyond the Seas, whereby their Creditors have been totally  
 ' deprived of their Debts: And whereas many Persons have and  
 ' do daily become Bankrupts, not so much by reason of Losses  
 ' and unavoidable Misfortunes, as to the Intent to oblige their  
 ' Creditors to accept such their unjust Proffers and Composition,  
 ' and to defraud and hinder their Creditors of their just Debts:  
 Therefore to remedy the said Abuses, and supply the Defects and  
 Inconveniences of former Laws relating to Bankrupts, Be it enacted  
 by the King's Most Excellent Majesty, by and with the Advice  
 and Consent of the Lords Spiritual and Temporal, and Com-  
 mons, in this present Parliament assembled, and by the Authority  
 of the same, That if any Person or Persons, who since the four-  
 teenth Day of *May* which was in the Year of our Lord One thou-  
 sand seven hundred and twenty nine, hath or have become Bank-  
 rupt, or who shall at any Time hereafter during the Continuance  
 of this Act become Bankrupt, within the Intent and Meaning  
 of the several Statutes made and now in force concerning Bank-  
 rupts, or any of them, and against whom a Commission of Bank-  
 rupt under the Great Seal of *Great Britain* hath, since the said  
 fourteenth Day of *May* which was in the Year of our Lord One  
 thousand seven hundred and twenty nine, been awarded and issued  
 out, or shall at any time hereafter be awarded and issued out;  
 whereupon the Person or Persons against whom such Commission  
 hath issued or shall issue, have or hath been or shall be declared  
 Bankrupt or Bankrupts, shall not within forty two Days after  
 Notice thereof in Writing, to be left at the usual Place of Abode  
 of such Person or Persons, or personal Notice, in case such Person  
 or Persons be then in Prison, and Notice given in the *London*  
*Gazette*, that such Commission or Commissions is, are or have been  
 issued, and of the Time and Place of a Meeting of the Com-  
 missioners therein named, or the major Part of them, surrender  
 him, her or themselves to the said Commissioners named in the  
 said Commission, or the major Part of them, and sign or subscribe  
 such Surrender, and submit to be examined from Time to Time  
 upon Oath, or being of the People called *Quakers*, upon the so-  
 lemn Affirmation by Law appointed for such People, by and be-  
 fore such Commissioners, or the major Part of them, by such  
 Commission authorized, and in all Things conform to the several  
 Statutes already made and now in force concerning Bankrupts;  
 and also upon such his, her or their Examination fully and truly  
 disclose and discover all his, her or their Effects and Estate Real  
 and Personal, and how and in what Manner, to whom and upon  
 what Consideration, and at what Time or Times he, she or they  
 have or hath disposed of, assigned or transferred any of his, her  
 or their Goods, Wares, Merchandizes, Monies or other Estate  
 and Effects (and all Books, Papers and Writings relating there-  
 unto) of which he, she or they was or were possessed; or in on  
 to which he, she or they was or were any ways interested or  
 intitled, or which any Person or Persons had, or hath or have had  
 in Trust for him, her or them, or for his, her or their Use; at any  
 Time before or after the issuing of the said Commission, or where-  
 by such Person or Persons, or his, her or their Family or Fa-  
 milies, hath or have, or may have or expect any Profit, Possibility

Bankrupts since  
14 May 1719.

not surrender-  
ing within 42  
Days Notice,

conforming to  
the Statutes,

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or embezzling  
Goods to Value  
of 20*l*.

† *Sic*.  
Felony.

Number and  
Limitation of  
Sittings.

Lord Chancellor  
may enlarge the  
Time for sur-  
rendering.

of Profit, Benefit or Advantage whatsoever, except only such Part of his, her or their Estate and Effects, as shall have been really and *bona fide* before sold or disposed of in the way of his, her or their Trade and Dealings; and except such Sums of Money as shall have been laid out in the ordinary Expence of his, her or their Family or Families; and also upon such Examination deliver up unto the said Commissioners by the said Commission authorized, or the major Part of them, all such Part of his, her or their the said Bankrupts Goods, Wares, Merchandizes, Money, Estate and Effects, and all Books, Papers and Writings relating thereunto, as at the Time of such Examination shall be in his, her or their Possession, Custody or Power (his, her or their necessary Wearing Apparel and the necessary Wearing Apparel of the Wife and Children of such Bankrupt only excepted) then he, she or they the said Bankrupt or Bankrupts, in case of any Default and wilful Omission in not surrendering and submitting to be examined as aforesaid, or in case he, she or they shall remove, conceal or embezzle any Part of such his, her or their Estate Real or Personal, to the Value of twenty Pounds, or any Books of Account, Papers or Writings relating thereto, with an Intent to defraud his, her or their Creditors (and being thereof lawfully convicted by Indictment† or Information) (a) shall be deemed and adjudged to be guilty of Felony, and shall suffer as Felons without Benefit of Clergy, or the Benefit of any Statute made in relation to Felons; and in such Cases such Felon's Goods and Estate shall go and be divided among the Creditors seeking Relief under such Commission; any Law, Usage or Custom to the contrary thereof in any wise notwithstanding. (a) [*Vide Observation of Heath Just. on this Passage, Rex v. Bullock, 1 Taunton Rep. p. 71. in Note.*]

II. Provided always, and be it enacted by the Authority aforesaid, That the said Commissioners, authorized as aforesaid, shall appoint within the said forty two Days so appointed as aforesaid for the Bankrupt to surrender and conform as aforesaid, not less than three several Meetings for the Purposes aforesaid, the last of which shall be on the forty second Day hereby limited for such Bankrupt's Appearance; except on Commissions already issued since the said fourteenth Day of May One thousand seven hundred and twenty nine, where the Person or Persons against whom such Commission issued has or have before surrendered and submitted to be examined; in which case the said Commissioners authorized as aforesaid, shall appoint only one Sitting more for the Purposes aforesaid, unless the Assignee or Assignees of the Estate of such Bankrupt shall think more Sittings necessary, and desire the same, and three Weeks Notice at least shall be given in the *London Gazette* of the Time and Place of such Meetings.

III. Provided always, and it is hereby declared and enacted by the Authority aforesaid, That it shall and may be lawful to and for the Lord Chancellor or Lord Keeper, or Commissioners for the Custody of the Great Seal of Great Britain for the Time being, to enlarge the Time for such Person or Persons surrendering him, her or themselves, and disclosing and discovering his, her or their Estate and Effects as aforesaid, as the said Lord Chancellor, Lord Keeper or such Commissioners shall think fit, not exceeding fifty Days, to be computed from the  
End

End of the said forty two Days, so as such Order for enlarging the Time be made by the said Lord Chancellor, Lord Keeper or such Commissioners, six Days at least before the Time on which such Person or Persons was or were so to surrender him, her or themselves, and make such Discovery as aforesaid.

IV. And be it further enacted by the Authority aforesaid, That every such Bankrupt or Bankrupts as aforesaid, after any Assignee or Assignees of his, her or their Estate and Effects shall be chosen and appointed, as hereinafter mentioned, shall be and is and are hereby required forthwith to deliver up upon Oath, or (one of the People called *Quakers*) upon solemn Affirmation before one of the Masters of the High Court of Chancery, or before any Justice of the Peace within his respective Jurisdiction, which Oath or Affirmation they are hereby empowered to administer, unto such Assignee or Assignees, all his, her or their Books of Accounts; Papers and Writings not seized by the Messenger of the said Commission, or not before delivered up to the Commissioners, or the major Part of them, and then in his, her or their Custody or Power, and discover such as are in the Custody or Power of any other Person or Persons, that any ways relate to or concern his, her or their Estate or Effects; and all and every such Bankrupt or Bankrupts, not in Prison or Custody, shall at all Times after such surrender as aforesaid be at Liberty, and is and are hereby required to attend such Assignee or Assignees upon every reasonable Notice in Writing for that Purpose given by such Assignee or Assignees unto such Bankrupt or Bankrupts, or left for him, her or them, at his, her or their House or Place of Abode, in order to assist, and shall assist such Assignee or Assignees in making out the Accounts of the said Bankrupt's Estate and Effects.

Books of Account to be delivered to Assignees on Oath.

Bankrupt to attend Assignees.

V. And be it further enacted by the Authority aforesaid, That all and every Bankrupt or Bankrupts having surrendered as aforesaid, shall, at all seasonable Times before the Expiration of the said forty two Days, or such further Time as shall be allowed to such Bankrupts to finish his, her or their Examination, be at Liberty to inspect his, her or their Books, Papers and Writings, in the Presence of such Assignee or Assignees, or some Person to be appointed by such Assignee or Assignees for that Purpose; and to take and bring with him, her or them, for his, her or their Assistance, such Persons as he, she or they shall think fit, not exceeding two Persons at any one Time, and to make out such Extracts and Copies from thence, as he, she or they shall think fit, the better to enable him, her and them to make a full and true Discovery and Disclosure of his, her or their Estate and Effects; and in order thereto the said Bankrupt or Bankrupts shall be free from all Arrests, Restraint or Imprisonment of any of his, her or their Creditors in coming to surrender, and from the actual Surrender of such Bankrupt to the said Commissioners, for and during the said forty two Days, or such further Time as shall be allowed to such Bankrupt or Bankrupts, for finishing his, her or their Examinations as aforesaid, provided such Bankrupt was not in Custody at the Time of such Surrender and Submission to be examined; and in case such Bankrupt shall be arrested for Debt, or on any Escape Warrant, coming to surrender him or herself to the said Commissioners, or after his

inspect Accounts.

and be free from Restraint during Examination, if not in Custody before.

Officer detaining  
Bankrupts

Penalty.

Bankrupts in  
Custody brought  
before Com-  
missioners at  
Creditors' Ex-  
pence.

Commissioners  
to attend in  
Prison.

Allowance to  
Bankrupts.

his or her Surrender shall be so arrested within the Time before mentioned, that then, on producing such Summons or Notice under the Hands of the said Commissioners, Assignee or Assignees, to the Officer who shall arrest him, her or them, and making it appear to such Officer, that such Notice or Summons is signed by the said Commissioners, or the major Part of them, or such Assignee or Assignees, and giving such Officer a Copy thereof, shall be immediately discharged. And in case any Officer shall detain such Bankrupt or Bankrupts (after he, she or they shall have shewn such Notice or Summons to him, and made it appear it was signed as aforesaid) in his Custody, such Officer shall forfeit and pay to such Bankrupt, for his own Use, the Sum of five Pounds for every Day such Officer shall detain such Bankrupt, to be recovered by Action of Debt in any of His Majesty's Courts of Record at *Wexminster*, in the Name or Names of such Bankrupt or Bankrupts, with full Costs of Suit.

VI. Provided always, and be it further enacted, That in case any Bankrupt be in Prison or in Custody at the Time of issuing of the said Commission as aforesaid, and is willing to surrender and submit to be examined according to the Directions of this Act, and can be brought before the said Commissioners and Creditors for that Purpose, the Expence thereof shall be paid out of the said Bankrupt's Estate and Effects: But in case such Bankrupt is in Execution, or cannot be brought before the Commissioners, that then the acting Commissioners shall from Time to Time attend the said Bankrupt in Prison or Custody, and take his or her Discovery, as in other Cases; and the Assignees of the said Estate shall have Power, and are hereby required to appoint one or more Persons to attend such Bankrupt, being in Prison or in Custody as aforesaid, from Time to Time, and to produce to him or her, his or her Books, Papers and Writings, in order to prepare his or her last Discovery and Examination according to the Directions before mentioned; a Copy whereof the Assignees of the said Estate shall apply for, and the said Bankrupt shall deliver to them, or their Order, ten Days at least before such last Examination.

VII. And be it further enacted by the Authority aforesaid, That all and every Person and Persons so become or to become Bankrupts as aforesaid, who shall within the Time limited by this Act, surrender him, her or themselves to the acting Commissioners named and authorized in or by any Commission of Bankrupt awarded or to be awarded against him, her or them, and in all Things conform, as in and by this Act is directed, shall be allowed the Sum of five Pounds *per Centum* out of the neat Produce of all the Estate that shall be recovered in and received; which shall be paid unto him, her or them by the Assignee or Assignees of the said Commissioners, in case the neat Produce of the said Estate, after such Allowance made, shall be sufficient to pay the Creditors of the said Bankrupt, who have proved their Debts under the said Commission, the Sum of ten Shillings in the Pound, and so as the said five Pounds *per Centum* shall not amount in the whole to above the Sum of two hundred Pounds. And in case the neat Produce of the said Estate shall, over and above the Allowance hereafter mentioned, be sufficient to pay the said Creditors the Sum of twelve Shillings

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Shillings and Six pence in the Pound for their respective Debts, that then all and every Person or Persons so conforming shall be allowed the Sum of seven Pounds ten Shillings *per Centum* out of such neat Produce, to be paid by such Assignee or Assignees, so as such seven Pounds ten Shillings *per Centum* shall not amount in the whole to above the Sum of two hundred and fifty Pounds. And in case the neat Produce of the said Estate shall, over and above the Allowance hereafter made, be sufficient to pay the said Creditors the Sum of fifteen Shillings in the Pound for their respective Debts, that then all and every such Person and Persons so conforming shall be allowed the Sum of ten Pounds *per Centum* out of such neat Produce, to be paid by the Assignee or Assignees, so as such ten Pounds *per Centum* shall not amount in the whole to above the Sum of three hundred Pounds; and every such Bankrupt shall be discharged from all Debts by him, her or them due or owing at the Time that he, she or they did become Bankrupt. And in case any such Bankrupt shall afterwards be arrested, prosecuted or impleaded for any Debt due before such Time as he, she or they became Bankrupt, such Bankrupt shall be discharged upon common Bail, and shall and may plead in general, that the Cause of such Action or Suit did accrue before such Time as he, she or they became Bankrupts, and may give this Act and the special Matter in Evidence; and the Certificate of such Bankrupt's conforming, and the Allowance thereof according to the Directions of this Act, shall be and shall be allowed to be sufficient Evidence of the Trading, Bankruptcy, Commission and other Proceedings precedent to the obtaining such Certificate, and a Verdict shall thereupon pass for the Defendant, unless the Plaintiff in such Action can prove the said Certificate was obtained unfairly and by Fraud, or unless the Plaintiff in such Action can make appear any Concealment by such Bankrupt to the Value of ten Pounds; and if a Verdict pass for the Defendant, or the Plaintiff shall become nonsuited, or Judgment be given against the Plaintiff, the Defendant shall recover his full Costs.

Bankrupts discharged freed from Debts.

Evidence of Trading.

Allowance to Bankrupts.

VIII. Provided always, and it is hereby declared and enacted by the Authority aforesaid, That if the neat Proceed of such Bankrupt's Estate so to be discovered, recovered and received, together with what shall be otherwise recovered and received, shall not amount to so much as will pay all and every the Creditors of such Bankrupt, who shall have proved their Debts under the said Commission, the Sum of ten Shillings in the Pound for their respective Debts, after all Charges first had and deducted, that then and in such Case such Bankrupt shall not be allowed the Sum of five Pounds *per Centum* out of such Estate as shall be so recovered in; but shall be allowed and paid by the Assignees so much Money, as the said Assignees and Commissioners authorized as aforesaid shall think fit to allow to such Bankrupt, not exceeding three Pounds *per Centum*.

IX. Provided always, and be it further enacted by the Authority aforesaid, That from and after the twenty fourth Day of June One thousand seven hundred and thirty two, in case any Commission of Bankruptcy shall issue against any Person or Persons, who after the said twenty fourth Day of June One thousand seven hundred and thirty two shall have been discharged by virtue of this Act, or shall have compounded with his, her or their

In what Cases  
future Effects  
of Bankrupts  
liable.

On what Con-  
ditions Certifi-  
cates to be  
signed.

their Creditors, or delivered to them, his, her or their Estate or Effects, and been released by them, or been discharged by any Act for the Relief of Insolvent Debtors after the Time aforesaid, that then and in either of those Cases the Body and Bodies only of such Person and Persons conforming as aforesaid shall be free from Arrest and Imprisonment by virtue of this Act; but the future Estate and Effects of every such Person and Persons shall remain liable to his, her or their Creditors, as before the making of this Act (the Tools of Trade, the necessary Household Goods and Furniture, and necessary Wearing Apparel of such Bankrupt and his Wife and Children only excepted) unless the Estate of such Person or Persons, against whom such Commission shall be awarded, shall produce clear after all Charges, sufficient to pay every Creditor under the said Commission, fifteen Shillings in the Pound for their respective Debts.

X. Provided also, and be it enacted by the Authority aforesaid, That no Discovery upon Oath or solemn Affirmation to be made by any Bankrupt or Bankrupts of his, her or their Estate and Effects pursuant to this Act, shall intitle such Bankrupt or Bankrupts to the Benefits allowed by this Act, unless the Commissioners authorized by such Commission, or the major Part of them, shall in Writing under their Hands and Seals certify to the Lord Chancellor or Lord Keeper, or Commissioners for the Custody of the Great Seal of Great Britain for the Time being, that such Bankrupt or Bankrupts hath or have made a full Discovery of his or her Estate and Effects, and in all Things conformed himself, herself or themselves according to the Directions of this Act, and that there doth not appear to them any Reason to doubt of the Truth of such Discovery, or that the same is not a full Discovery of all such Bankrupt's Estate and Effects; and unless four Parts in five in Number and Value of the Creditors of such Bankrupt or Bankrupts, who shall be Creditors for not less than twenty Pounds respectively, and who shall have duly proved their Debts under such Commission, or some other Person by them respectively duly authorized thereunto, shall sign such Certificate, and testify their Consent to such Allowance and Certificate, and to the said Bankrupt's Discharge in pursuance of this Act, to be also certified by such Commissioners; but the said Commissioners shall not certify the same, till they shall have Proof by Affidavit or Affirmation in Writing of such Creditors, or of the Person by them respectively authorized for that Purpose (a), signing the said Certificate, and of the Power and Authority by which any Person shall be authorized by any Creditor to sign such Certificate for any Creditor; which Affidavit or Affirmation, together with such Warrant or Authority to sign, shall be laid before the Lord High Chancellor, Lord Keeper or Commissioners of the Great Seal, with the said Certificate, in order for the allowing and confirming the same; and unless such Bankrupt make Oath, or being of the People called Quakers, solemnly affirm in Writing, That such Certificate and Consent of the Creditors thereunto were obtained fairly and without Fraud; and unless such Certificate shall, after such Oath or Affirmation of the Bankrupt, be allowed and confirmed by the Lord Chancellor, (a). [*As to Letter of Attorney from Creditor residing abroad,* 24 G. 2. c. 57. § 10.]

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Lord Keeper or Commissioners for the Custody of the Great Seal of *Great Britain* for the Time being, or by such two of the Justices of the Courts of King's Bench, Common Pleas or Barons of the Court of Exchequer at *Westminster*, to whom the Consideration of such Certificate shall be referred by the Lord Chancellor, Lord Keeper or Commissioners of the Great Seal for the Time being; and any of the Creditors of such Bankrupt are allowed to be heard, if they shall think fit, before the respective Persons aforesaid, against the making such Certificate, and against the Confirmation thereof; nor shall any Commissioner sign such Certificate, till after four Parts in five in Number and Value of the said Creditors shall have signed the same as aforesaid.

XI. And be it enacted by the Authority aforesaid, That every Bond, Bill, Note, Contract, Agreement or other Security whatsoever, to be made or given by any Bankrupt, or by any other Person, unto or to the Use of or in Trust for any Creditor or Creditors, or for the Security of the Payment of any Debt or Sum of Money due from such Bankrupt at the Time of his becoming Bankrupt, or any Part thereof, between the Time of his becoming Bankrupt and such Bankrupt's Discharge, as a Consideration, or to the Intent to persuade him, her or them to consent to or sign any such Allowance or Certificate, shall be wholly void and of no Effect; and the Monies thereby secured or agreed to be paid shall not be recovered or recoverable; and the Party sued on such Bond, Bill, Note, Contract or Agreement shall and may plead the General Issue, and give this Act and the special Matter in Evidence; any Thing herein contained, or any Law, Custom or Usage to the contrary notwithstanding.

Contracts to induce Creditors to sign Certificates, void.

General Issue.

XII. Provided always, and be it enacted by the Authority aforesaid, That nothing in this Act shall be construed to extend, or give or grant any Privilege, Benefit or Advantage, to any Bankrupt whatsoever, against whom a Commission of Bankrupt under the Great Seal of *Great Britain*, since the said fourteenth Day of *May* which was in the Year of our Lord One thousand seven hundred and twenty nine, hath issued, or hereafter shall issue, who hath or shall, for or upon the Marriage of any of his or her Children, have given, advanced or paid above the Value of one hundred Pounds, unless he or she shall prove, or by his or her Books fairly kept, or otherwise upon his or her Oath, or being of the People called Quakers, upon solemn Affirmation, before the major Part of the Commissioners in such Commission named and authorized, that he or she had, at the Time thereof, over and above the Value so given, advanced or paid, remaining in Goods, Wares, Debts, ready Money, or other Estate Real or Personal, sufficient to pay and satisfy unto each and every Person, to whom he or she was any ways indebted, their full and entire Debts; or who hath or shall have lost in any one Day the Sum or Value of five Pounds, or in the whole the Sum or Value of one hundred Pounds within the Space of twelve Months next preceding his, her or their becoming Bankrupt, in playing at or with Cards, Dice, Tables, Tennis, Bowls, Billiards, Shovelboard, or in or by Cock-fighting, Horse-races, Dog-matches or Foot-races or other Pastimes, Game or Games whatsoever, or in or by bearing a Share or Part in the Stakes, Wagers or Adventures, or in or by betting on the Sides

Persons excepted from the Benefits of this Act.

or

or Hands of such as do or shall play, act, ride or run as aforesaid, or that within one Year before he or she became Bankrupt, shall have lost the Sum of one hundred Pounds, by one or more Contracts for the Purchase, Sale, Refusal or Delivery of any Stock of any Company or Corporation whatsoever, or any Parts or Shares of any Government or Public Funds or Securities, where every such Contract was not to be performed within one Week from the Time of the making such Contract, or where the Stock or other Thing so bought or sold was not actually transferred or delivered in pursuance of such Contract.

Bankrupts imprisoned after Certificate allowed, how to be discharged.

XIII. And be it further enacted by the Authority aforesaid, That if any Bankrupt who shall have obtained his or her Certificate from the acting Commissioners, and such Certificate shall have been allowed and confirmed as by this Act is directed, shall be taken in Execution, or detained in Prison, on account of any Debts due or owing before he or she became Bankrupt, by reason that Judgment was obtained before such Certificate was allowed and confirmed, it shall and may be lawful for any one or more of the Judges of the Court, wherein Judgment has been so obtained against such Bankrupt, on such Bankrupt's producing his or her Certificate allowed and confirmed, to order any Sheriff or Sheriffs, Bailiff or Officer, Gaoler or Keeper of any Prison, who hath or shall have any such Bankrupt in his Custody, by virtue of any such Execution, to discharge such Bankrupt out of Custody on such Execution without Payment of any Fee or Reward; and such Sheriff or Sheriffs, Bailiff or Officer, Gaoler or Keeper is and are hereby required to discharge such Bankrupt out of Custody accordingly, and is and are hereby indemnified from any Action for an Escape for his or their so doing.

Judges or Justices may grant Warrants to apprehend Bankrupts not conforming.

XIV. And be it further enacted by the Authority aforesaid, That upon Certificate made under the Hands and Seals of the Commissioners by such Commission authorized, or to be authorized, or the major Part of them, that such Commission is issued, and such Person or Persons proved before them to become Bankrupt or Bankrupts, it shall and may be lawful to and for all or any of the Justices of His Majesty's Courts of King's Bench, or Common Pleas, or Barons of the Court of Exchequer, and to and for all and every the Justices of the Peace within that Part of the Kingdom of *Great Britain* called *England*, the Dominion of *Wales* and Town of *Berwick* upon *Tweed*, and they are hereby impowered and required, upon Application to them for that Purpose made, to grant his or their Warrant or Warrants under his or their Hands and Seals for the taking and apprehending such Person or Persons, and him, her or them to commit to the common Gaol of the County where he, she or they shall be so apprehended and taken, there to remain until he, she or they be removed by Order of the said Commissioners, or the major Part of them, by Warrant under their Hands and Seals; and the Gaoler or Keeper, to whose Custody such Person or Persons shall be committed, is hereby required to take and receive such Person or Persons into his Custody, and forthwith to give notice to one or more of the said Commissioners in the said Commission named, of such Person or Persons being

Gaoler to give Notice to Commissioners.



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in his or their Custody, to the Intent the said Commissioners may send their Warrant to such Gaoler or Keeper (which they are hereby impowered and required forthwith to send) for the delivering such Bankrupt or Bankrupts to the Person or Persons named in such Warrant, who shall be thereby authorized to convey and bring such Person or Persons to the said Commissioners, in order to such Examination and Discovery as aforesaid; and the said Commissioners are hereby likewise authorized and impowered by such their Warrant, or any other Warrant, to take and seize any of the Goods, Wares, Merchandizes and Effects of such Bankrupt or Bankrupts (the necessary wearing Apparel of such Bankrupt, or of his Wife or Children, only excepted) and any of his, her or their Books, Papers or Writings, which shall be then in the Custody or Possession of such Bankrupt or Bankrupts, or of any other Person or Persons, in any Prison or Prisons whatsoever; any Custom or Usage to the contrary in any wise notwithstanding.

Goods or Books  
to be seized in  
Prisons.

XV. Provided always, and be it enacted by the Authority aforesaid, That if any such Person or Persons so apprehended and taken, shall within the Time or Times allowed by this Act for that Purpose, submit to be examined, and in all Things conform, as if he, she or they had surrendered, as by this Act such Bankrupt or Bankrupts is or are required, that then such Person so submitting and conforming shall have and receive the Benefit of this Act, to all Intents and Purposes, as if he, she or they had voluntarily come in and surrendered himself, herself or themselves; any Thing herein contained to the contrary thereof in any wise notwithstanding.

Bankrupts con-  
forming.

XVI. And be it further enacted by the Authority aforesaid, That it shall and may be lawful to and for the said Commissioners, or the major Part of them, to examine as well by Word of Mouth, as on Interrogatories in Writing, all and every Person and Persons, against whom any Commission of Bankrupt is or shall be awarded, touching all Matters relating to the Trade, Dealings, Estate and Effects of all and every such Bankrupt and Bankrupts, and also to examine in the Manner aforesaid all and every other Person duly summoned before or present at any Meeting of the said Commissioners, or the major Part of them, touching all Matters relating to the Person, Trade, Dealings, Estate and Effects of all and every such Bankrupt and Bankrupts, and any Act or Acts of Bankruptcy committed by him, her or them, and also to take down or reduce into Writing the Answers of verbal Examinations of every such Bankrupt or other Person, had or taken before them as aforesaid; which Examination so taken down or reduced into Writing, the Party examined shall and is hereby required to sign and subscribe: And in case any such Bankrupt or Bankrupts, or other Person or Persons, shall refuse to answer, or shall not fully answer to the Satisfaction of the Commissioners, or the major Part of them, all lawful Questions put to him, her or them, by the said Commissioners, or the major Part of them, as well by Word of Mouth, as by Interrogatories in Writing, or shall refuse to sign and subscribe his, her or their Examination so taken down or reduced into Writing as aforesaid (not having a reasonable Objection either to the wording thereof or otherwise, to be allowed by the said Commissioners) it shall and may be lawful to

Commissioners  
may examine  
touching Bank-  
rupt's Effects.

Refusing to an-  
swer Interro-  
gatories.

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Punishment.

and for the said Commissioners, or the major Part of them, by Warrant under their Hands and Seals, to commit him, her or them to such Prison, as the said Commissioners, or the major Part of them, shall think fit; there to remain without Bail or Mainprize, until such Time as such Person or Persons shall submit him, her or themselves to the said Commissioners, and full Answer make to the Satisfaction of the said Commissioners to all such Questions as shall be put to him, her or them as aforesaid, and sign and subscribe such Examination as aforesaid, according to the true Intent and Meaning of this Act.

Proviso.

XVII. Provided always, That in case any Person or Persons shall be committed by the said Commissioners for refusing to answer, or not fully answering any Question or Questions put to him, her or them, by the said Commissioners by Word of Mouth, or on Interrogatories, that the said Commissioners shall, in their Warrant of Commitment, specify such Question or Questions.

*Habeas Corpus.*

XVIII. Provided also, That in case any Person or Persons committed by the Commissioners Warrant, by virtue of this or any other Acts now in force concerning Bankrupts, shall bring any *Habeas Corpus* in order to be discharged from any such Commitment, and on the Return of any such *Habeas Corpus*, there shall appear any such Insufficiency whatsoever in the Form of the Warrant, whereby such Person was committed, by reason whereof the Party might be discharged of such Commitment; that then it shall and may be lawful for the Court or Judge, before whom such Party shall be so brought by *Habeas Corpus* as aforesaid, and such Court or Judge shall, and is hereby required, by Rule, Order or Warrant, to commit such Person or Persons to the same Prison, there to remain as aforesaid, until he, she or they shall conform as aforesaid, unless it shall be made appear to such Court or Judge by the Party committed; that he, she or they have fully answered all lawful Questions put to him, her or them by the said Commissioners; or in case such Person was committed for not signing his, her or their Examination, unless it shall appear to such Court or Judge, that the Party so committed had a good and sufficient Reason for refusing to sign the same: And in case any Gaoler or Keeper of any Prison, to whom any such Bankrupt or Bankrupts, Person or Persons shall be so committed as aforesaid, shall wilfully suffer such Bankrupt or Bankrupts, Person or Persons, to escape from such Prison, or to go without the Walls or Doors of the said Prison, until he, she or they shall be duly discharged as aforesaid, such Gaoler or Keeper shall for such his Offence, being duly convicted by Indictment or Information, forfeit five hundred Pounds of lawful Money of Great Britain for the Use of the Creditors of such Bankrupt or Bankrupts.

Escape.

Penalty.

Gaoler refusing to produce Prisoner.

XIX. And be it further enacted, That the Gaoler or Keeper of such Prison as aforesaid, shall upon Request of any Person or Persons, being a Creditor or Creditors of such Bankrupt, and having proved his, her or their Debt, under the said Commission, and producing a Certificate thereof under the Hands of the said Commissioners, or the major Part of them, (which such Commissioners are hereby required to give *gratis*) forthwith produce and shew such Person or Persons so committed as aforesaid to any such Creditor or Creditors requesting the same: And in case such

Gaoler

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Goaler or Keeper of such Prison shall refuse to shew, or shall not forthwith produce such Person or Persons so committed as aforesaid, and being in his actual Custody at the Time of such Request, to such Creditor or Creditors of such Bankrupt, requesting to see such Person or Persons committed as aforesaid, such Goaler and Keeper of such Prison shall forfeit for such his wilful Refusal or Neglect the Sum of one hundred Pounds of lawful Money of *Great Britain*, for the Use of the Creditors of such Bankrupt or Bankrupts, to be recovered by Action of Debt in any of His Majesty's Courts of Record at *Westminster*, in the Name or Names of the Creditor or Creditors requesting such Sight of such Prisoner.

Penalty.

XX. And be it further enacted by the Authority aforesaid, That all and every Person and Persons who shall at any Time after the Time allowed to such Bankrupt to surrender and conform as aforesaid, voluntarily come and make Discovery of any Part of such Bankrupt's Estate not before come to the Knowledge of the Assignees, either to the said Assignees, or to the said Commissioners authorized as aforesaid, or the major Part of them, shall be allowed five Pounds *per Centum*, and such further and other Reward, as the Assignees and the major Part of the Creditors in Value present at any Meeting of the Creditors shall think fit, to be paid out of the neat Proceed of such Bankrupt's Estate, which shall be recovered on such Discovery, which shall be paid to the Person or Persons so discovering the same, by the Assignee or Assignees of such Bankrupt's Estate, and the Assignee or Assignees shall be allowed the same in their Accounts.

Allowance to Persons making Discovery of Bankrupt's Estate;

allowed in Account.

XXI. And for the better Discovery of the Estate of a Bankrupt, be it enacted by the Authority aforesaid, That all and every Person and Persons who shall have accepted of any Trust or Trusts, and shall wilfully conceal or protect any Estate, Real or Personal, of any Person or Persons becoming Bankrupt as aforesaid, from his, her or their Creditors, and shall not within forty two Days next after such Commission shall issue forth, and Notice thereof be given in the *London Gazette*, discover and disclose such Trust and Estate in Writing to one or more of the Commissioners or Assignees of such Bankrupt or Bankrupts Estate, and likewise submit him or herself to be examined by the Commissioners, in and by the said Commission authorized, or the major Part of them, if thereunto required, and truly discover the same, shall forfeit the Sum of one hundred Pounds of lawful Money of *Great Britain*, and double the Value of the Estate either Real or Personal so concealed, to and for the Use and Benefit of the said Creditors, to be recovered by Action of Debt in any of His Majesty's Courts of Record at *Westminster*, in the Name of the Assignee or Assignees of the said Commissioners, in which case full Costs shall be allowed to either Party.

Concealing Effects in Trust.

Penalty.

XXII. And whereas by an Act made in the seventh Year of His late Majesty's Reign, intituled, *An Act for the explaining and making more effectual the several Acts concerning Bankrupts*, Persons taking Bills, Bonds, Promissory Notes, or other personal Security for their Money, payable at a future Day, are enabled to prove their Debts under a Commission of Bankruptcy, but not to petition for or join in petitioning for any

7 G. 1. Stat. 2. c. 32. § 2.

Persons having  
Bonds or Notes  
may petition for  
Commissions.

Conditions of  
granting Com-  
missions.

Oath of Debt.

Bond.

Fraudulent  
Commissions.

new Commission, which having been found to be inconvenient : Now it is hereby enacted by the Authority aforesaid, That so much of the said Act as disables any such Person from petitioning for or joining in any Petition for a Commission against any Person or Persons who have before committed any Act of Bankruptcy, is hereby repealed : And it shall and may be lawful hereafter for such Person to petition for or join in petitioning for any such Commission of Bankruptcy; any Thing in the said Act contained to the contrary thereof in any wise notwithstanding.

XXIII. And for preventing the taking out Commissions of Bankrupts maliciously, Be it enacted by the Authority aforesaid, That no Commission of Bankrupt under the Great Seal of Great Britain shall, after the twenty fourth Day of June One thousand seven hundred and thirty two, be awarded and issued out against any Person whatsoever, upon the Petition of one or more Creditors, unless the single Debt of the Creditor, or of two or more Persons being Partners petitioning for the same, do amount to the Sum of one hundred Pounds or upwards, or unless the Debt of two Creditors, so petitioning as aforesaid, shall amount to one hundred and fifty Pounds or upwards, or unless the Debt of three or more Creditors, so petitioning as aforesaid, shall amount to two hundred Pounds or upwards, and the Creditor or Creditors petitioning for such Commission shall, before the same shall be granted, make an Affidavit, or (being one of the People called Quakers) make a solemn Affirmation in Writing before one of the Masters of the High Court of Chancery (which Oath or Affirmation they are hereby impowered to administer, and which shall be filed with the proper Officer) of the Truth and Reality of such his, her and their respective Debt and Debts, likewise give Bond to the Lord Chancellor, Lord Keeper or Commissioners of the Great Seal for the Time being, in the Penalty of two hundred Pounds, to be conditioned for proving his, her or their Debts, as well before the Commissioners named in such Commission as upon a Trial at Law, in case the due issuing forth of the same shall be contested and tried, and also for proving the Party a Bankrupt at the Time of taking out such Commission, and further to proceed on such Commission as hereinafter is mentioned; and if such Debt or Debts shall not be really due or owing, or if after such Commission taken out it cannot be proved that the Party was a Bankrupt at the Time of the issuing of the said Commission, but on the contrary it shall appear that such Commission was taken out fraudulently or maliciously, that then the Lord Chancellor, Lord Keeper or Commissioners of the Great Seal for the Time being, shall and may, upon Petition of the Party or Parties grieved, examine into the same, and order Satisfaction to be made to him, her or them for the Damages by him, her or them sustained; and for the better Recovery thereof may, in case there be Occasion, assign such Bond or Bonds to the Party or Parties so petitioning, who may sue for the same in his, her and their Name and Names; any Law, Custom or Usage to the contrary notwithstanding.

XXIV. And whereas Commissions of Bankrupts are frequently taken out by Persons who by means of such Commissions (on a Composition proposed by the Bankrupts) and on Promise, not to execute the same, prevail with and extort from the

‘ the Bankrupts their whole Debts, or much greater Part thereof  
 ‘ than such Bankrupts pay to their Creditors, or otherwise get  
 ‘ from such Bankrupts Goods or other Real or Personal Secu-  
 ‘ rity, which is contrary to the true Intent and Meaning of the  
 ‘ several Statutes made concerning Bankrupts, which said Statutes  
 ‘ intend, that all such Bankrupts Creditors shall be on an equal  
 ‘ Foot, and not one preferred before another, or paid more  
 ‘ than another in respect of his or her Debt:’ Be it therefore  
 enacted by the Authority aforesaid, That if any Bankrupt or  
 Bankrupts shall, after issuing of any Commission against him, her  
 or them, pay to the Person or Persons who sued out the same,  
 or otherwise give or deliver to such Person or Persons Goods  
 or any other Satisfaction or Security for his, her or their Debt,  
 whereby such Person or Persons suing out such Commission shall  
 privately have and receive more in the Pound in respect of his, her  
 or their Debt than the other Creditors, such Payment of Money,  
 Delivery of Goods, or giving greater or other Security or Satis-  
 faction, shall be deemed and taken to be such an Act of Bank-  
 ruptcy, whereby on good Proof thereof such Commission shall  
 and may be superseded: And it shall be lawful for the Lord  
 Chancellor, Lord Keeper or Commissioners for the Custody of the  
 Great Seal of *Great Britain* for the Time being, to award to any  
 Creditor or Creditors petitioning another Commission; and such  
 Person or Persons so taking or receiving such Goods or other  
 Satisfaction as aforesaid, shall forfeit and lose as well his, her or  
 their whole Debt, as the whole he, she or they shall have taken  
 or received, and shall pay back and deliver up the same or the  
 full Value thereof, to such Person or Persons as the said Com-  
 missioners acting under such new Commission shall appoint, in  
 Trust for and to be divided amongst the other of the Bankrupt’s  
 Creditors in Proportion to their respective Debts.

Commission  
 fraudulently ob-  
 tained to be  
 superseded,

and another  
 granted.

Penalty.

XXV. And be it further enacted by the Authority aforesaid,  
 That the Creditor or Creditors who shall petition for and obtain  
 any Commission of Bankrupt, shall be and is and are hereby  
 obliged, at his, her or their own Costs and Expences, to sue  
 forth and prosecute the same, until an Assignee or Assignees shall  
 be chosen of such Bankrupt’s Estate and Effects; and the Com-  
 missioners to be named in any such Commission shall, at the same  
 Meeting which shall be appointed for the Choice of the Assignees,  
 ascertain such Costs, and by Writing under their Hands shall  
 direct and order the Assignee or Assignees of such Bankrupt’s  
 Estate, who is and are hereby required to pay and re-imburse such  
 petitioning Creditor or Creditors such his, her or their Costs and  
 Charges as aforesaid, out of the first Monies or Effects of the said  
 Bankrupt that shall be got in and received under the said Com-  
 mission; and every Creditor of the said Bankrupt shall be at  
 Liberty to prove his, her or their Debt or Debts under the said  
 Commission, without paying any Contribution or Sum of Money  
 whatsoever for or on account of such Debt or Debts; any Law  
 or Statute to the contrary notwithstanding.

Charge of Com-  
 missions paid  
 by Assignees.

Contribution.

XXVI. And be it further enacted by the Authority afore-  
 said, That where any Commission of Bankrupt shall issue out  
 from and after the twenty fourth Day of *June* One thousand  
 seven hundred and thirty two, the Commissioners therein named,  
 or the major Part of them thereby authorized, shall forthwith,

Notice of Meet-  
 ing to be given  
 in the Gazette.

Debts how to be proved.

Choice of Assignees.

What Persons not qualified to choose.

Mutual Credit.

after they have declared the Person or Persons against whom such Commission shall issue a Bankrupt or Bankrupts, cause Notice thereof to be given in the *London Gazette*, and shall appoint a Time and Place for the Creditors to meet, which Meeting for the City of *London* and all Places within the Bills of Mortality shall be at the Guildhall of the said City in order to choose an Assignee or Assignees of the said Bankrupt's Estate and Effects; at which Meeting the said Commissioners shall admit the Proof of any Creditor's Debt, that shall live remote from the Place of such Meeting of the Commissioners, by Affidavit, or, being of the People called Quakers, by solemn Affirmation, and also permit any Person duly authorized by Letter of Attorney from such Creditors, Oath or Affirmation being made of the due Execution thereof, either by an Affidavit sworn or Affirmation made before a Master in Chancery, ordinary or extraordinary, or before the Commissioners *viva voce* (which Oath or Affirmation they are hereby respectively authorized to administer) and in case of Creditors residing in foreign Parts, such Affidavits or solemn Affirmations to be made before a Magistrate where the Party shall be residing, and shall, together with such Creditor's Letter of Attorney, be attested by a Notary Publick, to vote in the Choice of an Assignee or Assignees of such Bankrupt's Estate and Effects in the Place and Stead of such Creditor; and the Commissioners, or the major Part of them authorized, shall assign every such Bankrupt's Estate and Effects unto such Person or Persons as the major Part in Value of such Creditors, according to the several Debts then proved, shall choose as aforesaid; and the Assignee or Assignees so chosen shall be obliged to keep one or more distinct Book or Books of Account, wherein he or they shall duly enter all Sum and Sums of Money or other Effects, which he or they shall have got in or received out of the said Bankrupt's Estate, to which Book or Books of Account every Creditor who shall have proved his or her Debt shall at all seasonable Times have free Resort, and inspect the same as often as he or she shall think fit.

XXVII. Provided always, and be it enacted by the Authority aforesaid, That no Creditor or any other Person for and on the Behalf of any Creditor shall be permitted to vote in such Choice of Assignee or Assignees whose Debt, or the Debt of the Person or Persons so authorizing him to vote, shall not amount to the Sum of ten Pounds or upwards.

XXVIII. And be it further enacted by the Authority aforesaid, That where it shall appear to the said Commissioners or the major Part of them, that there hath been mutual Credit given by the Bankrupt and any other Person, or mutual Debts between the Bankrupt and any other Person, at any Time before such Person became Bankrupt, the said Commissioners, or the major Part of them, or the Assignees of such Bankrupt's Estate, shall state the Account between them, and one Debt may be set against another; and what shall appear to be due on either Side on the Balance of such Account, and on setting such Debts against one another, and no more, shall be claimed or paid on either Side respectively.

XXIX. And whereas many Abuses have been committed by pretended Creditors of Bankrupts, Be it enacted by the Authority

Authority aforesaid, That if any Person at any Time hereafter shall, before the acting Commissioners in any Commission of Bankruptcy, or by Affidavit or Affirmation exhibited to them, swear or depose, or, being of the People called Quakers, affirm, that any Sum of Money is due to him or her from any Bankrupt or Bankrupts, which Sum of Money is not really due or owing, or shall swear or affirm, that more is due than is really due or owing, knowing the same to be not due or owing, and that such Oath or Affirmation is false and untrue, and being thereof convicted by Indictment or Information, such Person shall suffer the Pains and Penalties inflicted by the several Statutes made and now in force against wilful Perjury, and shall moreover be liable to pay double the Sum so sworn or affirmed to be due or owing as aforesaid, to be recovered and levied as other Penalties and Forfeitures are upon penal Statutes after Conviction to be levied and recovered; and such double Sum shall be equally divided among all the Creditors seeking Relief under the said Commission.

Debts falsely  
claimed.

Penalty.

XXX. Provided always, and be it further enacted, That it shall and may be lawful for the said Commissioners authorized as aforesaid, or the major Part of them, as often as they shall see cause, for the better preserving and securing the Bankrupt's Estate, immediately to appoint one or more Assignee or Assignees of the Estate and Effects or any Part thereof; which Assignee or Assignees, or any of them, shall or may be removed or displaced at the Meeting of the Creditors so to be appointed as aforesaid, for the choice of Assignees, if they or the major Part in Value of them (whose Debts respectively amount to ten Pounds or upwards as aforesaid) then present, and of such Persons duly authorized as aforesaid, shall think fit; and such Assignee or Assignees as shall be so removed and displaced shall deliver up and assign all the Estate and Effects of such Bankrupt which shall have come to his or their Hands or Possession, or which shall have been assigned by the said Commissioners as aforesaid, unto such other Assignee or Assignees who shall be so chosen by the Creditors as aforesaid; and all the Estate and Effects of the Bankrupt which shall be delivered up or assigned, shall be, to all Intents and Purposes, as effectually and legally vested in such new Assignee or Assignees as if the first Assignment had been made to him or them by the said Commissioners: And if such first Assignee or Assignees shall refuse or neglect by the Space of ten Days next after Notice given of the said Choice of such new Assignee or Assignees, and of his and their Consent to accept such Assignment, signified to the first Assignee or Assignees by Writing under his or their Hand or Hands, to make such Assignment and Delivery as aforesaid, every such first Assignee or Assignees shall respectively forfeit the Sum of two hundred Pounds, to be divided and distributed amongst the Creditors, towards Satisfaction of their Debts, in such Manner as the Estate of the Bankrupt is or ought to be divided and distributed, and to be recovered by Action of Debt, Bill, Plaint or Information in any of His Majesty's Courts of Record at Westminster, by such Person or Persons as such the major Part of the Commissioners authorized as aforesaid, shall appoint to sue for the same, with full Costs of Suit, wherein no Privilege, Protection or Wager

Commissioners  
may appoint  
Assignees.

Assignees not  
delivering up  
Effects to new  
ones.

Penalty.

Costs.

Notice of Removal to be given in the Gazette.

Creditors, before choosing Assignees, to fix the Method of Dividends.

in Law, or more than one Imparance shall be allowed; any Law, Custom or Usage to the contrary notwithstanding

‘ XXXI. And whereas it may be found necessary, that as well Assignments of Bankrupts Estates already made by Commissioners, as Assignments hereafter to be made pursuant to the Choice of Creditors, should be vacated, and a new Assignment or Assignments be made of the Debts and Effects unreceived and not disposed by the then Assignees to other Persons to be chosen by the Creditors as aforesaid:’ Be it therefore enacted and declared by the Authority aforesaid, That it shall and may be lawful to and for the Lord Chancellor, Lord Keeper or Commissioners for the Custody of the Great Seal of Great Britain for the Time being, upon Petition of any Creditors, to make such Order therein as he or they shall think just and reasonable; And in case a new Assignment shall be ordered to be made as aforesaid, that then such Debts, Effects and Estate of such Bankrupt shall be thereby effectually and legally vested in such new Assignee or Assignees; and it shall and may be lawful for him and them to sue for the same in his or their Name or Names, and to discharge any Action or Suit, or to give any Acquittance for such Debts as effectually to all Intents and Purposes as the Assignee or Assignees in the former Assignment might have done in case no new Assignment had been made, any Thing herein or in any former Act contained or made to the contrary in any wise notwithstanding; and that the said Commissioners shall cause publick Notice to be given in the two *London Gazettes* that shall immediately follow the Removal of such Assignee or Assignees, and the Appointment of such other Assignee or Assignees as aforesaid, that such Assignee or Assignees is or are removed, and such other Assignee or Assignees appointed in his or their Stead, and that such Persons as are indebted to the said Bankrupt's Estate, do not pay such Debt or Debts to such Assignee or Assignees as shall be removed as aforesaid.

‘ XXXII. And whereas by reason of the Monies which are lodged in the Hands of Assignees until a Dividend is made, Assignees do oftentimes delay the dividing thereof, to the very great Prejudice of the Bankrupt's Creditors:’ For preventing whereof, and to the end Assignees may make speedy Dividends of the Estate and Effects of such Bankrupts, be it enacted by the Authority aforesaid, That before the Creditors shall proceed to the Choice of an Assignee or Assignees of any Bankrupt's Estate, the major Part in Value of the said Bankrupt's Creditors then present shall, if they think fit, direct in what Manner, how and with whom and where the Monies arising by, and to be received from Time to Time out of the Bankrupt's Estate, shall be paid in and remain until the same shall be divided amongst all the Creditors as by this Act is directed; to which Rule and Direction every such Assignee and Assignees, afterwards to be chosen, shall conform, as often as one hundred Pounds shall be got in and received from such Bankrupt's Estate, and shall be and are hereby indemnified for what they shall do in pursuance of such Direction of the said Creditors as aforesaid. [If Creditors do not give such Directions, the Commissioners or major Part may, 49 G. 3. c. 121. § 3.]

XXXIII. And



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XXXIII. And be it further enacted by the Authority aforesaid, That every Person or Persons chosen or who shall be chosen Assignee or Assignees of the Estate and Effects of such Bankrupt, shall, at some Time after the Expiration of four Months, and within twelve Months from the Time of issuing of such Commission, cause at least twenty one Days publick Notice to be given in the *London Gazette*, of the Time and Place the Commissioners and Assignees intend to meet, to make a Dividend or Distribution of such Bankrupt's Estate and Effects; at which Time the Creditors, who have not before proved their Debts, shall then be at Liberty to prove the same; which Meeting for the City of *London* and all Places within the Bills of Mortality, shall be at the *Guildhall* of the said City; and upon every such Meeting the Assignee or Assignees shall produce to the said Commissioners and Creditors then present, fair and just Accounts of all his and their Receipts and Payments touching the said Bankrupt's Estate and Effects, and of what shall remain outstanding, and the Particulars thereof; and shall, if the Creditors then present, or the major Part of them, require the same, be examined upon Oath, or, being of the People called Quakers, upon solemn Affirmation before the said Commissioners or the major Part of them, touching the Truth of such Accounts; and in such Accounts the said Assignee or Assignees shall be allowed and retain all such Sum and Sums of Money as they shall have paid and expended in suing out and prosecuting of such Commission, and all other just Allowances, on account of and by reason or means of their being Assignee or Assignees; and the said Commissioners or the major Part of them, shall order such Part of the neat Produce of the said Bankrupt's Estate, as by such Accounts or otherwise shall appear to be in the Hands of the said Assignees, as they or the major Part of them shall think fit, to be forthwith divided amongst such of the Bankrupt's Creditors who have duly proved their Debts under such Commission, in proportion to their several and respective Debts; and the Commissioners, or the major Part of them, shall make such their Order for a Dividend in Writing under their Hands, and shall cause one Part of such Order to be filed amongst the Proceedings under the said Commission, and shall deliver unto each of the Assignee or Assignees, under such Commission, a Duplicate of such their Order likewise under the Hands of the said Commissioners; which Order of Distribution shall contain an Account of the Time and Place of making such Order, and the Sum Total or *Quantum* of all the Debts proved under the said Commission, and the Sum Total of the Money remaining in the Hands of the Assignee or Assignees to be divided, and how much in particular in the Pound is then ordered to be paid to every Creditor under the said Commission; and the said Assignee or Assignees, in pursuance of such Order, and without any Deed or Deeds of Distribution to be made for that purpose, shall forthwith make such Dividend and Distribution accordingly, and shall take Receipts, in a Book to be kept for that Purpose, from each Creditor, for the Part or Share of such Dividend or Distribution which he or they shall make and pay to each Creditor respectively; and such Order and Receipt shall be a full and effectual Discharge to such Assignee, for

Method of making Dividends.

Assignees Accounts.

Dividend.

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Anno 5<sup>o</sup> GEORGE II. c.30. A.D. 1732.

for so much he as shall fairly pay, pursuant to such Order as aforesaid.

XXXIV. And whereas Assignees are, and may sometimes be prevented from making such speedy Dividends of the Estate and Effects of Bankrupts, as by this Act is intended, by reason of Debts due, or pretended and claimed to be due from such Bankrupts, upon long and intricate Accounts or Demands, which are disputed or not admitted by the Commissioners and Creditors to be just and fair Debts, and such Claimants are thereby obliged to ascertain such their Demands by Actions or Suits in Law or Equity, which are oftentimes many Years depending, and many other Differences and Difficulties do arise under Commissions of Bankrupts, which might be determined by Arbitration, if Assignees had Power to submit the same; Be it therefore enacted by the Authority aforesaid, That it shall and may be lawful to and for the Assignee or Assignees of any Bankrupt's Estate and Effects, by and with the Consent of the major Part in Value of the Bankrupt's Creditors, who shall have duly proved their Debts under such Commission, and who shall be present at any Meeting of the said Creditors, pursuant to Notice to be for that Purpose given in the *London Gazette*, to submit any Difference or Dispute between such Assignee or Assignees, and any Person or Persons whatsoever, for or on account, or by reason or means of any Matter, Cause or Thing whatsoever, relating to such Bankrupt or Bankrupts, his, her or their Estate or Effects, to the final End and Determination of Arbitrators to be chosen by the said Assignee or Assignees and the major Part in Value of such Creditors, and the Party or Parties with whom they shall have such Difference, and to perform the Award of such Arbitrators, or otherwise to compound and agree the Matters in Difference and Dispute between them, in such Manner as the said Assignee or Assignees, with such Consent as aforesaid, shall think fit and can agree, and the same shall be binding to all the Creditors of the said Bankrupt or Bankrupts; and the Assignees are hereby indemnified for what they shall fairly do according to the Direction aforesaid.

Power of Assignees to submit Disputes to Arbitration.

Assignees may compound Debts.

XXV. And be it further also enacted by the Authority aforesaid, That any Assignee or Assignees made or chosen as aforesaid, shall be and is and are hereby impowered, by and with the Consent of the major Part of such Bankrupt's Creditors in Value, who shall be present at a Meeting to be had for that Purpose, of which publick Notice shall be given in the *London Gazette*, to make Composition with any Person or Persons, Debtors or Accountants to such Bankrupts, where the same shall appear necessary and reasonable, and to take such reasonable Part as can upon such Composition be gotten, in full Discharge of such Debts and Accounts; any Law, Custom or Use to the contrary notwithstanding.

Bankrupts, after Allowance of Certificate, to attend Assignees in settling Accounts.

XXXVI. Provided always, and be it enacted by the Authority aforesaid, That after such Bankrupt or Bankrupts shall have obtained his, her or their Certificate, and the same shall be duly confirmed as herein is mentioned, every such Bankrupt or Bankrupts shall, and is and are hereby obliged to give his, her or their Attendance, upon every reasonable Notice in Writing to be  
given

given to him, her or them, or to be left at his, her or their usual Place of Abode, by the Assignee or Assignees or their Order, thereby requiring him, her or them to attend the Assignee or Assignees of such Bankrupt's Estate, in order to make up, adjust or settle any Account or Accounts between such Bankrupt or Bankrupts, and any Debtor to or Creditor of such Bankrupt's Estate, or to attend any Court or Courts of Record, in order to be examined touching the same, or for such other Business, which such Assignee or Assignees shall judge necessary for getting in the said Bankrupt's Estate and Effects, for the Benefit of his, her or their Creditors; for which said Attendance the Bankrupt shall be allowed and paid the Sum of two Shillings and Six pence *per Diem* by such Assignee or Assignees out of the Bankrupt's Estate; and in case such Bankrupt or Bankrupts shall neglect or refuse to attend, or, on such Attendance, shall refuse to assist in such Discovery, without good and sufficient cause to be shewn to the Commissioners, or the major Part of them, for such his, her or their Neglect or Refusal, to be by them allowed as sufficient, such Assignee or Assignees making due Proof thereof upon Oath, or, being of the People called Quakers, upon solemn Affirmation before the said Commissioners authorized as aforesaid, or the major Part of them, the said Commissioners, or the major Part of them, are hereby impowered and required to issue a Warrant or Warrants, directed to such Person or Persons as they shall think proper, for apprehending such Bankrupt or Bankrupts, and him, her or them to commit to the County Gaol, there to remain in close Custody without Bail or Mainprize, until he, she or they shall duly conform to the Satisfaction of the said Commissioners authorized as aforesaid, and be by the said Commissioners, or the special Order of the Lord Chancellor, Lord Keeper or Commissioners for the Custody of the Great Seal of Great Britain for the Time being, or otherwise by due Course of Law discharged; and such Gaoler or Keeper of such Prison to which such Bankrupt or Bankrupts shall be committed, is hereby required to keep such Person or Persons in close Custody within the Walls of the said Prison, until he, she or they be duly discharged as aforesaid, under the Pains and Penalties before mentioned, for such Gaoler or Keeper suffering such Prisoners, committed pursuant to this Act, to escape and go at large.

Allowance for Attendance.

Non-attendance.

Punishment.

XXXVII. And be it further enacted by the Authority aforesaid, That within eighteen Months next after the issuing of any such Commission as aforesaid, the Assignee or Assignees shall make a second Dividend of the Bankrupt's Estate and Effects, in case the same was not wholly divided upon the first Dividend, and shall cause a Notice to be inserted in the *London Gazette*, of the Time and Place the said Commissioners intend to meet to make a second Dividend and Distribution of such Bankrupt's Estate or Effects, and for the Creditors, who shall not before have proved their Debts, to come and prove the same; and at such Meeting every such Assignee or Assignees shall produce upon Oath or Affirmation as aforesaid, his, her or their Account or Accounts of the Bankrupt's Estate and Effects, and what upon the Balance thereof shall appear to be in his, her or their Hands, shall, by the like Order of the Commissioners or the major

Final Dividend within 18 Months.

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Annō 5<sup>o</sup> GEORGE II. c. 30.

A.D. 1732.

Exceptions.

major Part of them, be forthwith divided amongst such of the Bankrupt's Creditors who shall have made due Proof of their Debts, in proportion to their several and respective Debts; which second Dividend shall be final, unless any Suit at Law or in Equity shall be depending, or any Part of the Estate standing out, that cannot have been disposed of, or that the major Part of the Creditors shall not have agreed to be sold and disposed of in Manner aforesaid, or unless some other or future Estate or Effects of the said Bankrupt shall afterwards come to or vest in the said Assignee or Assignees; in which Case the said Assignee or Assignees shall, as soon as may be, convert such future or other Estate and Effects into Money in Manner aforesaid, and shall, within two Months next after the same shall be converted into Money as aforesaid, by the like Order of the Commissioners or the major Part of them, divide the same among such Bankrupt's Creditors who shall have made due Proof of their Debts under such Commission.

Suit in Equity.

XXXVIII. Provided always, That no Suit in Equity shall be commenced by any Assignee or Assignees, without the Consent of the major Part in value of the Creditors of such Bankrupt, who shall be present at a Meeting of the Creditors, pursuant to Notice to be given in the *London Gazette* for that Purpose.

Bankers, &amp;c.

XXXIX. And whereas Persons dealing as Bankers, Brokers and Factors, are frequently intrusted with great Sums of Money, and with Goods and Effects of very great Value belonging to other Persons: It is hereby further enacted, That such Bankers, Brokers and Factors, shall be and are hereby declared to be subject and liable to this and other the Statutes made concerning Bankrupts.

Persons not liable.

XL. Provided always, and it is hereby further declared and enacted by the Authority aforesaid, That no Farmer, Grazier or Drover of Cattle, or any Person or Persons, who is or are, or shall be Receiver General of the Taxes granted by Act of Parliament, shall be intitled as such to any of the Benefits given by this Act, or be deemed a Bankrupt within the same, or within any of the Statutes now in force concerning Bankrupts; any Law, Custom or Usage to the contrary notwithstanding.

XLI. And whereas Commissions of Bankrupts, and the Depositions taken before the Commissioners of Bankrupts, and the Proceedings upon such Commissions, are most commonly kept by such Persons as act as Clerks or Secretaries to such Commissioners, and by reason of the Death of such Clerks or Secretaries are many Times lost and mislaid, by means whereof such Persons as have or may purchase any Messuages, Lands, Tenements or Hereditaments, under any Commission grounded upon the Statutes made concerning Bankrupts, may be disabled to make out their Right and Title to the same: And there being no certain Place where the Creditors of any Bankrupt, or any Person or Persons claiming any Estate or Interest in any Messuages, Lands, Tenements or Hereditaments, by or under any such Commission as aforesaid, can have Recourse to such Commission and the Proceedings thereupon; and such Commissions, Depositions and Proceedings, in case they can be produced, are not at present of Record, nor can be given in Evidence, which may be of very evil Consequence to such Purchasers

A.D. 1732. Anno 5<sup>o</sup> GEORGE II. c. 30.

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‘chasers or Persons claiming as aforesaid:’ Be it therefore enacted by the Authority aforesaid, That upon the Petition of any Person or Persons to the Lord Chancellor, Lord Keeper or Commissioners for the Custody of the Great Seal of *Great Britain*, praying that such Commissions, and the Depositions taken thereon or any Part of such Depositions, and such Certificates so to be allowed and confirmed as aforesaid, or any Certificates heretofore allowed and confirmed, or any other Matters or Things relating to the said Commissions, or the Proceedings thereupon, may be entred of Record, the Lord High Chancellor, Lord Keeper or Commissioners of the Great Seal, shall and may direct and order such Commissions, Depositions, Proceedings and Certificates, or other Matters or Things, to be entred of Record; and in case of the Death of the Witnesses proving such Bankruptcy, or in case the said Commissions, Depositions, Proceedings or other Matters or Things, shall be lost or mislaid, a true Copy of the Record of such Commissions, Depositions and Proceedings, or other Matters or Things, signed and attested as hereinafter is mentioned, shall and may upon all Occasions be given in Evidence to prove such Commissions, and the Bankruptcy of such Person, against whom such Commission hath been or shall be awarded, or other Matters or Things; any Law, Usage or Custom to the contrary notwithstanding: And all Certificates which have been allowed and confirmed or to be allowed and confirmed, and entred of Record as aforesaid, or a true Copy of every Certificate signed and attested as hereinafter is mentioned, shall and may be given in Evidence in any of His Majesty’s Courts of Record, and be without any further Proof deemed, adjudged and taken to be a full and effectual Bar and Discharge of and against any Action or Suit, which shall be commenced or brought by any Creditor or Creditors of such Bankrupt, for any Debt or Demand contracted, due or demandable before the issuing of such Commission, unless any Creditor or Creditors of the Person that hath such Certificate, shall prove that such Certificate was fraudulently obtained; in which case Costs shall be allowed to either Party, as in other common Cases: And to the End any Creditor or other Person or Persons may know where to search and see whether such Commission hath issued, and find what Depositions have been taken by virtue thereof, and what Proceedings have been thereupon, and whether the said Bankrupt hath made such Affidavit or Affirmation as aforesaid, and whether such Certificates are entred of Record as aforesaid, and all other Matters or Things, which shall be entred of Record in pursuance of this Act, the Lord High Chancellor, Lord Keeper or Commissioners for the Custody of the Great Seal shall appoint a certain proper Place near the Inns of Court, where all and every the Matters aforesaid shall be entred of Record, where all Persons shall be at Liberty to search and see if the same are duly entred of Record; and the Lord Chancellor, Lord Keeper or Commissioners shall, by a Writing under his or their Hands, appoint a proper Person, who shall, by himself, or his sufficient Deputy, to be approved by the Lord High Chancellor, Lord Keeper or Commissioners by a Writing under his or their Hands, enter of Record such Commissions, Depositions, Proceedings and Certificates, and other Matters and Things, and have the Custody of the Entries thereof; and

Proceedings to be entred on Record.

by Direction of Lord Chancellor.

Liberty to search.

and also appoint such Fee and Reward to be paid to such Person for his Labour and Pains therein, as the Lord High Chancellor, Lord Keeper or Commissioners shall think reasonable, not exceeding what is usually paid in the like Cases; and that the Person so to be appointed, and his Deputy, shall continue to enter of Record all and every the Matters and Things aforesaid, and to have the Custody of the same, so long as he or they shall respectively behave themselves well in entering the same of Record, and keeping such Entries, and shall not be removed, but by Order in Writing under the Hand of the Lord High Chancellor, Lord Keeper or Commissioners, on a good and sufficient Cause therein specified; and in case such Person shall die, or be as aforesaid removed, the Lord High Chancellor, Lord Keeper or Commissioners for the Time being shall and may, in Writing under his or their Hands, appoint another Person to enter the same of Record, who shall have the Custody of the Entries thereof, and shall have and receive the like Fee and Reward for his Labour and Pains therein.

**Unnecessary  
Expences.**

XLII. And whereas the suing out and prosecuting of Commissions of Bankrupt is at present very expensive; to the great Prejudice of the Bankrupt and his Creditors; Be it further enacted by the Authority aforesaid, That there shall not be paid or allowed by the Creditors, or out of the Estate of the Bankrupt, any Monies whatsoever for Expences in Eating or Drinking of the Commissioners, or of any other Persons at the Times of the Meeting of the said Commissioners, or any of the Creditors: And that no Schedule shall be annexed to any Deed of Assignment of the personal Estate of such Bankrupt from the Commissioners to the Assignee or Assignees of the said Estate: And if any Commissioner or Commissioners in any Commission shall order any such Expence to be made, or eat or drink at any such Meeting at the Charge of the Creditors, or out of the Estate of such Bankrupt, or receive or take above the Sum of twenty Shillings each Commissioner for each respective Meeting, every such Commissioner so offending shall be disabled for ever to act as a Commissioner in such or any other Commission founded on this Act, or any of the Statutes made concerning Bankrupts.

**Commissioners.**

**Penalty.**

XLIII. Provided always, and be it further enacted by the Authority aforesaid, That the said Commissioners authorized as aforesaid, and every of them, shall not be capable of acting as a Commissioner or Commissioners in the Execution of any of the Powers and Authorities given and granted by this present Act, or any other Act or Acts of Parliament now in force concerning Bankrupts, after the twenty fourth Day of June One thousand seven hundred and thirty two (unless it be the Power hereby given of administering Oaths to Commissioners) until such Time as he and they respectively shall have taken an Oath to the Effect following; that is to say,

**Commissioners  
Oath.**

*I A. B. do swear, That I will faithfully, impartially and honestly, according to the best of my Skill and Knowledge, execute the several Powers and Trusts reposed in me as a Commissioner in a Commission of Bankrupt against  
and that without Favour or Affection, Prejudice or Malice.  
So help me God.*

XLIV. Which