

## THE LAW AND THE INSOLVENT DEBTOR

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The American system of bankruptcy is almost unique in the complete rehabilitation which it affords to the honest debtor who falls into insolvency. The conditions which he must meet in order to receive his discharge are much less stringent than those in the English law of bankruptcy, and vastly out of comparison with the political and business incapacities that are incurred by the discharged bankrupt in France and in most of the countries of Europe. To the Continental jurist this benevolence of our law toward the insolvent debtor is both puzzling and amusing. M. Brissaud, for example, in his "History of French Private Law," calls the reader's attention to "the American debtor who grows rich by going through bankruptcy." And in America itself there is many a creditor who, if asked his honest opinion of our law, would reply by defining it in the manner of Dr. Johnson's definition of patriotism—except that he would probably make it the first, instead of the last, "refuge of a scoundrel."

This extraordinary solicitude of our law for the unfortunate debtor is a comparatively recent appendage of the law of bankruptcy—and is largely an Anglo-American development. The first English statute providing for the release of the bankrupt from all his debts was passed in 1705 (4 Ann. c. 17), but it was so widely abused and so severely criticized that it was almost immediately followed by other statutes restricting the effect of the law, until at the time of the American Revolution English law permitted a release of the debtor only if his assets amounted to a certain portion of his total debts. The first American statute of bankruptcy, passed in 1800 and modelled largely on the then existing law of England, had no provisions for the release of the debtor, and it was not until 1841, when our second bankruptcy act was passed, that the idea of a complete discharge was incorporated into the law.

Now the question of the justice of such a release, apart from sociological and economic considerations, opens up a discussion into which even angels would fear to tread—let alone lawyers! But it might be interesting, and perhaps helpful, to see whether this modern humanitarianism of our law represents a final and logical stage in the history of the laws dealing with insolvent debtors; whether, in other words, the treatment of insolvent debtors throughout the centuries may be said

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to display a continuous, evolutionary progress from brutal severity to greater and greater leniency. If we can find any such "manifest destiny" in the history of the law, if there has been any such systematic evolution, then it would be just to say that the leniency of our modern law is a proof not only of a more advanced condition of society, but of a ripened practical wisdom.

Unfortunately, the history of the laws dealing with defaulting debtors displays no such evolution. Instead of a gradual progress from severity to increasing leniency, the movement has been rather that of a pendulum, oscillating from one side to the other, according to contemporary public opinion and experience. Take the history of imprisonment for debt. It is a curious but significant fact, bearing on the so-called "progress" of our laws for debt, that as far back as the eleventh and twelfth centuries it was as impossible to commit a man to prison for not paying his debts as it is today. In those early days, "the common law knew no process whereby a man could pledge his body or liberty for payment of a debt."<sup>1</sup> The two oldest writs of execution in English law were the *feri facias* and the *levari facias*, and by neither of them could the sheriff or bailiff arrest the body of the debtor. It was not until the enactment of the famous "Statute Merchant" in 1285 (13 Ed. I, St. 3), which introduced the commercial recognizance, that a debtor could be imprisoned for non-payment, and even then the statute was jealously restricted to mercantile debts only.<sup>2</sup> The common law itself had devised no means of arresting a debtor until in the reign of Edward III (1312-1377), the courts laid down the rule that the writ of *capias ad satisfaciendum* would lie to obtain execution of a judgment, if the debtor had already been arrested on mesne process by the writ of *capias ad respondendum*.<sup>3</sup> It was largely through this procedural rule of the courts, and not through any specific enactment of the legislature, that imprisonment for debt was introduced into England. The modern abolition of this practice is mainly the result of the humanitarian movement of the middle of the nineteenth century; but it is important to remember that what fired the indignation of the Victorian reformers was not so much the fact that the law permitted imprisonment for debt, as the abuses

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<sup>1</sup> POLLOCK & MAITLAND, HIST. OF ENGLISH LAW, Vol. II, p. 594.

<sup>2</sup> In 1311, the abuses of the STATUTE MERCHANT resulted in the passing of a law (5 Ed. II, c. 33) which read as follows:

Forasmuch as many persons, other than known Merchants, do feel themselves much aggrieved and fined by the Statute of Merchants made at Acton Burnell; We do ordain that henceforth that Statute shall not hold except between Merchants and Merchants, and of Merchandise made between them, and that the Recognizance be made like as is contained in the said Statute.

<sup>3</sup> Coke's Rep., p. 12a; for other cases, see HOLDSWORTH, HISTORY OF ENGLISH LAW, Vol. VII, p. 230.

which took place in the law and the conditions, familiar to readers of Dickens, which existed in the prisons of England.

But coming more closely to the matter of rehabilitation, it would not be too much to say that in the period of the Tudor monarchs and the first quarter of the seventeenth century, the chances which were open to the unfortunate debtor for recovering from his insolvency and for obtaining protection from the rapacity of his creditors, were practically as great as they are under our modern system of bankruptcy. The Privy Council, which was then at the height of its power, was constantly interfering on behalf of the debtor. It would compel creditors to refrain from suing him in the courts of common law; it would order sheriffs to abstain from arresting him or attaching his property; it would persuade, and sometimes even force, creditors to grant the debtor more time or accept a reduction of the debts; and in many other ways, it exercised a benevolent protection over the insolvent debtor.<sup>4</sup> Chancery had even established a practice of granting "bills of conformity" by means of which a failing debtor could compel obstinate creditors to accept a composition.<sup>5</sup>

But the inevitable reaction soon arrived. Even before the actual downfall of the Privy Council (1641), the law began to sharpen its teeth. The two bankruptcy statutes of the reign of James I (1 Jac. I, c. 15 and 21 Jac. I, c. 19) are the harshest in the whole history of bankruptcy legislation. Bills of conformity were abolished by proclamation in 1621,<sup>6</sup> the prisons of the country were over-crowded with insolvent debtors for whom the law offered no hope of release, and the Privy Council itself, under the pressure of public opinion and the jealousy of the common law courts, was gradually diminishing its interferences on behalf of the debtor. And yet, throughout this period of severity, English commerce was riding on an extraordinary wave of expansion and prosperity.

But before the end of the century the pendulum was again swinging in the direction of leniency. In 1670, public opinion compelled parliament to pass an act for the "Relief and Release of Poor Distressed Prisoners for Debt" (22 & 23 Car. II, c. 20), and in 1705 came the act of Anne, mentioned above, providing for the complete release of bankrupt debtors from all their past obligations, only to be followed by another reaction in public opinion, resulting in a series of statutes which

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<sup>4</sup> For numerous instances of the exercise of this jurisdiction, see DASENT, ACTS OF THE PRIVY COUNCIL, *passim*.

<sup>5</sup> Cf. MALYNES, *LEX MERCATORIA* (Ed. 1622), at p. 221.

<sup>6</sup> Cf. SANDER'S ORDERS IN CHANCERY, Vol. II, App., p. 1044; Also, Alderman Backwell's Case, I Vernon 152.

until the middle of the nineteenth century made the English treatment of debtors notorious throughout the civilized world.

We have so far been dealing with English law only. If we shift our eyes for a moment to the field of comparative jurisprudence and observe the course taken by the laws of other countries throughout the centuries, the same oscillating movement, from severity to leniency and back again to severity, will strike our attention. The words of Pollock and Maitland, apropos of an early medieval period, are a sound warning to anyone who thinks that he can trace a continuous thread of increasing humanitarianism from ancient times to the present:

If we are to have from comparative jurisprudence, any grand inductive law as to the treatment of debtors, it cannot be of that simple kind which would see everywhere a gradually diminishing severity.<sup>7</sup>

We might if we wished go back to Biblical times, when the Hebrew law had already established a system of releasing the debtor from all his debts once in every seven years.<sup>8</sup> But it will be sufficient to begin with that vast store-house of ancient law that has had such a profound influence on the jurisprudence of the western world. The earliest Roman law dealing with insolvent debtors—the “*manus injectio*” of the Twelve Tables<sup>9</sup>—was indeed a ferocious law. The defaulting debtor could be sold into slavery or put to death, and if he had more than one creditor, his body was to be hacked up—*partis secanto*—and the pieces distributed equitably among all the creditors!<sup>10</sup> In Cicero’s day a system of execution on the property of the debtor had replaced the personal execution of the early law.<sup>11</sup> But Cicero himself gives us an indication of the disastrous effects which the bankruptcy sale—the *venditio bonorum*—had upon the bankrupt:

Quae tanta calamitas inveniri potest?—Cuius bona venierunt, ii, non modo ex numero vivorum exturbantur sed si fieri potest infra etiam mortues amandatur!<sup>12</sup>

In the time of Augustus, Roman law had devised a system whereby an honest debtor could receive more lenient treatment if he made an as-

<sup>7</sup> *Op. cit.*, Vol. II, p. 595, footnote 1.      <sup>8</sup> Deuteronomy, Ch. XV.

<sup>9</sup> For this law, see GIRARD, *TEXTES DE DROIT ROMAIN*, 3d Ed., p. 13.

<sup>10</sup> The authorities on Roman Law are divided as to the practical execution of this barbarous law. Some have given it only a figurative interpretation—e.g. Muirhead in his *INTRODUCTION TO THE PRIVATE LAW OF ROME*; others, on the contrary, have taken it literally—e.g. Joseph Kohler in his absorbing work, *SHAKESPEARE VOR DEM FORUM DER JURISPRUDENZ*.

<sup>11</sup> The law was known as the *missio in possessionem*, because the decree of the magistrate put the creditors in possession of the bankrupt’s property. *GAIUS, INST.* III, 77-81; IV, 35, 65-68, 145.      <sup>12</sup> *Pro Quinctio*, Ch. 15.

signment of all his property to his creditors. This was known as the *cessio bonorum*,<sup>13</sup> a phrase which is still in use in many of the Continental bankruptcy systems. But the period of greatest indulgence toward the debtor came toward the close of the Empire, when the state began to exercise an active supervision over the affairs of insolvent debtors—a supervision very similar to that which, as we have seen, was exercised by the Privy Council of England in the time of the Tudors. “Letters of respite” (*inducia*)<sup>14</sup> were frequently granted by the Emperor, on the petition of a failing debtor, for the purpose of giving him a moratorium, sometimes for a period as long as five years, during which the creditors were prohibited from pressing their claims. In addition, a system of compositions was invented by means of the instrument known as the *condordia*,<sup>15</sup> whereby the amount of the debtor’s obligations would be whittled down upon certain conditions. The whole law of bankruptcy in the later Empire was so lenient that a debtor could apparently obtain a complete release, if he merely took an oath that he was honest and insolvent!<sup>16</sup>

But if the bankruptcy system of the Roman Empire was lenient, the next great system which followed it went to the furthest extreme of severity—and yet it was probably more successful in practice than any system that came before or after it—not excepting any of our modern systems, if we may judge by the influence which it had upon various countries. That system was built up, somewhat on the lines of the old Roman law, in the great medieval mercantile towns of Lombardy and Tuscany. There the practical genius and experience of the Italian merchant, combined with the theoretical wisdom of the great Italian jurists, had succeeded in constructing a machinery of bankruptcy as highly organized as any of the present day. Its influence, following in the wake of the Italian Law Merchant, spread by way of the international fairs of France and Spain, and before long had shaped the bankruptcy systems of all the rising nations on the European continent.<sup>17</sup> And yet what strikes one most when studying the medieval Italian system of bankruptcy is its remarkable severity toward the insolvent debtor. The insolvent, whether honest or not, was regarded as a criminal. He was the “*pessimum genus hominum!*”<sup>18</sup> “*Decoctor ergo fraudator!*” ex-

<sup>13</sup> GAIUS, III, 78; also Digest, 42, 3, “*de cessione bonorum.*”

<sup>14</sup> VAINBERG, *LA FAILLITE D'APRES LE DROIT ROMAIN*, p. 145. <sup>15</sup> *Ibid*, 149-152.

<sup>16</sup> See Blackstone’s reference to the leniency of the later Roman Law, in his *COMMENTARIES*, Bk. II, ch. 31. Cf. also, JUSTINIAN, Nov., 135, c. 1.

<sup>17</sup> For an idea of the last influence of the Italian system of bankruptcy on the Continent, see the opening chapters in KOHLER, *HANDBUCH DES KONKURSRECHTS*; RENOARD, *DES FAILLITES*; and THALLER, *DES FAILLITES EN DROIT COMPARÉ*.

<sup>18</sup> STRACCHA, *TRACTATUS DE DECOCTORIBUS*—the best first-hand authority on the medieval Italian bankruptcy law.

claims one of the greatest of the Italian jurists:<sup>19</sup> "insolvent—therefore fraudulent!"

Torture was permitted to make the bankrupt reveal his secret transactions, and the examinations were conducted by "subtili inquisitione!" Not only was the bankrupt himself never released from his debts, but even his near relatives—parents, children, and brothers living under the same roof with him—were held equally responsible for all his obligations. Even his shop-clerk did not escape liability for his failure. If the bankrupt made an assignment of his property and was proved to have acted honestly throughout, his only reward was to be saved from prison; but in lieu of imprisonment, he was subjected to the most degrading humiliations, the commonest of which was the wearing of a green cap as a warning to those who might want to give him credit again. Capital punishment was the law in many of the Lombard cities, and with one exception, none of them provided any measures whatever for the rehabilitation of the bankrupt.

That one exception was the city of Venice. There a reaction had apparently taken place, and special commissioners, called "sopraconsoli" were appointed for the purpose of making sure that the bankrupt would have a reasonable chance to start afresh, free from the burden of his past obligations. Thus, in the Constitution of Venice for the year 1457, we find a provision in Latin, running as follows:

The office of sopraconsul was created on the principle and for the sole purpose of making certain that our citizens, when reduced to insolvency by adverse fortune, would be able to carry on their business and not be forced to leave their families and wander about like idle beggars.<sup>20</sup>

Inasmuch as Venice was an exception to the uniform severity of the bankruptcy law of medieval Italy, and approached our own modern law in its solicitude for the honest insolvent, it ought to be of interest to inquire what the success of the Venetian law was in comparison with that of the rest of Italy. Did it help the credit system? Did it lessen the number of failures? Did it raise the level of commercial life? Let us see what the Italian scholar, Allesandro Lattes, says after an exhaustive study of the bankruptcy statutes of the medieval cities:

When one observes the notable frequency with which the bankruptcy laws of Venice were made and re-made, and how the numerous commercial crises caused by bankruptcies eventually brought on the mercantile decline of the Republic, one has reason to doubt of the practical wisdom of this leniency.<sup>21</sup>

<sup>19</sup> Baldus in his *CONSILIA SIVE RESPONSA*, 392.

<sup>20</sup> Cited in LATTES, *IL DIRITTO COMMERCIALE NELLA LEGISLAZIONE STATUTARIA*, p. 347.

<sup>21</sup> *Op. Cit.*, p. 321.

Here is a lesson of the past worth taking to heart. For the commercial conditions of the Italian cities in those days were not essentially different from what they are in any modern business community, and it is safe to say that human nature then was what it is today—especially in the matter of debts!