M. S. SERVIAN

Submitted for the degree of PhD at the University of Kent at Canterbury.

EIGHTEENTH CENTURY BANKRUPTCY LAW : FROM CRIME TO PROCESS

M. S. Servian

Submitted for the degree of PhD at the University of Kent at Canterbury

Eighteenth Century Bankruptcy Law : From Crime to Process

Thesis Abstract

During the 18th and early 19th centuries there was a vast change in the primary social function and in the meaning of the legal norm of bankruptcy law. With the growth of a depersonalised trading community whose members increasingly required an efficient means of clearing bad debts, bankruptcy changed from being a means of policing trade to being a process for debt-collection. The objectives are to explain how it was possible for judiciary and merchants to hold conflicting views of the proper end of bankruptcy law; and to explain how and why the legislature and the judiciary eventually proved responsive to the expectations and requirements of merchants over this vital aspect of the law relating to trade.

To these ends, Kuhn's theory of 'paradigm shift through crisis' is employed to explain the development of legal, as opposed to scientific knowledge. A 'relative autonomy' is established for 18th century bankruptcy law, judges being more concerned with maintaining the law's 'internal consistency' than with satisfying merchants' needs. By the late 18th century, the distance between what judges could offer, and what merchants required of bankruptcy, had become intolerable to the new impersonal trading community. The merchants' praxis for reform, the 'moral panics' of swindling and sham (friendly) bankruptcies, and the accelerating bankruptcy rate, led to a crisis in the judicial paradigm of bankruptcy as crime that was only resolved by legislation in 1824/5. Thus, the emerging possibility of self-declaration of bankruptcy established the new paradigm of bankruptcy as process.

The legal changes required and fought for by business accompanying the shift from personalised and honour-bound trading communities to a political economy based upon economic efficiency, and characterised by transactions between strangers, were achieved despite rather than because of judicial activity. Judges were motivated predominantly by the need to maintain the structural integrity of fields of legal discourse.

Contents

Chapter One

Introduction

Central to the success of 18th century English trade was credit[1], and central to the maintenance and recreation of the mercantile credit-system was the law relating to the consequences of a trader's insolvency. While insolvency law operated to recover the debts of non-trade debtors[2], mercantile debt-collection was the realm of bankruptcy law. This aspect of the law was widely used in the 18th century[3], not only because of the difficulties of enforcement of informal debt-collection arrangements('compositions')[4], but also because of the importance attached to the symbolic significance of bankruptcy. Bankruptcy represented a ritual degradation and, for the fair bankrupt, necessitated a reinstatement ceremony.[5] It also acted as the legal framework within which merchants assessed the risks of borrowing and lending. For 18th century middlemen, credit and debt were both their modus operandi, and default 'a daily threat to their livelihood'.[6]

Although bankruptcy law was a creature of statute, judicial decision-making in bankruptcy cases established a distinctive and 'internally consistent' judicial view of bankruptcy law. However, bankruptcy law was not only an object of knowledge for judges, it also had a separate, and, in many crucial ways, contradictory meaning for merchants who were subject to, and who employed, this branch of the law.

Despite doctrinal developments during the 18th century, the judicial view remained that bankruptcy was a branch of the criminal law. With the increasing depersonalisation of trade, meanwhile, the nature and requirements of England's mercantile community changed substantially. While early 18th century merchants could tolerate the consequences of the judicial view of bankruptcy as crime, their late

18th century successors could not. This prompted their involvement in a determined praxis for the reform of bankruptcy law.

The objectives of the present work, then, are two-fold. Firstly, competing mercantile and judicial conceptions of bankruptcy law will be identified. Ideal typifications of the early and late 18th century mercantile communities will be established in order to indicate their respective attitudes towards, and their expectations and requirements of, bankruptcy law. The distinctive and specialist judicial view of bankruptcy law will allow its conceptualisation not through the more open-ended ideal type model, but through Fletcher's notion of the existence of 'structural principles' in the law.[7] Implicitly throughout this study, and explicitly in the final Chapter, the consistent judicial view of bankruptcy law will be identified as a 'paradigm'.[8] In brief, a 'paradigm' consists of a network of model puzzle-solutions (or 'exemplars'), adhered to by an identifiable professional community (or 'disciplinary matrix'). Thus, the leading cases on bankruptcy law, followed by the 18th century judiciary, will be shown to have represented a paradigmatic view of bankruptcy law as being an element of the criminal law. 'Structural principles', in turn, will be shown to have represented one important aspect of a legal paradigm: its guiding epistemological foundations.

Having established the opposing judicial and mercantile conceptions of bankruptcy law; the second objective of the present work is to demonstrate the mode by which bankruptcy law was eventually altered to meet the changing requirements of 18th century business. Although there will be discussion of the growing 'depersonalisation' of trade, the changing socio-economic environment within which bankruptcy law operated (its 'sphere of influence') will not be presented at a high level of abstraction.[9] This changing socio-economic environment will

be seen to have influenced bankruptcy law's development through the mediation of human agents, the merchants, who both functioned within, and who were involved in the reconstruction of this environment.

Judges will be seen not to have responded unproblematically to the changing requirements of business. While they were sympathetic to the needs of merchants, judges were more concerned to maintain the internal consistency of the law. When merchants finally achieved a bankruptcy law appropriate to their requirements, it was as a result of the political as opposed to the judicial process.

This approach problematises the way in which bankruptcy law developed in line with the growth of an impersonal political economy in the 18th century. Judges were committed to an idea-structure, 'bankruptcy law', that was 'relatively autonomous'[10] from the needs of traders. Synchronically, it was 'relatively autonomous' in that the judicial view of bankruptcy was out of phase with (and therefore autonomous from) the needs of early 18th century trade. Bankruptcy law was, however, usable by early 18th century merchants (and was therefore only relatively autonomous from its sphere of influence). In the latter part of the 18th century, the relative degree of bankruptcy law's autonomy from the needs of trade was more apparent as bankruptcy law became virtually unusable by merchants (except for an unsatisfactory policy pursued by merchants of committing perjury to circumvent the judicial view of all bankrupts as criminals[11]).

Diachronically, bankruptcy law developed relatively autonomously from the changing socio-economic conditions. It developed autonomously from these conditions in that judges were more concerned to protect the structural integrity of bankruptcy law than they were to satisfy the changing needs of merchants. The development, however, was only relatively autonomous from bankruptcy law's sphere of influence for

two reasons. Firstly, judges did direct the law towards mercantile wishes whenever possible (i.e. whenever this did not threaten the internal consistency of the law). And secondly, when bankruptcy law could no longer satisfy mercantile need, the judicial view of bankruptcy as crime collapsed. Bankruptcy law was then reconstructed, via the political process, as a debt-clearing process. When this 'paradigm shift' occurred, it was despite, rather than because of judicial reactions to mercantile requirements.

It is hoped that by focusing upon the specifically judicial response to concretely identified socio-economic conditions, a programme suggested by Sugarman might be pursued:

> What is clear is that an advance in our understanding of the relative autonomy of the law is unlikely to occur at a high level of abstraction. Broad generalization is likely to prove difficult. Only diverse historical case studies will provide us with the data we so far lack.[12]

The main thrust of the present work, then, is to explicate the mode of development of the common law as it belatedly responded to the changing requirements of trade in the 18th century. There is a dearth of contextually-sensitive research into the legal history of bankruptcy law.[13] The choice of bankruptcy as a subject for study, however, has other points to recommend itself. Before indicating the direction of our investigation into the history of bankruptcy law, let us briefly consider some of these collateral benefits.

Firstly, the present study will contribute to a growing literature within what is coming to be nominated 'critical legal history'. This approach contrasts with two major features of the prevailing orthodoxy

in legal history. Firstly, it is opposed to a tradition whereby legal historical work tended merely to describe 'black letter', doctrinal legal development with no more than passing references to its social, economic, political, philosophical or institutional context.[14] Secondly, it is opposed to the 'Whiggish' interpretation of history in these traditional legal histories which:

> encourages the anachronistic imposition of present-day values on the complex reality of the past, inhibiting critical scrutiny of the paradigm itself[15], reducing the historian's role to that of judge or quiz master, awarding the winners and ignoring the losers.[16]

That is to say, the Whiggish interpretation distorts historical evidence by classifying it according to modern, as opposed to contemporary conceptions. And this interpretation, based upon fundamental beliefs in continuity and progress in human history, only recognizes historical events or circumstances which can be said to have evolved into modern counterparts.[17]

More positively, critical legal history is concerned with explaining how historically specific forms of social order were maintained and recreated through the ideas and practices of human agents; and through the institutions which they made, and which governed them. This humanism adds life to the rigid analysis of the complex web of interrelationships between law, state, economy and society.[18] Drawing upon legal and (traditionally) 'non-legal' sources, critical legal history problematises the concept of 'law'. A monolithic conception of law is replaced with a view which recognizes a plurality of legal realms and institutions.[19] And critical legal history offers an

approach which is both theoretically informed, and also empirical. It is empirical both at the level of the reconstruction of the relevant rules, procedures and institutional arrangements of the law; and at the level of the reconstruction of the specific socio-economic environment within which the law operated and had meaning. Both the theoretical input, and also the empirical conclusions can be discussed, refined, or replaced on the basis of new knowledge.[20]

By the end of the 1970s, a sound base had been established in the theoretically informed analysis of the material history of English criminal law.[21] Horwitz had broken new ground in his study of the transformation of American private law.[22] His work, however, suffered criticism both for its 'instrumentalism' (the view that judges unproblematically altered the law to facilitate the interests of business[23]), and for the damage that he inflicted upon the time-scale of the doctrinal developments in the pursuit of his thesis.[24] By 1979, Atiyah's history of contract law had proved sensitive to the intellectual context within which the doctrines of contract law grew.[25] And in 1984, we had the first major collection of essays on the development of specifically private law in its relationship not just to intellectual currents, but to its various, and concretely identified socio-economic backgrounds[26]. For an appreciation of the tangled interrelationships between law, economy and society, it is argued, further empirical studies are required of the form, content, structure, ideology, use and non-use of law.[27] In particular, it is suggested that:

> especially fruitful will be those studies that examine the inter-face and inter-action between civil and criminal institutions, for example, in the context of indebtedness, bankruptcy, corporate

> liquidation and the regulation of trade unions.[28]

In the present study, then, we will relate the doctrinal changes in 18th century bankruptcy law to their specific socio-economic context of the mercantile credit-system. Judicial and mercantile perceptions of bankruptcy will be reconstructed according to contemporary, as opposed to modern, categories and belief structures. Our study will be non-teleological - we will not focus merely on those developments which might be identified as being antecedents to modern aspects of bankruptcy law.[29] Continuity and discontinuity will be considered. We will examine the two-way relationship between changes in bankruptcy law, and changes in the practices and ideas which constituted 18th century mercantile social order. Our sources will include cases and statutes; but also material drawn from Select Committees, Parliamentary debates, texts, abridgements, pamphlets, periodicals, newspapers, literary and statistical sources. We will establish the significance of bankruptcy law to 18th century trade both at the level of the actual use of this aspect of the law, but also at the level of mercantile experience of bankruptcy as the legal framework within which credit was offered, or debts entered into. As important as this legal framework to the success of the credit-system were informal assessments of fellow traders' reputation and trustworthiness. We will empirically reconstruct the nature of mercantile interrelationships as well as the formal features of bankruptcy law. Guided by our over-riding theoretical concern to explain the dynamics of bankruptcy law's development, we will draw upon theoretical models established in a variety of disciplines, including the Philosophy of Science, Jurisprudence, Social Anthropology and Ethnomethodology.

Further, we will examine how the _form_ of bankruptcy law proved to be relatively autonomous from the everyday realities of the mercantile credit-system. We will explore the effects of various aspects of bankruptcy law's _content_ upon the operation of this credit-system. Of central concern will be an investigation into bankruptcy law's _structure_, and how this structure underwent transmutation when bankruptcy law came actually to threaten the efficacy of the credit-system. We will investigate the _ideological_ dimensions of bankruptcy law. We will see, for example, how the very stability of a reputation-based system of credit was symbolically recreated in the drama of a debtor's bankruptcy. We will also see how merchants were encouraged to _use_ bankruptcy law by the fact that informal debt-collecting arrangements could easily be overturned by a single creditor who wished to activate formal bankruptcy proceedings. Nevertheless, we will see merchants advocating precisely these informal arrangements, recommending the _avoidance_ of the formal bankruptcy mechanism. Finally, in this context, we will explore the frictions caused by the judicial view of bankruptcy law as straddling both the criminal _and_ civil law. We will examine how these frictions themselves firstly protected the judicial view from fierce mercantile attack, and then, by the end of our period, how merchants could no longer tolerate this duality in bankruptcy law.

In the present work, then, we will tackle some of the general themes emerging from the relatively new field of critical legal history. We will also contribute towards some specific issues which have arisen within this field.

In the context of a discussion concerning the growth of the legal device of the 'protective trust', Chesterman argues that 'the law... displayed a capacity to pursue independent lines of development while also displaying considerable responsiveness to economic and ideological

forces'.[30] As indicated, the exploration of the relatively autonomous mode of legal development of bankruptcy will be a central feature of the present study. However, with Chesterman, we will not employ the 'relative autonomy of law' concept to demonstrate law's ideological function in acting as an 'instrument of overt oppression of the working class and other disadvantaged groups on the part of those in a position of economic and political dominance'.[31] Valuable work <u>has</u> resulted from such a concept of law. For example, although the conspiratorial overtones of his work have been criticised[32], Hay has fruitfully employed the concept of law's relative autonomy from its immediate social and economic environment to explain how the 18th century criminal law functioned to maintain inter-class power structures.[33] More recently, Horwitz has employed the relative autonomy of law concept to explain how the private law maintains and legitimates the distribution of wealth between classes.[34]

In the present work, we will see how the relative autonomy of law was not merely a consciously, or unconsciously perpetrated 'trick' to legitimate forms of domination. Apart from any plebeian outrage at a law solely for merchants (evidence of which I have not found)[35], bankruptcy law was of little concern to social groups other than that of the merchants. Judges were certainly keen to satisfy the requirements of their mercantile customers. However, as we will see, they never did so at the expense of threatening the internal consistency of the law. The relative autonomy of the law, then, will be seen to have been an <u>institutional</u> part of the law. On the one hand, the law's relative autonomy worked against the short-term interests of trade: mercantile requirements, and what judges could offer of bankruptcy law, were out of phase in, particularly, the second half of the 18th century. On the other hand, the relative autonomy of law

was functional in symbolically recreating mercantile homogeneity in the exotic rituals involved in a bankruptcy.[36]

This emphasis on the relatively autonomous development of bankruptcy will also allow consideration of another specific issue that has arisen within critical legal history: the nature of the relationship between law and the emergence of the industrial revolution.[37] In employing Kuhn's theory of 'paradigm shift through crisis', we will see how bankruptcy law belatedly, but inevitably, came to coincide with the requirements of business. We will see how, in the case of bankruptcy law, the State intervened by Acts of Parliament in 1824 and 1825[38] to <u>create</u> the framework-type law that writers as politically diverse as Pashukanis[39] and Hayek[40] have argued to be the basis of a <u>laissez-faire</u>, free market society. The State responded to the agitation of merchants who pressed, in words and in action, for bankruptcy law as a manifestation of this '<u>Gesellschaft</u>'[41] form of law which guaranteed the existence and the enforceability of rights of formally free and equal, rational, and competitively self-interested individuals.[42] Such laws were enacted when the judiciary, committed to the maintenance of the internal consistency of the law, proved unable to accommodate the needs of merchants by means of <u>ad hoc</u> modifications of their paradigm of bankruptcy law. They were enacted to resolve a crisis in the judicial paradigm in the face of this mercantile agitation. And they were enacted to minimise the costs, and to maximise the returns in debt-collection by the creation of a <u>right</u> of discharge from past debts, guaranteed to a mercantile debtor who declared himself bankrupt, and who cooperated in the redistribution of his estate.[43] Previously this right to discharge had merely been conceived as a privilege granted at the creditors' whim.

The present study, then, describes an aspect of the legal dimension of a development from an economy based upon personal knowledge and honour, to the impersonal political economy associated with free market capitalism.[44] Other studies have discussed the legal changes which resulted from this socio-economic development. Kamenka and Tay, for example, describe the growth of an individualistic, gesellschaft form of law as emerging:

> out of the growth of individualism and of the protest against the status society and the fixed locality; it is linked with social and geographical mobility and the rise of the bourgeoisie.[45]

Within critical legal history, empirical studies have been undertaken of the functional transformations of legal norms[46] during this rise of an impersonal, free market system within which the necessary levels of effective demand were created to spur industrialised mass-production.[47] Private property rights became less qualified[48]; contract law ceased to take account of the substantive 'fairness' of bargains[49]; tort law created 'a market for injuries'[50], whilst ensuring that the redistribution of wealth did not occur[51]; land law came to facilitate a market in land[52]; and within the criminal law:

> many practices that became subject to criminal proceedings were not previously criminal; they were, variously, civil offences that became criminalised[53], traditional perquisites of employment that were no longer accepted by employers[54], and legal rights associated with common land that were (effectively) abolished.[55]

However, within critical legal history, too little attention has been paid to the actual processes by which individual aspects of the law proved responsive to the requirements of business. Hay sought to explain the responsiveness of the criminal law to the growth of property as the major relationship between people, with reference to some (relatively unevidenced) conspiracy of 'an astute ruling class'[56]. Horwitz sought to explain transformations in American private law with reference to some (again, unevidenced) community of interests between businessmen and judges (who were held unproblematically to have altered the law in favour of the formers' interests)[57]. And Atiyah attempted to explain changes in contract law in terms of some (ill-defined) influence of contemporary philosophical thought upon legal development.[58]

Although its focus will be on the development of bankruptcy law, it is hoped that the present work will offer a methodology for the reconstruction of the processes through which 18th century commercial law generally was transformed to coincide with the requirements of the emerging free market and of industrialisation. We will conclude that commercial law change occurred as a result of human struggle[59]; not as a result of some mere 'superstructural' reflection of changes in an economic 'substructure', nor as a result of the social engineering of judges or legislators, themselves ideologically committed to the free market or to industrialisation.[60]

Further, as Sugarman has noted, the relationship between economy and law is 'two-dimensional'[61]. That is to say, in the one dimension, law is shaped, through the mediation of human actors, by the economy. In the other dimension, law itself materially affects the ideas and practices of those involved in the day-to-day operation of the economy. In considering also this second dimension of bankruptcy law, we will

enter a debate within social history as to the nature of 18th century civil society.

Unlike a growing literature within social history, we will not concentrate in any depth upon the frictions between the various social rankings of the 18th century.[62] As noted, the significance of this avoidance is in the possibility it opens for a study of the relative autonomy of law as being an institutional, as opposed to merely to a class-biased, feature of 18th century law.[63] What we will focus upon are the internal dynamics of one of these ranks, later 'classes'; namely, that of merchants, traders, retailers and others of the 'middling sort'. This group will be reconstructed as the concrete socio-economic context within which bankruptcy law operated and had meaning. We will also see how this group acted as the impetus for a structural transformation of bankruptcy law. Despite these ideosynchratic objectives in reconstructing the mercantile social grouping, our model of the interrelationships between merchants will be seen to coincide with the view espoused in Brewer's recent work.[64] Furthermore, a missing, but crucial element to Brewer's conceptualisation of the 18th century trading community will be added.

Brewer argues that there is an 'emerging orthodoxy' amongst social historians by which 18th century civil society is conceived in terms of the interactions between two social groups: the 'patricians' and the 'plebeians'.[65] As we will demonstrate, Brewer is correct to warn of the dangers of this orthodoxy which:

> tends to ignore the considerable body of evidence for a growing group - the middling sort or bourgeoisie - who were numerous - and who began, during the course of the century, to distinguish themselves socially and politically from the patrician elite and the labouring poor.[66]

Brewer goes on to establish the existence of a social grouping of merchants who were uneasy about the patronage that linked them to aristocrats (especially given the recalcitrance of the latter in repaying debts), and who had elements within their ranks which also identified them as an entrepreneurial vanguard in the development of free market capitalism.[67]

Alongside their vulnerability to economic disaster that arose as a result of the 'client economy', 18th century merchants faced the instabilities in trade caused by frequent, unpredictable, and short-lived economic fluctuations. These, in turn, were caused by wars and natural disasters, and were often accompanies by runs on hard cash (when credit was most needed by traders) by stockjobbers, speculators, and 'genteel investors'.[68]

The bulk of mercantile enterprize assets were in circulating capital and consequently, Brewer argues, merchants needed a 'strictly regulated credit system'[69]. According to Brewer, there were two means by which merchants ensured a level of stability in the credit system.[70] Firstly, stability was created by the fact that merchants borrowed and lent within their immediate trading community.[71] Information (later to be disseminated by local newspapers[72]) thus helped to stabilise the credit system. In the present study we will see how, by the latter part of the 18th century, reputation came to replace personal knowledge as the major criterion of creditworthiness. Secondly, voluntary associations, or 'clubs', were established which:

> provided a cushion against a member's more aggressive creditors, made borrowing money much easier, and provided the organizational base from which to raise larger capital sums.[73]

We will investigate one such organization: the Guardians or Society for the Protection of Trade against Swindlers or Sharpers, which sought to protect its membership not so much from aggressive creditors, as from trade fraudsters.

Our findings thus coincide with Brewer's argument as to how the credit system thrived despite economic insecurity. Indeed, we will also conclude with Brewer that honour-bound interpersonal relationships, newspapers, and clubs helped to instill an appropriately responsible attitude towards credit and debt. However, Brewer's explanation of how the 18th century mercantile credit-system survived the insecurities of trade lacks a vital element.

Brewer briefly describes the crisis in confidence sufferred by creditors in their debtor, when the latter was arrested and then imprisoned for debt.[74] He also mentions how judges sustained mercantile custom in their 'ad hoc' decisions about the use of bills of exchange.[75] However, the enormous significance of the legal dimension to the operation of the mercantile credit-system is all but ignored. In particular, bankruptcy law hardly receives a mention.

In the present work we will further Brewer's argument that the merchants should be taken seriously as a social ranking in the 18th century beyond their relations of 'clientage and dependency'[76] with the aristocracy. However, we will argue that bankruptcy law operated, as importantly as personal ties and clubs, as the framework within which the mercantile credit-system reproduced itself. Debts were entered into with a thought to the risks of bankruptcy, and credit was offered in the knowledge that bankruptcy law could be employed to recover bad debts. When Brewer cites Defoe as arguing that 'what was needed was a system for fixing and rationalizing' credit, Brewer is wrong to suggest that this was achieved simply by merchants ensuring

the availability of accurate information.[77] As Defoe himself knew, the rationalization of bankruptcy law was also essential.[78] The material consequences of bankruptcy law upon the maintenance and recreation of a stable credit-system is underlined by the frequent and heated mercantile demands for the reform of this branch of the law. Indeed, bankruptcy law's relevance to the everyday operation of trade was such as to cause a determine <u>praxis</u> for reform, involving both persuasion and perjury[79], by the late 18th century participants in a depersonalised trading community.[80]

Having indicated the contribution that the present work will seek to make to critical legal history and to social history, let us now sketch in outline the direction that the study will take. In Chapter Two we will explain how early 18th century judges saw all bankrupts as trade criminals, and how they could not conceive of bankruptcy through misfortune. Judges perceived the act of bankruptcy, the formal entry into bankruptcy proceedings, as conclusive proof of the criminality of all bankrupts. The creditors' power to discharge their bankrupt debtor from past debts was seen, by the judiciary, as an opportunity for the creditors to display humanity, or to avenge a personal wrong which they had suffered. The decision over the question of discharge was not seen as being a judgement as to the bankrupt's, already established, culpability. The third chapter demonstrates mercantile dissatisfaction with this judicial view of all bankrupts as criminals. Merchants knew that bankruptcy could also occur through misfortune. So as to protect the credit-system and entrepreneurial risk-taking, merchants argued, bankrupts should receive their just deserts. The fraudulent bankrupt should be incapacitated from future trading, whereas the unfortunate bankrupt should be laundered to allow him to recommence trading afresh. Creditors, with their improper

motive of vengeance, were seen as being the wrong people to decide upon the bankrupt's desert in their decision over whether or not the bankrupt should be discharged from past debts. Nevertheless, the existence of the possibility of discharge at all,will be seen to have insulated the 'relatively autonomous' judicial view of bankruptcy as crime from too vehement a demand for reform by merchants.

In Chapter Four we describe how judges, in the special case of a factor's bankruptcy, were prepared to bow to merchants' wishes by placing a bankrupt factor's principal in a privileged position over the factor's general trade creditors. Judges will be seen to have been sympathetic to merchants' wishes, but never at the expense of threatening the law's internal consistency.

Chapter Five is concerned with a generally held view in the late 18th century that bankruptcy law was singularly failing to satisfy the end judges perceived it to possess. Far from trade fraud being diminished, it was believed that 'swindling' had reached epidemic proportions. The 'moral panic' about swindling is shown to have had the effect of legitimating the increasingly important mode of credit of indorseable bills of exchange. The following chapter, on 'sham' (or, friendly) bankruptcies designed to defraud real creditors, depicts the late 18th century mercantile view that bankruptcy law was, in fact, mainly a vehicle for fraud.

Chapter Seven describes the new, and depersonalised English trading community of the late 18th century. We will see how merchants ceased to argue in favour of bankrupts receiving their 'deserts'. Merchants now argued that bankruptcy law should merely represent a debt-clearing process. This could be achieved, they claimed, if discharge was held out as an inducement for cooperation on the part of the bankrupt. The guarantee of discharge for fair behaviour

would maximise returns for creditors on their debtor's bankruptcy. The desire amongst merchants that creditors maintain some control over the discharge decision (as opposed to the decision resting entirely with some judicial body), is explained with reference to the function of bankruptcy's ritualised degradation and reinstatement ceremonies in symbolically recreating merchant homogeneity.

The next chapter offers further evidence of the merchants' shift in emphasis from a concern with the welfare of unfortunate bankrupts, to a concern that bankruptcy law should offer a cheap and swift process for the recovery of bad debts. Merchants argued that a debtor should be able to declare himself a bankrupt when debtor and creditors agreed that this was in their mutual interests. This stood in contrast to the legal position whereby entry into bankruptcy proceedings was by means of an act of bankruptcy which was formally a crime. Merchants not only argued for the possibility of self-declaration of bankruptcy, they also acted to achieve it. Increasingly, debtors and creditors resorted to pretending that some fraudulent act of bankruptcy had occurred in order to activate bankruptcy law's debt-clearing potential. The hostile judicial reaction to these 'fair' bankrupts (a concept which judges could not comprehend) is also discussed.

Chapter Nine examines how judicial and mercantile views of bankruptcy law had, by the late 18th century, become so far divorced from one another that the former's view was thrown into 'crisis'. Unlike the development of the law relating to a factor's bankruptcy, judges could not resolve this crisis by bowing to merchants' wishes. The internal consistency of the law would not allow it: the criminality of all bankrupts was structural to the judicial paradigm of bankruptcy law. Judges responded to this crisis by strengthening their view of bankruptcy as crime. In line with general developments in the criminal

law, judges incorporated the necessity of a union of actus reus and a mens rea into acts of bankruptcy. As we shall see, this had little effect on other than the most accidental of acts of bankruptcy.[81] Judges also responded to the 'panic' about sham bankruptcy by making discharge harder to obtain. Thus, judges further frustrated the merchants' case that discharge should be easily obtainable by a cooperative bankrupt.

Finally, in an explicitly theoretical chapter, we will see how the development of legal knowledge coincided quite closely with Kuhn's explanation of how scientific knowledge develops. It will be seen that crises arising from internal and external problems premised upon an existing paradigm lead, via a specific process, to a shift in paradigms. One paradigm is replaced with a new, and 'incommensurable' paradigm. Bankruptcy law shifted from being primarily a means of policing trade, to being primarily a debt-clearing process. This transmutation occurred in response to the 'moral panics' about swindling and sham bankruptcy, in response to the merchants' praxis for reform, and in response to the accelerating bankruptcy rate during and after the Napoleonic Wars.[82] Legislation in 1824/1825 instituted self-declaration of bankruptcy and made discharge, for the fair bankrupt, a virtual right.

It is to be hoped that Edward Jenks was inaccurate with his first, but correct with his second adjective when he described 'the uninteresting but important subject of bankruptcy jurisdiction'[83]. And it will be demonstrated that he was quite wrong in his assertion that 'the consolidating and amending Bankruptcy Act of 1825 does not contain any features of startling novelty'.[84]

Chapter Two

Bankruptcy as Crime

In the early 18th century, the legislature and the judiciary considered bankruptcy law to be an aspect of the criminal law.[1] This claim is evidenced firstly, in the wording of and in the criminal sanctions contained in Bankruptcy Acts; secondly, in judicial pronouncements; and thirdly, in contemporary pamphlet material which indicates that merchants would have preferred otherwise. A brief survey of this evidence will precede an explanation of a judicial inability to conceive of 'unfortunate' bankruptcy. Judges will be seen to have been preoccupied with the 'manifest fraud' in the act of bankruptcy which was committed by all bankrupts to gain that very status. This 'manifest fraud' will be seen to coincide with judicial notions of crime which depended upon what G.P. Fletcher has identified as the 'structural principle' of 'manifest criminality'[2]. Bankruptcy law, however, whilst being conceived of as a crime by legislators and judges, proved to be a paradoxical aspect of the criminal law. A crime was 'tried' by interested individuals - the bankrupt's creditors who had *prima facie* control over the decision whether or not a certificate should be granted discharging their debtor both from past debts, and from the perpetual fear of imprisonment on *mesne* process.[3] It will be argued that this paradox of a civil law crime can only be resolved if the certificate decision is seen to have been held by legislators and judges to have been a matter for creditors' vengeance or humanity as opposed to being a question of the bankrupt's culpability.

I. Bankruptcy Law as an Aspect of the Criminal Law

The legal perception of all bankrupts as criminals had a long pedigree in England. The earliest bankruptcy statute, in 1542[4], was concerned with 'divers and sundry persons craftily obtaining into their hands great substance of other men's goods' which they employ 'for their own pleasure and delicate living against all reason, equity and good conscience'.[5] The bankrupt was referred to throughout as 'the offender', as he was in the Elizabethan Act of 1570[6] and in later legislation.[7]

While the 1732 Act[8] maintained the idea that bankruptcy was a crime; in response to mercantile agitation[9], it at least recognised the possibility that bankruptcy could occur through misfortune. Reference was made to many persons who:

> ...have and do daily become bankrupt, not so much by reasons 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 just debts.[10]

It is significant that unfortunate bankruptcy was mentioned, despite the fact that it was considered to be too infrequent to be deserving of special attention.[11]

The 1732 Act effectively made the device of the 'certificate of discharge' a perpetual feature of bankruptcy law.[12] In short, the certificate released a bankrupt from debts accruing before the bankruptcy, and from the persistent fear of imprisonment for debt by a creditor on mesne process (i.e. after only a preliminary hearing by a judge). The certificate was granted through a three-fold process: firstly it had to be agreed by four-fifths in number and value of the

creditors, then by the Commissioners in Bankruptcy (in every bankruptcy, three Commissioners would conduct and supervise the proceedings), then by the Lord Chancellor.

This provision led Hardwicke L.C. to state in 1739 that:

> The old laws considered bankrupts as fraudulent insolvents, and they were often called offenders, but the more modern laws have considered them as unfortunate insolvents.[13]

Merchants would have been delighted with this state of affairs. However, by 1743, Hardwicke began to have second thoughts on this matter, noting that 'all bankrupts are considered in some degree as offenders'.[14] Later that year he explicitly reaffirmed the criminal nature of bankruptcy. A bankrupt:

> ...is guilty of a crime and a tort in becoming bankrupt; and though the genus and turn of bankruptcy acts is altered of late, yet it is by the old acts of Parliament considered as a wrong.[15]

Hardwicke's change of heart may be explained by the fact that whereas in the earlier two cases the bankrupt's culpability was immaterial (Bromely v. Goodere concerned the validity of a certificate awarded two years after the bankrupt's death), in the third case it was not. This case concerned a composition between Lingood and Bennet. This was an informal method of settling debts that might otherwise lead to a bankruptcy. Bennet was prepared to accept a part of Lingood's debt to him over a short period of time as good consideration for the whole debt. Lingood, however, became bankrupt before he had completed the

repayments. Hardwicke held that Lingood's 'crime and tort' in becoming bankrupt was such as to allow Bennet to come in under the commission of bankruptcy for the full amount of the original debt, and not for the lesser amount agreed in the composition. Bennet was not to suffer for his compassion towards Lingood. Further, in a case of 1742, Hardwicke had already identified Lingood as 'a criminal and fraudulent person'.[16] The perceived importance of proving this villain a bankrupt and therefore fraudulent outweighed any desire on the part of Lord Hardwicke to prove himself, and bankruptcy law, to be liberal and in keeping with merchants' wishes.

In the mid-century, Lord Mansfield was clear that a bankrupt was a criminal. Bankruptcy Acts were said to be 'introduced to avoid frauds':

> they vest in the assignees all the property that the bankrupt had at the time of what I may call the crime committed, (for all the old statutes consider him as a criminal).[17]

Further evidence of the judicial view of all bankrupts as criminals will be apparent throughout the present work. Judges saw bankrupts as posing a threat to the very fabric of their contemporary social order: credit was widespread in 18th century society, and someone who became insolvent posed a direct threat to the stability of that system.

The early 18th century pamphlets on bankruptcy law may be taken as being representative of merchants' interests.[18] Often hostile towards lawyers, these pamphlets referred to trade in such exalted terms as 'the life and support of the Common-wealth'.[19] Their authors' main concern was to persuade legislators, judges, and possibly fellow merchants that bankruptcy need not only occur through

fraud: misfortune could lead to a blameless bankruptcy. These pamphleteers argued precisely against the legislative/judicial view of all bankrupts as criminals. One author explicitly referred to 'the charge of the preamble'[20] of the 1732 Act, and stated quite categorically that 'the law certainly looks upon the bankrupt as a culprit under its chastisement'.[21]

As will be argued later: bankruptcy was an <u>enigmatic</u> branch of the Criminal Law in that a crime was 'tried' by private individuals. Nevertheless, legislators and judges considered all bankrupts to be fraudulent. At a time of extensive and perilous overseas commerce[22], the inability of judges to conceive of unfortunate bankruptcy requires some explanation. It will be argued that the judges' vision was blinkered by a 'structural principle' of the law that prevented them from seeing anything other than the fraud that was a necessary component of the acts of bankruptcy. Since all bankrupts had committed an act of bankruptcy, in the eyes of the judges all were <u>ipso facto</u> criminals.

II. <u>Manifest Fraud</u>

a) <u>The nature of an act of bankruptcy</u>

On a petition of bankruptcy by a creditor, the Lord Chancellor would direct Commissioners to ascertain whether or not a debtor was legally bankrupt. This turned upon the debtor being a 'trader' within the definition of the Acts[23], his having debts beyond a specified amount, and his having committed one of the several acts of bankruptcy. These acts fell within two general categories: those concerned with certain dealings by the debtor with his property (e.g. a fraudulent conveyance, or fraudulently allowing his chattels to be sequestrated); and those

pertaining to personal actions or defaults by the debtor (e.g. departing the realm, or denying himself to his creditors by keeping house).

The debtor's solvency, in the sense of his capacity to repay debts even by borrowing elsewhere, was not at issue before the Commissioners. Whereas solvency could rise and fall over a protracted period, the act of bankruptcy occurred at a single, discernable moment. The significance of this fact will be discussed shortly.

Two further points should be mentioned here. Firstly, not all bankrupts were necessarily insolvent. An intention to defraud was not an element of an act of bankruptcy which could, consequently, be committed inadvertently.

Secondly, bankruptcy law effectively punished insolvency itself, whether it had occurred through fraudulent dealings, negligence, or misfortune. An insolvent trader would eventually be forced into committing one of the acts of bankruptcy. As one pamphleteer noted, a debtor could not avoid denying himself to his creditors to avoid arrest for debt on mesne process, or, if already imprisoned for debt, he would be unlikely to find bail within two months with his creditors bearing down upon him, and 'each of these is a sufficient act'.[24]

De jure, however, neither the insolvency itself, nor the manner in which the insolvency arose, were at issue. All bankrupts had committed an act of bankruptcy which 'in the eyes of the law is considered as a crime'.[25] Misfortune prior to an act of bankruptcy was unseen by the judges. This judicial inability to see beyond the act of bankruptcy is explicable by reference to a 'structural principle' of the early 18th century Criminal Law, that of 'manifest criminality'.

b) The nature of a 'structural principle'

Fletcher has argued that the pre-19th century common law crime of

larceny is, at first sight, a seemingly arbitrary 'array of puzzles'.[26] He seeks to explain apparently enigmatic judicial decisions in larceny cases without recourse to historical interpretation that either refers to historical accidents, or to historical determinism. To this end, and to devise 'a general theory of criminal liability', Fletcher argues that 'camouflaged' in pre-19th century larceny law was a 'coherent system of legal thought', the rules of which contained an 'inner dynamic of ... development'.

Fletcher extrapolates two 'structural principles' from pre-19th century larceny law with which he hopes to explain the development of this branch of the law. While he accepts that there will be 'imperfect expressions' of his theory in his data, Fletcher nevertheless claims to have found an 'underlying unity' in pre-19th century larceny law.

The first of these 'structural principles' was that of 'possessorial immunity' which was, in fact, 'an <u>explicit</u> rule of the courts'. In brief, it refers to the protection from criminal liability enjoyed by one who received possession of goods from their owner, and subsequently appropriated them for his or her own gain. With the exception of those who 'broke bulk', this principle protected, for example, bailees from criminal actions until well into the 19th century. Where possessorial immunity was present, the miscarriage was conceived as being a private rather than a public wrong, and the <u>civil</u> actions of <u>detinue</u> and <u>trover</u> were available.

The second structural principle determined what was, as opposed to what was not, a crime. 'Manifest criminality' unlike possessorial immunity, 'informs the development of the law of larceny as an <u>implicit</u> guideline rather than as an explicit norm of the system.' Fletcher summarises its meaning:

> In the traditional approach toward larceny, the judges and treatise writers responded to their intüitive sense of stealing as a recognizable event in the physical world. The premise was that only those takings conforming to their shared image of stealing could be punished for larceny.[27]

Before identifying the act of bankruptcy as a manifestly criminal action, we should mention some of the weaknesses of Fletcher's theory of structural principles.

Firstly, while possessorial immunity was said to be an explicit rule of the courts, Fletcher offers no indication as to his methodology in deriving the structural principle of manifest criminality. He appears to have discovered manifest criminality partly through an awareness of ancient criminal law (manifest criminality is traced along an 'unbroken line' to the 'earliest periods of legal consciousness'), and partly from pure intuition ('what we fail to see today is that the way lawyers looked at larceny prior to the end of the 18th century represented a coherent system of legal thought. In this paper I shall attempt to explicate that system of thought.'[28]).

Secondly, Fletcher does not adequately explain why pre-19th century judges adhered to these principles. Any explanation that is offered is either tautologous (they were 'structural' principles) or vague (possessorial immunity is said to have related to a 'shared Western understanding about the kind of relationships that ought to be exempt from the scope of the criminal law'[29]). There is no explanation of why 18th century judges were content to continue the tradition of culpability based on manifest criminality. To state that in <u>ancient</u> times manifest criminality was the justification for summary

execution of a thief caught 'in the act', is not to explain why the 18th century judiciary maintained this view of crime. The assertion of an 'inner-dynamism' of the law is an unsatisfactory answer: Fletcher himself indicates how, in a matter of decades in the late 18th century, judges broke this centuries old 'unbroken line'.

Thirdly, Fletcher gives little indication as to why a metamorphosis occurred in late 18th century larceny law. By his account, manifestly criminal actions had required no proof of the perpetrator's intent in order to be identified as crimes (except in 'doubtful cases' discussed below). In the late 18th century, manifest criminality 'withered', and culpability came to be based upon the union of an act (the 'actus reus') and an intention (the 'mens rea') occurring at one moment. Furthermore, manifest criminality, and later the union of actus reus and mens rea, are said to have taken gradual precedence over the principle of possessorial immunity. Thus in R. v. Pear[30], for example, what, in the early 18th century would have been a breach of trust, was, in the late 18th century, larceny by trick. Fletcher had sought to steer a 'middle course' between the 'extremes' of seeing history as a series of accidents, and seeing history as being predetermined. While he argues at the level of his abstract structural principles, he does not even enter the accidentalist/determinist debate. When he discusses what causes the structural principles to undergo change, his so-called 'middle course' is revealed as being simple idealism. He writes in terms of 'intellectual currents' and 'rationalist and utilitarian theories made popular by Bentham and the English translation of Beccaria'.[31] Where did these currents come from, and how did they influence legal thought?

Having noted these objections to Fletcher's approach, it is important for us also to note that his structural principles do fit the facts of 18th century larceny law. His structural principles are

less than explanation, but more than description: there is insufficient account of why they existed, or why they underwent transmutation; however they do, at a highly abstract level, explain the otherwise confusing and enigmatic judicial decisions in larceny cases in the 18th and early 19th centuries.

Later, it will be argued that by methodologically re-defining structural principles as 'silent paradigms' of a kind similar to those found by Thomas Kuhn in scientific communities, we can save structural principles from the methodological flaws outlined above.[32] While the persistence of the principle of manifest criminality will be taken on trust, reasons will be given both in legal tradition and in contemporary socio-economic conditions for the 18th century judiciary's acceptance of another structural principle in the law: that of a 'special relationship' between debtors and creditors. An explanation of law change recognising an 'inner dynamic' of development that neither merely describes, nor offers idealistic reasons for the metamorphoses of its structural principles is also undertaken below.[33] In brief, in the context of 18th century bankruptcy law, these metamorphoses will be seen to have occurred as a result of material changes in the nature of the contemporary trading community that rendered the internal doctrinal legal developments a positive impediment to the growing requirement for an effective means of debt collection.

c) The act of bankruptcy as an example of manifest criminality

As has been seen, whereas solvency could rise and fall over a protracted period of time, the act of bankruptcy, the entry into bankruptcy proceedings, occurred at a single, discernable moment. This coincides with Fletcher's proposition that the assumption behind

manifest criminality was precisely that 'crimes occur at an identifiable moment in time'. The kind of property transactions and personal defaults involved in acts of bankruptcy also identify them as manifestly criminal actions. 'Thieves could be seen thieving', and tradesmen who fraudulently conveyed goods, or who departed the realm, could be seen to be cheating their creditors.

In Gulston's bankruptcy proceedings, the validity of a 'doubtful' act of bankruptcy was in question.[34] Evidence revolved around whether Gulston, prior to departing the realm, had shutters or windows in his coach, and whether he had acted 'furtively' in changing his regular coffee house.[35] Fletcher has noted how the 'shared image' of stealing, symbolised in the principle of manifest criminality, resulted in a particular vocabulary: words like 'furtive' have their roots in ancient terms meaning 'to steal'. The attempt to prove Gulston 'furtive', was an attempt to prove him manifestly criminal.

The 1732 Bankruptcy Act includes a most illuminating statement in its preamble. The fact of people escaping commissions of bankruptcy is said to be 'to the manifest wrong of their creditors, and to the great discouragement of trade'. The use of the word 'manifest' is of obvious interest. Further, the legislature was concerned not only with the fraud on the creditors, but also with the threat to trading confidence in general. This, again, coincides with Fletcher's description of manifest criminality:

> ...the thief upset the social order not only by threatening property, but by violating the general sense of security and wellbeing of the community; in this broader sense, theft was feared as a socially unnerving event.[36]

Finally, Fletcher argues that although the perpetrator's intention was irrelevant in obvious cases of theft, in 'doubtful' cases, intention (the '<u>animus furandi</u>') could be relied upon 'to challenge the authenticity of appearances'. Thus in <u>Woodier's Case</u>, Woodier had <u>clearly</u> committed the act of bankruptcy of departing the realm.[37] The fact that he probably did so in order to escape the consequences of murdering his wife was held to be irrelevant:

> ... if a man goes abroad, though not with the intention of delaying his creditors, and in fact they are delayed, it is an act of bankruptcy.[38]

However in <u>ex parte Hall</u>[39], the actual act of bankruptcy was in doubt. A creditor called at Hall's house at eleven at night to demand repayment of a debt.[40] Hall and his wife were in bed. Mrs Hall went to the window to tell the creditor that he could see Mr Hall if he called at a reasonable hour. The creditor filed a petition of bankruptcy against Hall by whom he claimed to have been denied. The Lord Chancellor could perceive neither manifest fraud, nor as was pertinent in this case, a fraudulent intention on the part of Hall. The Lord Chancellor stated that the circumstances were so 'flagrant', that the next attorney to bring a similar case before him would be 'committed'.

d) <u>The judicial inability to conceive of unfortunate bankruptcy</u>

The legal view of bankruptcy placed it within the realm of crimes. Not only is this explicit in the thrust of statutes, in judicial pronouncements, and in accusatorial pamphlets calling for a change in this situation; the judicial view of bankruptcy as crime is also underlined by the correspondence between the principle of manifest

criminality in 18th century larceny law, and the manifest fraud in 18th century acts of bankruptcy.

Judges, then, could not even conceive of unfortunate bankruptcy: it was not possible to be manifestly fraudulent through ill fortune. De jure neither the insolvency nor the manner in which it occurred were at issue. De facto the insolvency was punished whether as a result of fraud, negligence or misfortune. In part judges, as indicated, were keen to protect the credit-system from the violence of acts of bankruptcy which they perceived as being blatant attempts to defraud creditors. However, also lurking behind this judicial fetishism with the act of bankruptcy may have been a puritanical distaste for usury itself, conceived, perhaps, to be worthy of punishment per se, and especially when it involved a positive action which could be interpreted as being fraudulent:

> The most rustic of Squire Westerns would have acknowledged that eighteenth-century England's extensive network of credit was essential to the economic strength and prosperity of the kingdom. But the wide availability of credit was never viewed as an unmitigated blessing. Creditors were held responsible for making it possible for people to buy what they could not afford, and thus for promoting luxury, encouraging speculation and generally corroding morals. These personal vices were believed to threaten the very existence of the social order by threatening the continuity of real property.[41]

Later, it is argued that this judicial view which de facto punished insolvency, regardless of cause, stood in stark contrast to that of

merchants who wished bankruptcy law not to prevent the fraud in the act of bankruptcy, but pre-bankruptcy fraud so that the law could act 'to encourage honest men, and to punish knaves'.[42]

If judges saw bankruptcy law as an aspect of the Criminal Law, it was an enigmatic branch of the criminal law . From 1706, this crime was 'tried' by private and interest individuals: the bankrupt's creditors who had prima facie control over whether or not a certificate of discharge should be granted. This paradox may only be resolved if judges are seen to have perceived bankruptcy as a breach of a 'special relationship' between debtors and creditors that creditors alone had the right to avenge or to forgive.

III. A Civil Law Crime

a) The punishment for bankrupts

The certificate of discharge was first introduced into English bankruptcy law in 1705. As noted, the certificate freed a bankrupt from past debts and from the perpetual fear of imprisonment for debt. Despite this provision, and quite apart from the removal of a bankrupt's remaining assets, the 1705 Act maintained the traditional view of bankruptcy as crime by allowing for multifarious punishments of bankrupts.

Punishment could be either 'positive' or 'negative' in nature. A bankrupt who failed to surrender his person to the Commissioners within thirty days of a commission of bankruptcy, or a bankrupt who did not hand over his entire estate to the commission, was liable to the positive punishment of a criminal prosecution at the instigation of his creditors.[43] A culprit would be liable to execution without benefit of clergy.[44] Since nearly all prosecutions were taken out by

private individuals in the 18th century, it is unremarkable that creditors instigated this positive punishment of the bankrupt's body.

The negative punishment of a bankrupt was the refusal of his certificate. Undischarged, a bankrupt's reputation suffered under a tag 'odious to the law'.[45] His trading capacity was nil: any money received by an undischarged bankrupt went straight to his assignees in bankruptcy for distribution amongst his creditors. The bankrupt's body was either in prison, or ever liable to be placed there.

The certificate decision, then, was perceived by merchants as a decision over the bankrupt's behaviour prior to the bankruptcy.[46] An unfortunate bankrupt should receive the benefit of discharge, a fraudulent bankrupt should receive the negative punishment of not being granted discharge. This raises the problem of how judges, who saw <u>all</u> bankruptcy as fraudulent and criminal in nature, perceived the certificate decision.

The answer lies in the post 1706 legislation that, soon after the inception of the certificate device, lodged the certificate decision <u>in the hands of creditors</u>. Before the allowance and confirmation of a certificate by the Commissioners and the Lord Chancellor, four-fifths in number and value of the creditors had firstly to have signed it. What judges saw as being a crime was 'tried' by interested parties without any judicial control:

> ... there is no mode of compelling creditors to sign a certificate; the law has left it entirely to their caprice[47].

Following the strict letter of the Bankruptcy Acts, judges were apparently content to have a criminal action resolved by private law methods.

b) A civil law crime

So far, it has been taken as unproblematical that 18th century judges saw a clear distinction between criminal and civil law. In 1893, however, Durkheim raised serious doubts about the 'most accepted' of jurisprudential distinctions - that between public and private law[48]. private law, Durkheim explained, is that which concerns the dealings of individuals inter se. This is otherwise called 'civil law' and is the domain of contract, tort and property. Public law concerns 'the regulation of the relations of the individual to the state'[49], and includes administrative, constitutional and criminal law.

Durkheim was undoubtedly correct in stating that:

> when we try to get close to these terms, the line of demarcation which appeared so neat at the beginning fades away.[50]

He accused jurisprudence of being 'unscientific' in the face of the fact that where 'state functions' end, and where 'individual action' commences, is indeterminable since all action is social action.[51] Furthermore, Sugarman has argued that private law, in the 18th century, was used to establish 'a plurality of semi-autonomous realms'[52] concealing 'quasi-public law qualities'[53]. In other words, the jurisprudential private/public law distinction hid the fact that a partnership deed, for instance, which was established by 'facilitatory' private law, created a situation of self-regulation more akin to the regulations inherent in the public law form.

Whether or not the public (specifically criminal) and private (or civil) law distinction in 18th century law is explicable in terms of empirically testable criteria for the categorisation of certain social action within either domain, there does appear to have been

such a separation in the judicial mind. Indeed, this separation was precisely the means by which legitimacy was gained by the semi-autonomous, self-regulating realms described by Sugarman which, thanks to their having been established by private law, were made invisible as mini-states within the 'official' state system.[54]

Horwitz has argued, in the context of American law, that:

> although...there were earlier anticipations of a distinction between public law and private law, only the nineteenth century produced a fundamental conceptual and architectural division in the way we understand the law.[55]

Despite this claim, 18th century English Abridgements of the law included separate sections on criminal law[56], and, as has already been seen in the case of bankruptcy law, legislators and judges conceived bankruptcy as an aspect of the criminal law, whilst merchants attacked exactly this categorisation. Moreover, recent research has employed this 18th century conceptualisation of law as falling within the criminal or civil domain to explicate, through the notion of there having been a 'criminalisation' of previously civil (or legally irrelevant) actions, the emergence of new forms of social control relevant to the growth from a 'moral economy' with traditional perquisites (for example, a collier's privilege to take coal for his family's consumption[57]), to an impersonal market-based political economy in which private property rights became less qualified.[58] As will be seen, in the case of bankruptcy law, also alongside the growth of a depersonalised market-economy, 'decriminalisation' took place.

So, even if the criminal/civil divide was a sham in as much as a subsisting partnership deed, for instance, would have controlled the lives of the signatories as least as much as any aspect of the criminal law, it is necessary to accept this distinction as real for the 18th century judiciary if we are to reconstruct the arguments around, and the dynamics of the transformation of bankruptcy law from being primarily a mode of policing trade, to being mainly a debt-clearing process.[59] As Durkheim himself noted, 'legal and moral obligations, religious faiths, financial systems, etc... all consist of established beliefs and practices.'[60]

Having noted the 'unscientific' nature of the criminal/civil distinction, it is nevertheless possible to posit four heads under which an explanation for the judicial separation of crimes and civil wrongs may be sought. Firstly, certain social action, generally seen to be sufficiently threatening to social order to carry a stigma for the perpetrator, was seen by judges and legislators to be a matter for the criminal as opposed to the civil law. Secondly, certain social activity may have been placed within the categories of criminal or civil wrongs on grounds of expediency: that is, with a view to achieving specific ends. Thirdly, traditional placings of particular social activity within either the criminal or civil law may account for judicial or legislative inertia in reclassifying crimes as civil wrongs and vice versa in times of changing social values. Finally, traditional classifications, and perceived contemporary requirements, may give rise to 'structural principles' within a particular field of legal discourse. Thus, a network of criminal or civil law decisions over an area of social activity (held to be relevant to the law) may give rise to a unique and lasting gestalt that not only maintains the boundaries of the field, but, as is argued later,[61] also creates an internal dynamic for its development.

c) Stigma

Applying this explanation for the separation of the criminal and civil law to 18th century bankruptcy law, bankruptcy is firstly seen as carrying a huge stigma. For the purposes of this chapter, Goffman's definition of stigma will be accepted as a good working construction: 'the situation of the individual who is disqualified from full social acceptance'.[62]

'Bankruptcy' laws have virtually universally carried with them social stigmatisation for the bankrupt. Sauter described this aspect of the ancient Boetian code of bankruptcy: as happened to Mnesarchus, Euripides' father, the Boetians caused their bankrupts to be disgraced by forcing them to sit in the market place with a basket on their heads and 'he that sat thus, was ever after held infamous'.[63] At the beginning of the 17th century, Shakespeare had Shylock refer to Antonio as 'a bankrupt, a prodigal who dare scarce show his face at the Rialto'.[64] In 1760, Nomius Antinomos stated that 'the word Bankrupt is odius to the law, and through its means has been stigmatised with infamy by general acceptation'.[65] In addition, the novel Vanity Fair, set at the beginning of the nineteenth century, includes several statements concerning the stigma attached to bankruptcy. One example reads: 'Captain Osborne, of course, could not marry a bankrupt's daughter'.[66] This phenomenon of stigma also attaching to individuals related in some way to a stigmatised person is not unique to bankruptcy law:

> ... the loyal spouse of the mental patient, the daughter of the ex-con, the parent of the cripple, the friend of the blind, the family of the hangman, are all obliged to share some of

> the discredit of the stigmatized person to whom they are related.[67]

Further evidence of the stigma attached to bankruptcy is to be found in the history of the tort of defamation. Goodinge referred to several examples of successful actions on the case for falsely calling someone a bankrupt. Indeed, 'to say of a merchant, he hath eaten a spider, with an averment what the meaning is, as much as to say he is ready to burst, is actionable'.[68]

While 18th century bankruptcy law carried the same stigma for the perpetrator as other aspects of the crimimal law, this offers no explanation as to why civil law methods were employed to punish an offender. It is possible, however, that creditors 'tried' their bankrupt debtor as a result of a conscious decision on the part of the legislature that this strategy would be politic.

d) Instrumentalism

Amongst others, Kamenka and Tay have argued that the use of law as an instrument to achieve policy objectives is a recent phenomenon representing a change in the very form of law: 'the elevation of the social interest is replacing the individualistic structure of private rights and duties'.[69] This instrumentalist view of law has recently led legal historians to attempt to explain legal history in terms of judges altering the law to satisfy the requirements of their new mercantile customers.[70] While this writing of history according to modern, as opposed to contemporary conceptions of law will be discussed and criticised later[71], it may nevertheless prove useful to investigate bankruptcy as a civil law crime in terms of the legislature consciously creating this situation on grounds of expediency. It will be

seen that the explanation offered by this approach is less satisfactory than one based upon Fletcher's analytical device of structural principles.

In the 18th century, as today, the burden of proof was considerably more weighty in criminal than in civil actions. The 1818 Select Committee on the Bankrupt Laws[72] heard evidence of why there had been so few prosecutions in bankruptcy during the 18th century[73] despite figures showing there to have been a great many bankrupts who did'not receive a certificate of discharge. Part of the explanation offered related to the relative facility of proving a bankruptcy for the purposes of the civil law as against the great difficulties in proving a bankruptcy for the purposes of the criminal law. Joseph Miller stated that the existence of 'so many technical requirements to support a conviction, renders conviction nearly impossible'.[74] Thomas Tilson claimed to know of cases of concealment which, although the actual concealment could have been easily proved, were not prosecuted by the creditors. The problem lay 'in the formal proof of the bankruptcy and proceedings'.[75]

The legislature may have been reluctant to place bankruptcy unequivocably within the domain of crimes for fear of insolvent traders escaping any legal penalty because of the difficulties attached to proving a bankruptcy for the purposes of the criminal law. Furthermore, the costs of a bankruptcy were borne out of the bankrupt's remaining estate.[76] Had bankruptcy been a part of the criminal law not only in spirit, but also in procedure, the creditors would have had to have paid for the administrative costs of a bankruptcy out of their own pockets.

Thus, the legislature may have consciously decided to make the crime of bankruptcy a civil law process with a view to entrapping as many insolvent tradesmen as possible. This suggestion, however, is a

weak one: despite the greater complexity of a bankruptcy, courts were trusted to deter and to punish other 'criminal' activity, and (to the merchants' chagrin), bankruptcy as a civil action denied a basic tenet of natural justice, that no man should be a judge in his own cause.[77]

Other 'instrumental' explanations of bankruptcy as a civil law crime are also lacking in concrete evidence of legislative intent. Bankruptcy law was conceived as not only a punishment for the bankrupt, but also as a method for redistributing the bankrupt's estate amongst his creditors.[78] It is possible, then, that legislators were wary of departing from the norm in criminal law whereby any money removed from the convict went to the Crown. It may, further, have been technically too difficult to start bankruptcy actions as a crime (to punish) and then to move them into the civil law (to redistribute estates).

At a time when 'our laws were enforced only by penalties without mention of reward',[79] it would have been incongruous for judges to award certificates of discharge to 'fair' bankrupts. By focusing their attention on the inevitable act of bankruptcy, judges, in any case, knew no meaning for 'fair' bankruptcy.

Creditors may have been seen as the appropriate people to 'try' a bankrupt because they alone had first hand knowledge of the case, and were consequently 'the only competent judges'.[80] It may have appeared to be absurd to have juries comprising people from the same trading communities as the creditors and the bankrupt deliberating in cases of which the creditors themselves had the best knowledge.[81]

This instrumentalist approach to explaining bankruptcy law's paradox of being a civil law crime represents poor historical method: not only is it suspect in that a modern conception of law is being applied to 18th century law, but it also provides an intuitively possible, but factually unproven account of the reason for this

enigma. In other areas of the criminal law, moreover, many of the problems identified above were either overcome or ignored.[82]

e) Tradition

More mileage is possible when the traditional legal attitudes towards debt are considered.[83] If these traditional attitudes, placed alongside the contemporary socio-economic context of bankruptcy law, are seen to give rise to structural principles in the law, a more profound explanation for bankruptcy as civil law crime is available than that offered by either the social stigmatisation or instrumentalist approach.

Maine referred to 'the extraordinary and uniform severity of very ancient systems of law to debtors, and the extravagant powers which they lodge with creditors'.[84] Indeed, Sauter alluded to the ancient Indian code of 'Bankruptcy' which allowed creditors to remove first a hand, then an eye of a 'bankrupt' before executing him[85]. Sauter also wrote of the severity of the ancient Egyptian code which allowed creditors to 'pawn the embalmed bodies of the dead [debtors] for money'.[86] Roman law developed from execution for all insolvents, to imprisonment or slavery for the fraudulent, and a release for the fair.[87]

In England, Pollock and Maitland described as 'not a little remarkable' the fact that pre-13th century English insolvents were free from punishment.[88] They stated that with the increase in commerce during the reign of Edward I, the law changed to coincide with that of our 'continental cousins':

> ... the so-called "statute merchant" was invented, which gave the creditor power to demand the seizure and

imprisonment of his debtor's body.[89]

Traditionally, then, legal codes had placed enormous power in creditors' hands over the fates of their 'bankrupt' debtors. Leaving aside the anomalous 1705 Bankruptcy Act that gave creditors minimal control over the punishment of their debtors, it is now necessary to consider the inception of the 1706 Bankruptcy Act. While the 1705 Act first introduced the certificate of discharge into English Law, the 1706 Act first placed the decision over the certificate in creditors' hands. This was to remain the law throughout the 18th and much of the 19th centuries.

The immediate history of the 1705/1706 Bankruptcy Acts has been traced by Holdsworth who pointed to legislative efforts to free deserving bankrupts from gaol from the reign of Henry VIII to that of Anne. Of the ad hoc late 17th century legislation with this end, Holdsworth commented that 'the number of these Acts leads us to think that they were not very effectual'.[90] Holdsworth perceived these Acts as being aimed towards relieving 'the harshness of the law'.[91] While this is undoubtedly part of the truth, the number and the ad hoc nature of these Acts suggest that the legislature had no intention to make discharge a permanent feature of the law. The 17th century Acts must also be conceived as having been short-term responses to immediate needs. Thus, after several years of intense petitioning of the House of Lords by imprisoned bankrupts, a temporary Act was passed allowing Justices of the Peace to discharge bankrupts[92]; and in the hope of recruiting people to fight in the War of the Spanish Succession, an Act was passed 'for the discharge out of prison such insolvent debtors [and bankrupts] as shall serve or procure a person to serve, in Her Majesty's fleet or army'.[93] If these temporary Acts were not very effectual in securing long-term relief from the law's

harshness, they may well have been most effectual in satisfying immediate needs.[94] The legislature could, nevertheless, capitalize upon this proof of its benevolence during a period of a stringent penal code and a wicked prison regime.

To some extent, the 1705/1706 legislation that established the certificate of discharge in English law may be seen as a continuation of the ad hoc and temporary 17th century Acts by which the legislature proved itself merciful and satisfied immediate requirements. This is how Hardwicke explained these Acts in 1744; the certificate provision:

> ... was temporary at first, and never intended to be a perpetual law,[95] but was made in consideration of two long wars which had been very detrimental to traders, and rendered them incapable of paying their creditors.[96]

Part of Defoe's explanation also reveals this ambiguity of 'humanity' and 'immediate needs': the nation was said to have been driven to 'compassion' as a result of:

> ... the unhappy circumstances of trade in general, occasioned by a long war, of great losses at sea, and a general stop upon the Spanish trade.[97]

The legislature was certainly aware of the effect on trade of 'this most obstinate war'[98]:

> Nothing can be more evident, than that if the French King continues master of the Spanish monarchy, the balance of power in Europe is utterly

> destroyed, and he will be able in a short time to ingross the wealth and trade of the world.[99]

However, although the war (and some particularly bad storms) may have been the spark, this offers no real explanation for the arrival of the certificate of discharge device. Other wartime measures have been passed in the realm of bankruptcy law that have not outlived their specific wars[100] - the certificate of discharge is still with us some 278 years on. A fuller explanation for the inception of the certificate device may only be possible after a survey of merchants' complaints about bankruptcy law from those of Roderyk Mors in 1542[101], to those of Sauter in 1640[102], to those of Defoe[103] et al in the early 18th century. In brief - bankruptcy law, without the certificate device, would have proved to be intolerable to, and unusable by, early 18th century merchants.[104]

f) Structural principles and the resolution of the riddle of bankruptcy law as a civil law crime.

Having discussed traditional legal attitudes towards debt, and having offered an outline of the immediate history of the inception of the certificate of discharge in English law, it is now possible to consider why, post 1706, creditors were seen to be the appropriate people to decide on the question of discharge: why what the judges and legislators saw as crime, they saw as being properly 'tried' by interested individuals.

Contrary to the ad hoc Acts of beneficence of the 17th century legislature, the 1706 Bankruptcy Act re-established the very personal relationship between debtors and creditors. Post 1706, it was not the legislature that proved its mercy in occasionally allowing for discharge

of bankrupts; this power was placed, and was to remain placed, in the hands of creditors.

It has already been seen that traditional legal attitudes towards debtors and creditors allowed creditors great amounts of control over the punishment of their bankrupt debtors:

> In many early systems of law, the obligation of the debtor is personal in a very literal sense - the body of the debtor may be taken by the creditors.[105]

Indeed, in The Merchant of Venice, Shylock assumed his right over Antonio's body to be personal, and of no more concern to the Venetian state than that its courts should ensure that he, Shylock, could exercise his right:

> The pound of flesh which I demand of him,
> Is dearly bought, is mine and I will have it:
> If you deny me, fie upon your law.[106]

This was the traditional legal approach to debtor/creditor relationships: when a debtor became insolvent, the creditor was to be allowed to avenge the personal wrong that he had suffered. Of primary concern in an insolvency was the breach of a 'special relationship' between a debtor and his creditor. In the personal and honour-based trading communities of the early 18th century[107], this 'special relationship' had gained the status of being a structural principle in English law.

Maine traced to the Roman concept of nexus the legal origins of the centrality to 'bankruptcy' laws of this special relationship between debtors and creditors.[108] He explained how, in ancient

systems of law, the alienation of property rights was a more solemn and important transaction than one which established obligations between parties. The first was a conveyance, the second, a contract. Originally, the nexus was the Roman formal ceremony by which a conveyance was made. A libripens, equipped with scales, would place 'the copper in the balance' before the parties involved in the conveyance. Eventually, and according to Maine, imperceptibly to the Romans, the nexus became a contract while the conveyance became a mancipatio. Despite the transformation of the legal function of the legal norm of the nexus, it maintained its formal and solemn mode of being established. In a bargain for ready money:

> ... so long as the business lasted
> it was a nexum, and the parties were
> nexi; but the moment it was completed,
> the nexum ended, and the vendor and
> purchaser ceased to bear the name derived
> from their monetary relation.[109]

Maine went on to explain the severity of ancient systems of law to debtors, and the 'extravagant' powers they lodged with creditors, with regard to the concept of the nexus. In his own words:

> When we once understand that the nexum
> was artificially prolonged to give time
> to the debtor, we can better comprehend
> his position in the eye of the public
> and the law. His indebtedness was
> doubtless regarded as an anomaly and
> suspense of payment in general as an
> artifice and distortion of a strict
> rule. The person who had duly consum-
> mated his part of the transaction must,
> on the contrary, have stood in particular

> favour; and nothing would seem more natural than to arm him with stringent facilities for enforcing the completion of a proceeding which, of strict right, ought never to have been extended or deferred.[110]

In the context of small and honour-based trading communities which, as we shall see, included several examples of personal special ties, this was the legal background to the structural principle in early 18th century bankruptcy law of a special relationship between debtors and creditors. Alone, this special relationship will not explain bankruptcy's paradox of being a civil law crime. It is now necessary to focus upon a particular aspect of the structural principle of manifest criminality which, it will be recalled, identified all bankrupts as criminals, all having committed the manifestly fraudulent act of bankruptcy.

Judges were not concerned with the intention of a person who committed a crime, they were solely concerned with the objective 'fact' of the crime, and with the harm suffered by the victims and by society at large. For judges and legislators, the creditors' decision over whether to grant a certificate was not in point of fact a 'trial' of the bankrupt based upon his criminal liability: all bankrupts were culpable since all had committed a manifestly criminal act of bankruptcy.

The refusal of a certificate could punish a bankrupt debtor. However, if granted, a certificate actually rewarded a bankrupt with the opportunity to recommence trade as a new man. Judges and legislators, then, conceived the decision actually to grant a certificate as a means by which creditors could display humanity, despite the harm they had suffered. This remained the judicial attitude towards

the granting of certificates throughout the 18th and early 19th centuries, Eldon L C remarking in 1805 that:

> ... there can be no stronger proof of the good nature and humanity of the British character than the readiness with which creditors sign [certificates of discharge] without any thought, even previously to the third [and final] examination [before the Commissioners in bankruptcy].[111]

This legal perception of the certificate of discharge as a device available for humanitarian creditors had its analogy in other areas of the criminal law.

Hay has argued that 18th century criminal law rested not only upon terror (especially of the gallows), but also upon the clemency of its administrators and the usually wealthy individuals who had been wronged and who took out the prosecutions: 'The prerogative of mercy ran throughout the criminal law, from the lowest to the highest level'.[112] During a period of aristocratic patronage, discretion, and 'strong benevolence of the soul'[113], it must have appeared as quite natural to judges that creditors should have the power of mercy over 'their man', their bankrupt debtor.

Furthermore, there are several examples of special relationships existing in the early 18th century trading community that suggest that creditors seeing debtors as 'their men' was not a unique phenomenon. Fletcher, in his structural principle of possessorial immunity implies a special relationship between bailors and bailees[114]; George refers to the special bonds between master and apprentice[115]; and later, I demonstrate a special relationship between principals and factors.[116] With their history in medieval statuses, these special bonds were not

universally popular in the early 18th century. What Fletcher described as possessorial immunity (a servant not being liable to the criminal law for dishonestly appropriating goods of his master which his master actually handed over to his servant for some purpose) led to Gulliver's shame when talking to the King of Lilliput:

> I remember when I was once interceding with the King for a criminal who had wronged his master of a great sum of money, which he had received by order, and ran away with; and happening to tell his Majesty, by way of extenuation, that it was only a breach of trust; the Emperor thought it monstrous in me to offer, as a defence, the greatest aggravation of the crime: and truly I had little to say in return, farther than the common answer, that different notions had different customs; for, I confess, I was heartily ashamed.[117]

Moreover, in the context of the occasional 17th century legislation of apparent benevolence towards bankrupts, the certificate of discharge probably appeared to judges to be another example of legislative humanitarianism. The breach of the traditional and structural special relationship between debtors and creditors must have made the creditors seem to judges to be the most appropriate people not only to have the power to avenge this wrong, but also to hold the power of mercy over their bankrupt debtor.

Effectively, bankruptcy was a crime 'tried' by private and interested individuals. This paradox of a civil law crime is explained if judges are seen to have visualised the certificate decision not so much as a

'trial' to determine a bankrupt's culpability, but as a power in creditors to avenge or to forgive an unequivocal crime that represented a breach of their special relationship with their debtor.

Several problems are raised by this interpretation of bankruptcy law as a civil law crime. There is the problem, already discussed, as to the level of judicial consciousness of any civil/criminal divide. There is some question as to whether the judiciary in the early 18th century held sufficient homogeneity of meanings to enable us to talk of a 'judicial view' of anything.[118] And there is a basic evidential problem in substantiating a hypothesis that claims there to have been a profound contradiction in the judicial attitude towards the legal status of a bankrupt: judges were hardly likely to have discussed this issue in court. Nevertheless, as is demonstrated below, by establishing bankruptcy law as an object of knowledge for both the judiciary, and for merchants who could become involved in this branch of the law, the internal and external dynamics of bankruptcy law reform during the 18th century can be identified.

Chapter Three

Conflicting Views of Bankruptcy Law in the Early 18th Century

The early 18th century legislature and judiciary knew bankruptcy law as an element of the criminal law: bankruptcy law was concerned with policing trade. In the present chapter it will be argued that contemporary merchants held a different and conflicting attitude towards bankruptcy law's proper function. To this end, an 'ideal typification' will be established of the early 18th century trading community's view of the purpose of bankruptcy law. It will be demonstrated that although merchants accepted the need for punishing trade fraud by means of bankruptcy law, they also perceived a major end of bankruptcy law to be the protection of unfortunate insolvent tradesmen from their creditors. In the final section of this chapter, the opposing legal and merchant views of the purpose of bankruptcy law will be juxtaposed. It will be argued that the legislative/judicial view was 'relatively autonomous' from the view held by bankruptcy law's customers, the merchants. It will further be argued that the certificate of discharge despite its holding different meanings for judges and merchants, insulated the legal view from too violent a demand for reform by the merchants.

I. The early 18th century trading community and its attitude towards the proper end of bankruptcy law.

a) An ideal type

It is not proposed to discuss the nature of an 'ideal type'[1] in any great depth. There is already a large sociological literature on the

subject[2], and, through usage, the concept is becoming increasingly familiar both historians[3] and to lawyers.[4] For our purposes, an ideal type may be defined as being a construct that establishes that which is distinctive about an aspect of social reality so that some explanatory objective may be realised.[5]

In setting up an ideal type of the early 18th century trading community's attitude towards bankruptcy law, two objectives are sought. Firstly, it will be demonstrated that there was a body of people, 'merchants', who shared a common concern about the state of bankruptcy law. Secondly, merchant and legal attitudes towards bankruptcy will be contrasted, and the latter shown to have been 'relatively autonomous' from the former.

To these ends, the first category in the ideal type will be 'merchant homogeneity' in the early 18th century. We will establish that despite the fact that there were divisions within the social ranking of 'merchants', and despite the fact that merchants had a fairly low level of self-consciousness as an identifiable group, they, nevertheless, did share a sufficient level of homogeneity of experience and interests to identify them as a separate rank within the social order of the early 18th century.

Having established that there was a group of people ('merchants') who could be said to have held a common attitude towards anything, the next category in the ideal type will be 'merchants' attitudes towards credit and debt'. Here, it is argued that, as a result of the existence of small and personalised trading communities, merchants conceived a special, honour-bound relationship between debtors and creditors.

This argument, in turn, will help to elucidate the nature of our next area of concern, namely, 'merchants' attitudes towards the purpose of bankruptcy law'. In this section we will see how merchants

required three things from bankruptcy law. Firstly, they wished bankruptcy law to redistribute the bankrupt's remaining assets ratably amongst his creditors; secondly, they wanted to see the fraudulent debtor punished; and thirdly, in conflict with the judicial view of bankruptcy, they desired a bankruptcy law that would award the entirely unfortunate bankrupt his <u>desert</u> of discharge. Like the judiciary, merchants saw humanity in bankruptcy law's provisions relating to discharge. However, more importantly, they saw the possibility of discharge as encouraging entrepreneurial risk-taking, and as protecting the nation's trade from the loss of participants merely through their ill-fortune.

Our next category, 'merchants' dissatisfaction with bankruptcy law', relates to these mercantile fears that the nation's trade would suffer unless deserving bankrupts actually, and assuredly, received discharge. Merchants major dissatisfaction with bankruptcy law was, then, the fact that <u>creditors</u> held an unfettered decision over whether or not their bankrupt debtor should receive discharge. A close examination of the multifarious reasons why merchants did not trust creditors to base the certificate of discharge decision solely upon the bankrupt's desert, will indicate the level of mercantile interest in, and dissatisfaction with, the existing bankruptcy law. We will see how it was this crucial issue of the purpose of the certificate of discharge that both separated and united mercantile and judicial views of bankruptcy law. The certificate issue separated the two views in as much as where the judiciary saw a question of humanity or vengeance, merchants saw a matter of the bankrupt's desert. And it united the two views in as much as without the existence of the possibility of discharge, merchants could not have tolerated their contemporary bankruptcy law.

The final category, 'merchants' proposals for reform of bankruptcy law', will help further to explain why merchants tolerated and used bankruptcy law as it stood, despite the fact that they feared irrationality in creditors' decisions over discharge. Because of their belief in a special relationship between debtors and creditors, merchants, like judges, wished creditors to have a say in the discharge decision. Unlike judges, merchants especially desired this decision to be reviewable by an impartial judge.

A close examination of the elements within each of these categories will furnish us with a model of the early 18th century mercantile attitude towards bankruptcy law. This model will later be compared and contrasted with the substantially different view of the late 18th century, depersonalised trading community. It will also concretise the socio-economic environment within which bankruptcy law functioned. This, in turn, will provide the basis for a discussion of the 'relatively autonomous' nature of the judicial view of bankruptcy, from the view held by those who operated within, and who were subject to this aspect of the law.

b) Merchant homogeneity

Early 18th century merchants may be identified as having been a sufficiently homogenous social grouping for us to be able to refer to 'mercantile attitudes' towards bankruptcy law, or to a 'merchants' case' for bankruptcy law reform. This is not to claim that merchants frequently shared common views over specific political issues, not is it to ignore struggles within the social grouping of 'merchants' whether between various trades in a town, between geographically diverse trading communities, between retail and wholesale trade, between inland and overseas trade, and so forth:

> The petitions in support of Wilkes in the 1760s came from Bristol and Liverpool as well as from the lesser merchants and traders of London. Like the smaller freeholders of the counties who resented the growing power monopoly of the great magnates, those groups recognised their common interest in Wilke campaign to reduce the authority of the ruling class in government. It was rare that the opportunities of politics and resentment against tax changes, war policies or falling rates brought merchants, tradesmen and freeholders together. Usually their behaviour did fit the vertical relationship of interest groups. Bristol sugar, Liverpool slaves, the East India and City interests petitioned parliament as need arose, or worked through the great landlords, as the Leeds woollen merchants did through Fitzwilliam and Lascelles.[6]

Merchants did, nonetheless, share common attitudes towards bankruptcy law. As will be seen in later sections of this chapter: bankruptcy represented both a common risk and a common worry for merchants.[7]

To avoid either reductionism or particularism, before discussing mercantile attitudes towards bankruptcy law, it is necessary to establish that there was indeed a social grouping in the early 18th century sufficiently homogeneous to be said to have had shared attitudes towards anything.

Certainly there was a group of people who earned their living by buying cheap and selling dear, and, generally, it was this group that fell within the ambit of bankruptcy law[8]:

> When dealing with an occupation whose status was not specified by statute, the courts applied four criteria of trading: first, it must entail both buying and selling; second the articles involved must be personal chattels; third, it must be a "general way of merchandise"; and finally, it must constitute the means by which the debtor sought his living.[9]

This use of a legal as opposed to some more positive socio-economic definition of 'merchants' has its dangers in that it is possible that the legal definition did not correspond with any real social grouping. A comparison of William Cooke's lists and criteria for those who could become bankrupt[10], with Dorthoy George's characterisation of London trades[11], suggests that the legal definition did identify a social group. The fact that several of the trades mentioned by George included some manufacturing, did not prove fatal to their inclusion in bankruptcy law. Thus, for example, shoemakers, tailors and milliners appear on both Cooke's and George's lists. Cooke noted that bankruptcy legislation covered those who bought commodities to manufacture them for re-sale[12]. Thus, in Chapman v. Lampshire[13], a distinction was drawn between a mere working carpenter and one who bought timber and materials to carry on his trade. Only the latter could be bankrupt - only the latter attempted 'to gain a livelihood by a credit gained on an uncertain stock'.[14] Whilst distinctions such as this may, along with problems with statutory definitions of trading, have led to 'an intolerable burden of interpretation on the courts of law'[15], this nevertheless represented a problem with the penumbra rather than the core of the meaning of 'merchant'. Duffy is certainly correct in pointing to the various absurdities thrown up in the legal definition

of a merchant, and in pointing to the failure of the law to satisfy the rationale of Blackstone for the inclusion or exclusion of an occupation within the ambit of bankruptcy law:

> It is clear that the excessive narrowness of the statutory definition led to the exclusion of a host of occupations which, increasingly as a result of economic growth, both used extensive capital and were vulnerable to accidental losses.[16]

Nevertheless, a sufficient correlation between the legally defined 'merchant' and actual 'merchants' subsists for the use of the legal term without reducing or particularising the history of bankruptcy law. Alexander certainly found it possible to use bankruptcy records (and therefore the legal definition of traders) in tracing channels of distribution amongst the 18th century retail trade.[17]

Although merchants uniquely fell within the domain of bankruptcy law, it should be noted at this point that other groups had an interest in bankruptcy law reform. Duffy refers to the iniquitous exclusion of 'agriculture, [large] manufacturing, mining and transportation'[18] from bankruptcy legislation and judgments. In a later chapter we will see how early 19th century barristers in commercial practice, another group with a different interest in bankruptcy law, joined with merchants in calling for reform of this branch of the law.[19]

One further note: the financial restrictions on who could become a bankrupt[20] had an effect on the sort of tradesmen who actually became bankrupt and, relatedly, on the kind of tradesmen who were motivated to campaign for bankruptcy reform. Thus, a final reservation in talking of the 'merchants' case' for bankruptcy reform: the merchants concerned did not operate on a small scale and were frequently, but by

no means exclusively involved in some way with the richer overseas trade.[21]

Having argued that a legal definition of 'merchants' is satisfactory when talking of 'mercantile attitudes' towards bankruptcy law or a 'merchants' case' for its reform, it is now possible to have regard to the manner in which the case was put, and to the level of homogeneity amongst merchants.

If merchants de facto occupied a specific position in the 18th century processes of production (namely, the distribution of goods); they did not act as an organised pressure group in favour of collective interests arising from this shared economic position. Marshall notes, however, that as individuals merchants pressed for laws and for government policy in favour of merchant interests generally:

> If the merchants were anxious to secure political backing for their activities in the shape of a favourable foreign policy they were equally anxious to mould public opinion in their favour. This was not, of course, a coherent policy carried out by an organized body. It was rather the result of numerous pamphlets written to recommend particular objects in which writer after writer strove to make it appear that some policy, likely to benefit the particular merchant group whose interests he was upholding was also in the best interests of the nation.[22]

As will be seen, this was precisely the manner in which the merchants' case vis-à-vis bankruptcy law emerged.

While the merchants did not produce 'national associations and

political organizations'[23] to promote their interests, they certainly shared a homogeneity of interests at whatever level of self-consciousness. This is manifest in their relationship with other social groupings and, as will be seen shortly, in their inter-personal relationships and shared belief-systems.

According to Tigar, in his account of the rise of the bourgeoisie and of a legal system relevant to its requirements[24], by the beginning of the 18th century merchants had long occupied a specific rank in society. In not as a national organisation, then certainly in their various localities, merchant communities had wrestled with landowners to gain charters for their towns offering substantial self-government and their own 'law merchant'.[25] Tigar offers an explanation as to how, by the late 18th century, merchants had ceased to be a 'middle rank' in the feudal order and had become the dominant 'class'.

This idea of merchants as occupying a specific rank in early 18th century society is also borne out by Morris who refers to 'the language of 'ranks' and 'orders' which belonged to the writings of Gregory King, Daniel Defoe, Archdeacon Paley and Edmund Burke' as opposed to the situation after 1780 when 'this language was slowly replaced by the language of class'.[26] Similarly, Hobsbawm refers to merchants post 1750 who 'recognised themselves increasingly - and after 1830 generally - as a 'middle class', and not merely a 'middle rank' in society'.[27] Indeed, it will be demonstrated in a later chapter[28] that the notion of the <u>status</u> of being a merchant was not entirely in decline by the early <u>19th</u> century: this status could be ritually removed or reinstated.

Early 18th century merchants, then, represented a rank in their society. They stood apart from landowners from whom they had claimed town charters; into whose 'ranks' a minority of successful merchants could rise as 'gentlemen'[29]; and with whom they entered into

'relations of clientage and dependency'[30] that may, as Thompson suggests, have denied them political power, but nevertheless maintained their ranking in society.

The view of merchants as a stratum in society did not arise solely because of their relationship with landowners. Thompson discusses the price-fixing arrangements over grain fought out between plebeian crown and gentry Justices of the Peace.[31] The former are shown to have had traditional perceptions of a duty on Justices to ensure a morally fair price for grain, especially during time of dearth. This conflicted with the grain merchants' 'political economy' by which price should be determined by supply and demand. In the plebeians' hostile relationship with merchants[32], merchants were again forced into the role of being a separate status group.[33]

Merchants, then, held a specific position within the productive processes of the early 18th century. They shared and campaigned for their common interest not as a fully self-conscious and nationally organised class, but as individuals or as local communities occupying a rank within the social order.

As indicated, merchant homogeneity occurred not only through merchant relationships with other social strata, but also through merchants' inter-personal relationships and shared belief-systems.[34] Seldom is this more apparent than in mercantile attitudes towards credit and debt.[35] Discussion of these attitudes will further enhance the view of merchant homogeneity and will help to establish merchant attitudes towards, in particular, bankruptcy law.

c) Merchants' attitudes towards credit and debt

As we know, early 18th century judicial perceptions of bankruptcy law included a structural principle by which a special relationship was

seen between debtors and creditors.[36] To a large extent, this judicial notion coincided with mercantile attitudes towards the debtor/creditor bond.[37] Since English society in general, and the merchant ranking in particular, was 'shot through with credit'[38] - this special relationship based upon the debtor/creditor bond has enormous significance in the explanation of early 18th century merchant homogeneity.

For the 18th century tradesman, credit was 'an essential piece of his trading equipment'[39]. His credit, in turn, depended upon his reputation amongst his fellow tradesmen based as much upon his experience and success in past trading ventures as upon his perceived general trustworthiness.[40] Thus, Defoe referred to credit as 'the life and blood of his trade ... in a word, his fame'.[41]

We have already,[42] and will again[43] allude to the importance of reputation in 18th century trade. A century earlier, Shakespeare was clear about the crucial role of 'fame' in his contemporary social structure:

> He that filches from my good name,
> Robs me of that, which not enriches him,
> and makes me poor indeed.[44]

In the early 18th century, the link between credit and reputation was well-known:

> Money has a younger sister, a very
> useful and officious servant in trade...
> Her name in our language is called
> Credit, in some countries Honour...[45]

Pocock argues that the special, honour-based relationship between debtors and creditors that permeated 18th century merchant society

as did the multifarious interconnections of borrowing and lending, is explicable with reference to Augustan notions of civic identity.[46] This special relationship (a concern with other's 'good opinion') was founded upon a belief that only with this form of personal relatedness could those engaged in trade consider their pursuits as 'real' and 'virtuous' as those who owned land or 'real [sic] property'.

Furthermore, the importance of honour and reputation amongst early 18th century trading communities also relates to the fact that these communities were small and highly personal.[47] George found that the communities both attempted to protect their identity ('corporate towns aimed at excluding newcomers from exercising trades or handicrafts'[48]), and that they maintained a high level of integrity:

> ... trades had their own customs, their own localities, often a distinctive dress and much corporate spirit (shown for instance in the customary obligation to attend the funeral of a fellow workman)[49]

Richard Clough's evidence about his own bankruptcy to the 1759 Select Committee on the Bankrupt Laws[50] suggests that county rivalry was strong. Clough was sent by York corporation to trade in Manchester where he became bankrupt. The Lancashire creditors, he claimed, would not grant him a certificate of discharge on grounds of county pride. Clough was, or at least felt himself to be, a member of a separate trading community.[51]

This emphasis on honour in the debt bond is not to say that merchants were unconcerned with making a profit by lending or, indeed, from borrowing capital. When capital was lent or borrowed by traders[52], however, a personal and honour-based bond existed over and above any

legal obligation to repay the loan. This inter-merchant relationship and shared belief helped to recreate merchant homogeneity:

> [honour is] a nexus between the ideals of a society and their reproduction in an individual through his aspiration to personify them.[53]

In a complex of small and personal (but interconnected[54]) trading communities, where credit was essential, and where credit was determined by a tradesman's reputation and honour, it is not surprising that mercantile attitudes towards credit and debt should be based upon a shared belief in the existence of a special relationship between creditors and debtors. This idea of a special relationship between creditors and debtors not only helps to identify homogeneity amongst merchants, it also helps to explain mercantile attitudes towards, specifically, the purpose of bankruptcy law.

d) <u>Merchants' attitudes towards the purpose of bankruptcy law</u>

Early 18th century merchants shared a belief that:

> The common end of all the laws relating to bankrupts, is to discover and collect the estate of the debtor, in the best and speediest manner, in order to make an equal distribution of it among all the creditors, in proportion to every man's debt, without respect to the artifical distinction of debts of a higher and lower nature.[55]

The redistribution of a bankrupt's remaining estate, rate and rate-like amongst his creditors, was also an end for bankruptcy law explicitly stated by legislators and judges[56]. Where merchants and legislators/ judges parted company was in their respective attitudes towards the bankrupts themselves.

As shown, early 18th century legislators and judges perceived bankruptcy law as an element of the criminal law. Judges saw all bankrupts as culpable, all having committed a 'manifestly fraudulent' act of bankruptcy. Of concern was the harm done to creditors and to the nation's trade, not the intention of the debtor prior to his bankruptcy.

Whereas lawyers were morally outraged by <u>any</u> bankruptcy, merchants knew that their profession was precarious and that 'such is the uncertainty of human affairs and especially in trade, the furious and outrageous creditor becomes bankrupt himself in a few years, or perhaps months'.[57] This reasoning in part accounts for pamphlets by merchants, or on behalf of the merchants' interest, calling for some effective means of distinguishing fraudulent from unfortunate bankrupts so that the law could act 'to encourage honest men, and to punish knaves'.[58] Merchants knew on the occasion of a bankruptcy that there but for the Grace of God they too went.[59]

Merchants' views of fraud are discussed at length in a later chapter[60]; however, mention might be made at this point of their views as to what constituted a non-fraudulent bankruptcy. Holdsworth cites the 16th century H.Brinklow's reasons for a merchant failing. These included 'loss of goods,... fortune of the sea, evil servants, evil debtors, ... [and] fire'.[61] By the 18th century, many merchants were blaming wars and storms for calamities in overseas trade.[62] Those retailers who had credit enough to be liable to the Bankruptcy Acts[63], did not become bankrupt, according to Defoe, so much because

of fraud, but because of negligence, overtrading, taking and giving too much credit, having a badly placed business, an ill-chosen stock, not tolerating customers' foibles, living too well, or marrying too young.[64] Wyndham Beawes summed up the merchants' opinion:

> Mr Savary says that the failures of merchants oftener proceed from ignorance, imprudence and ambition, than from malice and design, and I am entirely of his opinion.[65]

Now, the merchants' calls for the separation of fraudulent and unfortunate bankrupts did not solely arise because of the knowledge that a creditor to one bankruptcy could later find himself as the bankrupt to another. Merchants, to some extent, concurred with lawyers in seeing the certificate of discharge as a humanitarian device. However, as we shall see, humanitarianism was a matter of secondary concern to the merchants, whereas it was the sole basis for the certificate provision in the eyes of the lawyers.

Compassion for one's debtor was for Defoe 'a debt of charity due from all mankind to their fellow creatures'.[66] Another author dwelled specifically on the certificate of discharge: 'the humanity of this provision, is and ought to be, a prejudice in its favour'.[67] Later this pamphleteer advocated that 'an honest man, who, either by losses or a gradual decay of his trade, is reduced to the proper object of compassion'.[68] Compassion was reserved for unfortunate bankrupts.

In 1760 a most practical pamphlet was published under the pseudonym Nomius Antinomos calling for fundamental changes in bankruptcy law.[69] Despite his pragmatism, Antinomos also placed much weight on the humanitarian aspect of the certificate of discharge.

The unfortunate bankrupt, he states, 'may be a worthy object of our regard and pity'.[70] Later he exclaims 'how cruel ... ever to keep a living man in his grave'.[71]

So too did dictionaries of commerce, full of practical guidance for merchants, advise that honourable behaviour towards one's bankrupt debtor should include positive concern for his welfare:

> A man in trade, though standing himself secure, should have a benevolent concern for those who miscarry, and instead of scheming the destruction of others, should stretch out the arm of assistance to those who would follow his wise and industrious example.[72]

Postlethwayt is here actively advocating a special relationship between merchants over and above legal bonds and the mutual desire for profit.

Merchants, then, wanted fraudulent and unfortunate bankrupts to be separated. They feared their own bankruptcies, and they agreed with judges that the certificate of discharge could be offered as a humanitarian gesture. Merchants, however, only wanted certificates to be awarded to deserving and honest bankrupts. While judges saw only fraudulent bankrupts - merchants could also see fair bankrupts. Only the latter deserved certificates. The former, having broken their bond of honour with their creditors, deserved the harshest treatment. Antinomos explained that: 'one bankrupt may be a worthy object of our regard and pity whilst another, as being a villain, may deserve a gibbet'.[73] Pamphleteers were careful to distance their calls for the laundering of unfortunate bankrupts from their views of fraudulent bankrupts: 'I neither am, nor would be thought hereby, a favourer of fraud, or the escape of evil men.'[74]

The fear of their own failing, and their desire to offer compassion towards deserving bankrupts were not the only reasons why merchants called for notice to be taken of the plight of unfortunate bankrupts. Having appealed for humanity towards honest bankrupts, the author of Considerations upon Commissions...[75] continued:

> Indeed, considering this matter merely in a political view, it is wisdom in a nation, whose prosperity depends upon commerce, that the law should be as favourable as possible to unsuccessful adventurers, and that there should not be insuperable difficulties in the way of a man's setting up again.[76]

Destroying the trading capacity of an honest trader who broke through misfortune was held not only to undermine that individual regardless of his deserts, it was also said to be counter-productive for the nation's trade.

In the first place, underlying much of the merchants' case for reform of, and therefore their attitudes towards the purpose of bankruptcy law, was the especially unstated fear that if the risks involved in perfectly honest trading ventures were too high, then the particularly perilous overseas trade may have been threatened.[77] This fear helps to account for merchants' chagrin that creditors had the power to grant or to withhold certificates of discharge without any check that they had based their decision on the bankrupt's desert.[78] The fear remained largely unstated because merchants would never admit to a connection between their responsible trading and the speculative practices of stockjobbers and the 'monied interest' whom merchants saw little short of being fraudsters.[79]

According to J Cohen's assessment of 18th century bankruptcy law,[80] far from fearing that bankruptcy law would stifle business risks, merchants would have seen bankruptcy law as encouraging daring ventures. Cohen has argued that:

> ... the absence of a general law of incorporation until the mid-nineteenth century meant that bankruptcy served as a curious form of surrogate for corporate limited liability...[81]

This attempt to 'write history backwards', to explain past events in terms of future events,[82] leads Cohen into difficulties. Nevertheless, with important reservations, there is some truth in his statement. He has two lines of argument.

Firstly, Cohen argues that there is a parallel between 18th century bankruptcy and later limited liability companies in that in both cases, only 'businesses' could benefit. He fails, however, to distinguish between the fact that bankruptcy was for traders alone, whereas limited liability companies were and are for traders and manufacturers, as well as allowing for the possibility of a trade in shares so abhorrent to 18th century tradesmen. Further, there is the failure to separate the two different kinds of limited liability. A certificate of discharge limited liability by freeing a bankrupt from all debts accrued prior to the bankruptcy. This left the former bankrupt with nothing save any allowance he might be entitled to because of statutory provision.[83] Incorporation, alternatively, limits liability to assets tied up in the specific unsuccessful business.[84] Nevertheless, the possibility of discharge did, as Cohen suggests, offer at least the opportunity for a businessman who had broken to have his slate wiped clean, and for his liability thus to

be limited, albeit to everything he owned at the point that he became bankrupt.

Cohen's second argument that bankruptcy was an early surrogate for limited liability is based upon the claim that the 'customary justifications' for both forms of limited liability are similar: '... to facilitate mutual credit and to encourage the taking of enterprise risks.'[85] This claim is based solely upon a passage from Blackstone[86], and upon an assumed present-day conventional wisdom. Only with an important and fairly damning proviso, however, can the 'commercial advantages' of the two forms of limited liability be said to be similar. This proviso is that the uncertain consequences of a bankruptcy while the certificate decision lay in the unfettered discretion of 4/5 in number and value of the creditors, did <u>not</u> offer any substantial 'commercial advantage' to entrepreneurs unless they were fortunate in their original choice of creditors, or unless they were fraudulent people prepared to acquire fictitious creditors and a 'sham' bankruptcy.[87] Merchants pleaded for these 'commercial advantages' at the time at which Blackstone was writing - they did not already have them except on the basis of good fortune or fraud. Thus, the 'limited liability' offered by bankruptcy law was itself limited in usefulness when an entrepreneur weighed up the risks attached to entering a line of business.

As for Blackstone, his position is, in fact, unclear. He could have been idealising the law as it stood, assuming that creditors <u>de facto</u> rested their decision over the certificate on their bankrupt debtor's culpability. Alternatively he may have entered into the spirit of the merchants' case and, between the lines of his description of bankruptcy law, have been calling for some rational decision-making process over the certificate of discharge that ensured that the unfortunate, and that only the unfortunate, received their desert of a

certificate of discharge, Certainly he, unlike the judiciary who saw only the fraud in the inevitable act of bankruptcy, could conceive of a blameless insolvency:

> ... if by accidental calamities, as by the loss of a ship in a tempest, the failure of brother traders, or by the non-payment of persons out of trade, a merchant or trader becomes incapable of discharging his own debts, it is misfortune and not his fault.[88]

Whether, as Cohen suggests, to improve the already low risks in failure, or, as seems more likely, to prevent risks of failure being such as actually to discourage adventurous trading schemes, merchants wanted bankrupts to receive their just deserts for the benefit of the nation's trade.

In the second place, again underlying the merchants' view that one purpose of bankruptcy law was to offer discharge to, and only to unfortunate bankrupts, was the argument that this was not only humanitarian but also politic in that England was increasingly relying upon trade for its subsistence[89], and that it could ill-afford to lose individuals who 'have been the nation's darling traders.'[90] One often expressed fear was that too harsh a bankruptcy law would and did drive people abroad rather than face the consequences of their failure.[91]

'Antinomos' warned against losing to English commerce the skills, overseas connections, inventions and secrets of unfortunate tradesmen.[92] Rather than maintaining so punitive a law as to force honest bankrupts abroad, he argued: 'I should rather think that the well wishers to this country would set about contriving how to bring back those who are already gone.'[93] Not only was it folly to make them flee the realm, but English trading ambitions may have been further harmed by honest

bankrupts escaping 'even to our rivals and our enemies'.[94]

One pamphleteer offered a moral tale concerning bankruptcy law's alleged effect of forcing abroad honest traders who broke through misfortune. It contains elements of both the loss to England, and the potential gain to rival nations arising from this effect. A 'very considerable serge maker of Taunton' was compelled to 'retire beyond sea' for fear of the consequences of his bankruptcy.[95] The serge maker related to the author:

> ... of large offers made him to settle in a neighbour nation; but the Government advised thereof, recalled and pardoned him, whereupon he presented the King with a piece of serge, the finest in its kind I ever have seen.[96]

No such power rested with 'the Government' in the 18th century suggesting that this story is, in fact, a parable.[97]

This author, however, was not ignorant of the certificate provisions in the Act of 1706.[98] In making another point about the effect on <u>creditors</u> when bankrupts fled abroad, he displayed his high hopes for the success of the certificate of discharge in offering creditors the opportunity of recovering at least some of their debts from their bankrupt debtor:

> The prospect of liberty afforded by the Act will prevent persons from transporting themselves and estates whereby creditors lost the whole of their debts.[99]

As we draw away from the 1706 Act, merchants are seen to have less confidence in the certificate offering liberty for honest bankrupts (with all of the advantages this brought) whilst the certificate decision lay in the hands of interested parties, the creditors.

There is certainly evidence that bankrupts were <u>in fact</u> driven abroad for fear of perpetual imprisonment and/or incapacity to trade. Clough and Fish stated to the 1759 Select Committee that:

> ... many bankrupts have been obliged to go abroad on account of hardships they labour under by the bankrupt laws... the witnesses both say they would have gone abroad if they had no families; and that they had heard of bankrupts going abroad to set up manufactures.[100]

There are enough recorded cases on the act of bankruptcy of 'departing the realm' to suggest that this occurred with some frequency.[101]

Merchants were not only distressed that former 'darling traders' could be lost to English commerce because they were forced abroad; 'darling traders' who failed could also be lost if their creditors, in refusing to grant a certificate of discharge, decided to leave their bankrupt debtor imprisoned, ever liable to be imprisoned, or simply uncreditworthy.[102] Merchants were clear that life imprisonment of an honest bankrupt at the caprice of his creditors' inhumanity was extraordinarily cruel and 'a punishment which the Law of England inflicts on scarce any criminal'.[103] Not only cruel, this 'punishment' was also contrary to the nation's interest. In prison, an honest tradesman was said to be corrupted, learning 'the most wicked arts of knavery and cheating'.[104] The imprisoned fair bankrupt was a discouragement to merchants acting with honour, he was:

> ... obliged to pine away in an obscure corner, or rot out the remainder of his years in prison and there no doubt repents of his honesty for life after.[105]

Even if honest bankrupts were released from gaol, their skill could still be lost to England's trade, their being 'so dis-spirited and depressed, that they seldom [gain] a reputation or afterwards [thrive] in the world'.[106]

So, merchants saw bankruptcy law as having two proper purposes. First, it should redistribute the bankrupt's remaining estate amongst his creditors; and second, it should separate the fraudulent from the fair bankrupts and offer discharge to, and only to, the latter. The fraudulent bankrupt should be punished at least by not being allowed to re-enter trade. The honest bankrupt should receive his desert of a certificate of discharge. The reasons behind merchants calling for the discharge of fair bankrupts included: a fear held by most merchants that they could become bankrupt themselves one day; a concern with the welfare of fellow, honourable tradesmen; a perceived threat to the nation's trade should the legal risks be too high for adventurous trading; and a fear that the nation's trade would suffer if 'darling' but unfortunate tradesmen were put out of circulation, and if some actually felt forced to trade from a rival mercantile nation.

Whereas lawyers saw only humanitarianism in the certificate provisions, merchants could also see the potential for a bankruptcy law that would offer both a safety net for deserving individual tradesmen, and a means of benefitting positively the nation's commerce. This potential, however, could only be realised if the certificate decision was based upon a bankrupt's culpability, not upon the caprice of his creditors.

e) Merchants' dissatisfaction with bankruptcy law

From the 1706 Act onwards, it was prima facie up to creditors to decide whether or not their bankrupt debtor should receive a certificate of discharge. Until four-fifths in number and value of the creditors had signed the certificate, the later hurdles of the Commissioners' and the Lord Chancellor's confirmation and allowance could not be approached. Whether bankrupts received their deserts as being fraudulent or honest men, thus lay entirely in their creditors' hands. One author's claim that creditors were the 'only competent judges'[107] of their bankrupt debtor was, not surprisingly, a rare voice amongst 18th century merchants. For the most part, merchants believed that the non-judicial nature of the certificate decision threatened their ends of punishing all fraudulent bankrupts, but rewarding all honest bankrupts. An honest bankrupt might flee abroad or turn to fraud rather than 'await the capricious humour and inclination of his creditor'.[108] Consequently, the merchants' major dissatisfaction with bankruptcy law was the fact that the certificate decision was arbitrary whilst in the control of creditors. This belief militated against any desire for self-regulation on the part of merchants.[109] They argued that judges should be entrusted with what should be a 'judicial' decision.

It was precisely this dissatisfaction that lay behind Steele's description of the state of bankruptcy in the Spectator, a paper whose contributors were not renowned for their immoderacy: 'nothing... can be more unhappy than the condition of bankruptcy'.[110] The bankrupt, who relies upon his creditors for fair treatment, 'cannot but look upon himself in the state of the dead'.[111] The creditors who have been the victims of his bankruptcy, Steele continues, are his judges. Enemies, not friends, they may forget that it could be they who are undone, and

they exact revenge upon their hapless bankrupt debtor regardless of the merits of his case. They have possession of not only the remainder of the money that they lent him, but 'even of everything else, which had no relation to it.'[112]

Another author accused creditors of publicly denouncing their bankrupt debtors to 'justify their own hard usage and [to] throw a veil over their own faults'.[113] He declared that:

> ... daily experience evinces that the confinement of a man for debt, does not depend so much upon the real defect of the debtor, as upon the temper and the disposition of the creditor.[114]

A third author stated that creditors who refused certificates were not so much concerned with the money they had lost:

> ... but the gratification of some other itch when they thus pursue particular men, and whole families to utter ruin and destruction.[115]

When merchants enumerated the various 'other itches' or improper motives that drove creditors to refuse certificates to honest bankrupts (regardless of humanity, the bankrupts' desert, and the harm to English commerce), most commonly cited was the view expressed by Steele[116] that <u>revenge</u> kept discharge from honest bankrupts. Doubting the success of the certificate of discharge in freeing fair bankrupts, 'Antinomos' asked creditors:

> Where is the liberty of the poor debtor... if when he has given up his all, you be allowed still to hold him through mere revenge?[117]

In his evidence to the 1759 Select Committee, John Fish implied that revenge was largely responsible for the fact that since 1757 there had been 590 commissions of bankruptcy[118], but only 285 certificates of discharge.[119] As we know, merchants of this period considered that most bankruptcies arose through misfortune or improvidence rather than through fraud.[120] Fish believed his own predicament to have been brought about by his creditors' revenge:

> ... he has been a bankrupt about nine years, and has not yet obtained his certificate, notwithstanding that he has conformed to all that is required by the laws of bankruptcy.[121]

Revenge was not the only improper motive of creditors over the certificate decision that merchants saw as frustrating the certificate's potential of separating the fraudulent and the unfortunate for different treatment. Merchants noted that if creditors were in the same line of trade as the bankrupt, it was in their interest to keep him from recommencing trade in competition with them.[122] We have also seen how county rivalry could keep a certificate from an honest bankrupt.[123] A fourth improper motive was that of keeping a bankrupt in gaol so that he did not have the legal capacity to testify against his creditors on other matters. The 1759 Select Committee heard just such a case. Having pondered at length over the facts of this case of a bankrupt described as 'just and honest'[124] by his assignees in bankruptcy,[125] the Committee concluded that:

> ... the only creditors that oppose the bankrupt's certificate are the managers of <u>The Royal Family Privateers</u> [a ship]; who were the original and only cause of

> his bankruptcy, by the unwarrantable detention of all of his property in their own hands; those very managers who threw him into prison, and still detain him there upon the aforesaid two fictitious causes of action.[126]

Creditors, it was thought, sometimes also withheld certificates in the hope of being bribed to sign them. The Select Committee took evidence from Thomas Bell and James Oliver[127] who claimed that:

> ... the reason why they have not obtained their certificates is because they would not each of them give the principal creditor... £50 for signing.[128]

The awareness that bribery may have been necessary to secure a certificate would have encouraged traders who were about to fail to act fraudulently in either concealing some money, or placing some in the care of a friend. The fact that these were capital criminal offences would have been little deterrence because, amongst other reasons, creditors proved reluctant to take out prosecutions that could lead to the death of their bankrupt debtor.[129]

Merchants thus argued that the improper motives of creditors over the certificate decision not only denied honest bankrupts their deserts, they also reassured or even encouraged fraudulent bankrupts:

> ... if the unfortunate were separated from the guilty, if none but criminals[130] and cheats were punished with imprisonment, a prison would appear more terrible to them, they being now kept in countenance by the company of honest men.[131]

The decision over the certificate being left to the creditors also allowed for the specific fraud of 'sham' bankruptcy where the 'creditors' were in fact friends of the bankrupt who falsely swore debts so that they could later grant a certificate to the bankrupt. This form of fraud was, as we shall see, a major worry amongst merchants in the late 18th and early 19th centuries.[132] Nevertheless, mention of it here helps to explain one author's conclusions as to the effect of creditors deciding upon the certificate vis-à-vis the encouragement of fraud. The granting to creditors this decision, was said to be:

> ... so great a discouragement to honesty that 'tis greatly to be feared some of that denomination [bankrupts] being sensible of the disposition of those they had to deal with, have made concealments to maintain themselves in prison and to satisfy the craving appetites of designing creditors; or procured fictitious ones to make the number and value required; choosing rather to run the risk of being hanged than the more terrible death of starving in prison and seeing their families brought into the utmost distress.[133]

So, according to merchants, while the certificate decision lay with creditors, honest bankrupts often failed to receive discharge because of their creditors' improper motives, and dishonest bankrupts were encouraged either by suffering similar treatment to fair bankrupts[134], or by actually having more chance than the fair in obtaining discharge, albeit by illegal means. Merchants were all the more dissatisfied with creditors' power over the certificate in that neither the

Commissioners nor the Lord Chancellor could consider a certificate until 'after four fifths in number and value of the said creditors shall have signed the same'.[135] This percentage was said to be too high because it usually allowed one or two creditors to control the certificate decision regardless of the wishes of the other creditors.

The author of Proposals for Promoting Industry...[136] specifically mentioned the merchants' distrust of this provision:

> ... this often left [the bankrupt] to the mercy of a very few or one single rigid creditor, and made his liberty and freedom of settling again, very uncertain.[137]

The author reminded readers that the creditor who refused to grant a certificate was not:

> ... obliged to give any reason for so acting, being accountable to none but God for any unreasonable severities towards the bankrupt; though [the bankrupt] had satisfied the Commissioners, and so great a majority of his creditors, consenting to sign his certificate, were of the opinion he had done all that an honest man ought to do.[138]

Again the fear was substantiated by the experience of those bankrupts who gave evidence to the 1759 Select Committee.[139] Edward Green stated quite simply that: '... as the law now stands, too great a power is lodged in one or two creditors.'[140] John Fish, the bankrupt of nine years standing, was keen to inform the Committee that only

two of his creditors (who were also his assignees in bankruptcy) perpetually refused to sign his certificate of discharge, 'in consequence of which he is liable to be arrested every day, and is thereby incapable of gaining his livelihood'.[141] Similarly, Samuel Higgins' chief creditor, also his assignee in bankruptcy, 'has refused signing his certificate, without giving any reason'.[142]

The creditors' not having to give reasons for their decision to grant or not to grant a certificate, noted by Higgins and the author of Proposals for Promoting Industry..., was another area of dissatisfaction felt by merchants towards the existing certificate of discharge provision. There was neither a check by any judicial body on creditors' reasons for refusing certificates, nor, in the absence of creditors having to offer reasons for their reticence, was there even any question of their fellow tradesmen pointing to unsatisfactory justification for their treatment of their bankrupt debtors. Merchants' preference that if creditors had to have a say in the certificate decision, they should be forced to give reasons for their decision, further differentiated mercantile from legal opinion about the certificate of discharge and bankruptcy law. For merchants, creditors should explain how they were giving bankrupts their desert. For lawyers, since the certificate was merely a device available for creditors' beneficence, there was nothing for creditors to explain about their decision: either they did, or they did not wish to display humanitarianism.

Had the certificate decision been conceived by judges to have been a judicial decision, they would have been distressed by the absence of natural justice in that creditors did not need to give reasons for their decision. Merchants were dissatisfied by the lack of this aspect of natural justice, as they were by the lack of another basic tenet of natural justice that !no-one should be a judge in his

cause'.[143] Merchants attacked a situation whereby creditors 'become merciless judges in their own cause'.[144] The judges' lack of concern over the absence of the 'nemo judex' rule further underlines the fact that judges saw the certificate as a matter of creditors' humanity as opposed to creditors' judicial decision based upon the bankrupt's culpability.

In 1761, Beawes regarded the certificate decision being in the hands of creditors with the same disdain as Steele had done half a century earlier:

> Acts of beneficence are not to be expected of creditors, whose losses generally sour their tempers and keep their resentments warm against the unhappy occasion of [their debtor's bankruptcy], even to the extinction sometimes of humanity,... philanthropy is almost lost among us... the unfortunate man is now equal shunned with the infected one...[145]

Despite his description of the granting of discharge as an act of beneficence, Beawes clearly saw a proper end of bankruptcy law to be the release of unfortunate bankrupts, but the punishment of fraudulent ('infected') bankrupts. Despite exhortations by fellow merchants to differentiate the fair from the foul bankrupts - on losing money, creditors' tempers were said to be such as to deny the potential of the certificate to give bankrupts their deserts and thus to benefit English trade. Merchants' major dissatisfaction with bankruptcy law in the early 18th century, and consequently the area in which they most pressed for reform, was over the question of creditors' powers over the certificate of discharge.

f) Merchants' proposals for reform of bankruptcy law

Not surprisingly, merchants pressed for there to be some judicial control over the certificate of discharge. Not all merchants wanted creditors to have no say in the granting of certificates. The author of the 1707 pamphlet Remarks on the Late Act...[146] (who, as we have seen, had higher hopes than most later writers for the success of the certificate device in freeing unfortunate bankrupts[147]) actually advocated that three parts in four, rather than the existing four parts in five of the creditors should be able prima facie to decide upon the granting or withholding of the certificate. In making a demand for such a marginal change in the law (a difference of one in twenty creditors in number and value), this pamphleteer appears implicitly to be accepting the power of creditors over the certificate. However, whereas by law, the Commissioners and the Lord Chancellor could only consider a certificate that was already signed by the requisite number of creditors, this author submitted that there should be an appeal available for an undischarged bankrupt to 'the Lord Chancellor, Lord Keeper... or ... to two of the judges, or a trial at law which [should] be final'.[148] Consequently, this author wanted the certificate to depend upon the bankrupt's culpability. Creditors would be accountable in court for their motives in keeping a certificate from a bankrupt.

Other pamphleteers sought to remove entirely the power of creditors over the certificate. One author argued that England should follow the example of the Dutch Chamber of Insolvency and use tradesmen other than the actual creditors to determine the granting of certificates.[149] This power with creditors was said to deny bankrupts their deserts and to lead to fraud:

> Certainly therefore indifferent and disinterested judges, well versed in trade, are the properest persons to be intrusted with such authority.[150]

Further to ensure that a judicial decision occurred over the question of the certificate, this author advocated an 'appeal to the Lord Chancellor in a summary way'.[151]

Merchants, then, argued that creditors should only have a reviewable decision over the certificate, or that they should have no decision over it at all. Some argued that certain kinds of fraud should debar a bankrupt from any hope of a certificate.[152] One author revealed his own conception of trading morality in the kinds of 'fraud' that he recommended should be such as to keep a certificate from a bankrupt.[153] These included: removing books or stock from one's place of business, not keeping proper accounts prior to breaking over a legally defined amount, and also (revealing once more mercantile distrust of finance capital) stock-jobbing, underwriting insurance policies or holding a monopoly.

Antinomos argued that another reform in bankruptcy law, which would help to ensure separate treatment for honest and fraudulent bankrupts, would be the employment of different labels for each kind of bankrupt:

> We should... make use of a more general term, without affixing ignominy, or insinuating a request of pity, and call all persons indefinitely, who break bank, or stop payments, insolvents.
>
> The two species of Insolvents, the good and the bad, we may distinguish by the names; for the first sort, of compounder or distributor: and as the word bankrupt is

> odious to the law, and through its means has been stigmatised with infamy by general acceptation, we should leave that, in its reputed sense, for the second.[154]

Antinomos then went on to describe how in France and Holland the 'bankrupts'' names were posted in public places,[155] while the 'compounders' were treated with 'temperance of justice, secrecy of their affairs, and a confident benevolence, that imitates friendship.'[156] This author, along with merchants generally, sought a way of reforming bankruptcy law so that the unfortunate and the fraudulent bankrupts could be distinguished for separate treatment.

In the next section of this chapter, the ideal type of the early 18th century trading community and its attitude towards bankruptcy law will both be summarised, and will be compared with contemporary legal attitudes towards bankruptcy law. It will be seen that these two sets of views were 'relatively autonomous' from one another, and that the certificate of discharge, despite its having a different meaning for merchants and for lawyers, provided sufficient common ground for merchants to <u>tolerate</u> the law as it stood, and, correlatively, for judges and legislators to <u>maintain</u> the law as it stood.

II. <u>The early 18th century legal view of bankruptcy law as being relatively autonomous from the contemporary mercantile view</u>

a) <u>The conflicting merchant and legal views of bankruptcy law</u>

Merchants, as defined by the Bankruptcy Acts, existed as a social ranking in the early 18th century and shared a common interest in the

state of bankruptcy law. Bankruptcy law was important to merchants for whom credit was essential both for their trading and for their honour-based inter-personal ties. They saw bankruptcy's ends to be the redistribution of a bankrupt's remaining assets amongst his creditors, to free unfortunate bankrupts from past debts, but to deny discharge so as to punish fraudulent bankrupts. Traders were keen that honest but unfortunate bankrupts received their desert of discharge for various reasons: they feared their own bankruptcies, they approved of humanity towards fellow tradesmen, and they were worried that English commerce would be harmed either if entrepreneurial risks were set too high, or if honest tradesmen were kept from contributing to the nation's wealth through incapacity to trade, imprisonment, or through being forced abroad even to a rival trading nation.

Mercantile dissatisfaction over the state of bankruptcy law arose because merchants feared that while creditors held the certificate decision, their improper motives would prevent the separation of unfortunate and dishonest bankrupts so that the former, and only the former would receive discharge. Consequently merchants argued in favour of some judicial control over the certificate decision, or some other method of ensuring the separation of fair and foul bankrupts. Merchants approved of the certificate of discharge as a feature of bankruptcy law; they objected, however, to the manner in which the certificate decision was made: the decision was not necessarily made according to the bankrupt's culpability, and thus bankrupts did not necessarily obtain their just deserts.

As we saw in Chapter Two, the Legislative/Judicial view of bankruptcy law was somewhat different from that held by bankruptcy law's customers, the merchants. To reiterate: the legal perception of bankruptcy law was that it was as aspect of the criminal law designed not only to return what remained of creditors' money, but also to

police trade and to punish bankruptcy per se.

Judges could not conceive of unfortunate bankruptcy because for them the act of bankruptcy, committed by all bankrupts to gain that very status, was an example of 'manifestly' fraudulent action. The sole legislative reference to unfortunate bankruptcy was a dismissive comment in the preamble to the 1732 Act that referred to many persons who:

> ...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 just debts.[157]

One pamphleteer displayed his anger at this legislative response to the merchants' case:

> The latter part, indeed of the [1732 Act's] preamble supposes such a catastrophe [as a trader breaking through misfortune], in the words losses and unavoidable accidents[158]. Why then are there no laws peculiar to his case for him to fly to for relief? But why must he be tried under the severity of those planned out and designed for villains only?[159]

If this author was distressed that where merchants could see unfortunate or fraudulent bankrupts, lawyers could see only the latter, he also clearly believed lawyers to have seen bankruptcy proceedings as being, in his term, a trial. In the previous chapter we discussed an

apparent paradox in bankruptcy law: for lawyers, the creditors' decision over the certificate seemingly represented a crime being tried by interested individuals. This paradox was only resolved when the certificate decision was seen to have been held by judges to have been a matter for creditors' vengeance or humanity towards 'their man', rather than a judicial decision based upon the (already established) culpability of the bankrupt.

Whereas judges saw all bankruptcy as being fradulent, and the certificate decision as being merely an opportunity for creditors to display humanity; merchants perceived this decision as a determination of whether or not a bankrupt deserved discharge as an unfortunate, as opposed to a dishonest tradesman. This conflict of views is displayed in Daniel Lindsay's evidence to the 1759 Select Committee.

Lindsay had been imprisoned as a bankrupt for fifteen years prior to the establishment of the Select Committee. He implied that his major creditor's 'improper motive' of revenge had both kept his own certificate from him, and was representative of why creditors generally were the wrong people to decide upon discharge and, thereby, a bankrupt's culpability. Lindsay's major creditor was disqualified by the Commissioners from gaining a dividend from the remaining assets because he had neglected to admit to owing the bankrupt's estate a sum of money. The major creditor appealed from this decision to the Lord Chancellor who upheld the Commissioners' finding. However the Lord Chancellor also held that he could:

> ...be considered as a creditor under the said commission, so far as to be at liberty to assent or dissent from the bankrupt's having his certificate.[160]

This decision is particularly revealing of the differences between legal and merchant attitudes towards bankruptcy law.

The Lord Chancellor saw a fraud by the major creditor upon the other creditors such as to deny him the right of receiving any of the bankrupt's remaining assets. This fraudulent behaviour, however, was held to be irrelevant vis-à-vis the major creditor's quite separate, and special relationship with his bankrupt debtor. The fraud did not free the bankrupt from being the major creditor's 'man', nor did it free the bankrupt from his release depending upon the good nature and humanity of this inevitably embittered creditor. Where Lindsay and other merchants would see this creditor as being the last man able to determine Lindsay's guilt and dispassionately to decide upon the granting or withholding of a certificate, the Lord Chancellor saw this creditor as a correct person to decide whether or not to be benevolent towards Lindsay - a manifestly fraudulent bankrupt.

Whilst the certificate decision in the hands of creditors kept people like Daniel Lindsay in gaol for long periods of time, merchants were nevertheless keen that the certificate of discharge should be available at all. With hindsight it is all too easy to forget that from 1705, the certificate was only held out by the legislature as being a temporary measure,[161] despite the fact that it was never allowed to lapse. While merchants were dissatisfied with the manner in which certificates were awarded, they were happy that there were in fact certificates at all.

Merchants, then, saw certificates of discharge as (potentially) offering unfortunate bankrupts the opportunity to start off once more in trade, with all of the benefits that this would bring to English commerce. Judges, alternatively, saw certificates as devices by which creditors could display humanitarianism towards their (by definition) fraudulent bankrupt debtors. Merchants argued for a more judicial

certificate decision. The fact that this reformist position accepted the importance of there being certificate of discharge provisions in bankruptcy law, insulated the judges' view of bankruptcy law from too violent a demand for a complete reappraisal. As will be seen, the judicial view was only relatively autonomous from that held by merchants.

b) The relative autonomy of the legal view of bankruptcy law

Implicitly and explicitly throughout the present work, the judicial view (later, 'paradigm'[162]) of bankruptcy law will be presented as having been 'relatively autonomous' from the mercantile view of bankruptcy law. The development of bankruptcy law by judges and, eventually, legislators, will also be seen to have occurred 'relatively autonomously' from the requirements of business.

Balbus identifies two approaches to the study of the level of autonomy in the history of capitalist law:[163] firstly, there is the 'instrumentalist' approach that explains law change as resulting from the strategic action of dominant actors[164]; and secondly, there is the 'formalist' approach which explains law change as occuring through some 'inner dynamism' of the law. The former approach collapses law into being a mere tool for classes or for interest groups; while the latter approach claims a high level of autonomy in legal development.

Arguing that the form of capitalist law must be understood on an analogy with Marx's theory of the logic of the commodity form[165], Balbus suggests that the 'instrumentalist' versus 'formalist' debate is based upon a false premise that law is autonomous to the extent that it is independent of the will of social actors. However, when one becomes involved in theoretically informed empirical analysis of the history of specific aspects of the law, Balbus' so-called 'false

premise' becomes an invaluable tool for the identification of the mode of legal change in its relationship to social and economic circumstances. It is precisely in the tension between on the one hand, mercantile requirements[167], and on the other, the judicial concern to maintain the structural integrity of fields of legal discourse, that a materialist history of, in our case, bankruptcy law must be founded.

Balbus' theory of the commodity-like form of capitalist law implies a monolithic, unified and unproblematic conception of law. Rather more convincingly, Sugarman argues that:

> a legal system usually possesses a range of facilities which may be analytically distinguished and which need to be differentiated if the relation between law and economy is to be advanced beyond the level of simplistic hypothesis.[168]

However, more importantly for our purposes, Balbus' high level of abstraction, if allowed, would put a gag on both contextually sensitive legal historical work, and upon the further elucidation of the 'relatively autonomous' nature of at least some aspects of legal development.[169] Once one adopts the position that the legal form is merely, and completely, explicable with reference to the logic of the commodity form, there is little space left for historical analysis of human struggles for the development of law appropriate to specific needs.

In the present work, then, we refer to but two aspects of any 'relative autonomy' of 18th century law. Firstly the judicial view of bankruptcy law is seen to have been 'relatively autonomous' from the view of those who were subject to, and who used this branch of the law; and secondly, we will see how bankruptcy law developed 'relatively

autonomously' from the changing requirements of business. This project opens at least these two aspects of the law's 'relative autonomy' to empirical scrutiny.[170]

Already we have seen that the early 18th century legal perception of bankruptcy law was 'relatively autonomous' from the mercantile view. It was 'autonomous' in that where judges saw criminals and humanitarian creditors, merchants saw both fraudulent and unfortunate bankrupts, and also a possible means of ensuring their separate treatment. The judicial view was only 'relatively' autonomous in that it may well have suffered fierce attack by the merchants had not the certificate device been available to discharge some bankrupts.[171] The judicial view, then, was distinct from that of merchants. However, it was sufficiently relevant to the requirements and expectations of merchants for judges to be able to maintain their view, and to maintain bankruptcy law as it stood. It is neither surprising that there was a match between what merchants wanted and what judges could offer, nor is it surprising that this match was imperfect - merchants and judges had different life experiences.[172]

Synchronically, early 18th century bankruptcy law had different but related meanings for lawyers and for merchants. Diachronically, the development of the law was relatively autonomous from merchant calls for reform. This relatively autonomous mode of development revealed itself in two ways.

First, in the following chapter, judges will be seen to have been neither entirely ignorant of, nor uninterested in merchant calls for reform in at least one aspect of bankruptcy law: the financial consequences of a factor's bankruptcy. While judges altered the law to coincide with merchants' desires, they, however, could only accommodate merchants up to the point of their 'structural principles'[173] being under threat. The very coherence of a judicial view of an area of the

law depended upon the continued existence of these structural principles. Even if the rules within a structural principle contained their own 'inner dynamic of development', the autonomy of their development was limited. The mode of development of a structural principle was only relatively autonomous in that judges steered the 'inner dynamic' of the rules towards merchants' desires, but never at the cost of threatening the integrity of the structural principle itself.

The second way in which bankruptcy law's relatively autonomous mode of development revealed itself is discussed at length in later chapters. In a changing socio-economic environment, merchants' expectations and requirements of bankruptcy law altered. The relative distance between what judges continued to be able to offer of bankruptcy law, and what merchants wanted of bankruptcy law became so immense, despite the certificate acting as a bridge between the two sets of views, that the old judicial view collapsed. The judicial view of bankruptcy law was thus only relatively autonomous from the merchants' view in that by the 1820s, with the distance between the judicial and mercantile views having reached a critical state, it fell upon Parliament not merely to update bankruptcy law, but to provide the judiciary with an entirely new meaning for bankruptcy law in line with mercantile requirements and expectations.

Chapter Four

Normal Law Change - the Special Case of Factors' Bankruptcies

In following Chapters we will argue that, guided by the general depersonalisation of trade during the 18th century, the merchants' expectations and requirements of bankruptcy law changed in vitally significant ways. Merchants came to require an efficient, debt-clearing process of bankruptcy law. They came to see bankruptcy's trade-policing function not only as standing in the way of this end, but also as itself failing to deter what was believed to be a huge increase in levels of trade fraud.

We will also describe how judges, with their professional commitment to the maintenance of the structural integrity of fields of legal discourse, proved unable or unwilling, to accommodate the new needs of business. The judicial and the mercantile views of bankruptcy law became critically out of phase.

Finally, we will discuss how, via the political process, bankruptcy law eventually - and inevitably - proved responsive to the new mercantile requirements. A 'paradigm-shift' occurred in bankruptcy law; with bankruptcy law itself now directed towards the collection of bad debts, with the policing of trade as being of only residual concern. The judicial discourse concerning bankruptcy law was re-constituted; the structural principles of bankruptcy law were reconstructed.

Before progressing with this argument, however, it is necessary to make a brief excursion into a specific area of the development of bankruptcy law: the financial consequences of a 'factor's bankruptcy. It will be seen that judges <u>were</u> prepared to alter the law in favour of the demands of trade, but never at the expense of threatening the internal consistency of the law.

It is necessary to deal with this point here for various reasons.

Firstly, we will see the high level of commitment of judges towards the maintenance of the law's structural principles. An appreciation of this level of commitment is necessary if we are to understand judicial recalcitrance towards altering the structural principles that identified bankruptcy law as an element of the criminal law.

Secondly, we will see that judges were far from being unsympathetic towards the requirements of trade. Judges did not fail to alter the 'bankruptcy as crime' paradigm because of any intrinsic distaste felt towards those engaged in commerce. They did so because their structural principles bound them to their existing view of bankruptcy law.

Thirdly, the first of two elements of the relatively autonomous mode of development of 18th century bankruptcy law will be described. In the present chapter, judges will be seen to have maintained their structural principles whilst, wherever possible, altering the law in favour of mercantile interests. Later, this first element of the relatively autonomous development of bankruptcy law will be compared with, and contrasted to, the second element. It will be seen that any piecemeal development of the structural principles of the judicial 'bankruptcy as crime' paradigm could <u>never</u> satisfy mercantile requirements for a structurally <u>different</u>, debt-clearing bankruptcy law. The development of bankruptcy law was also only <u>relatively</u> autonomous from the requirements of business in as much as this judicial view eventually collapsed, and underwent a structural metamorphosis.

Fourthly, we will see how 'normal law change' - cumulative legal development, at least sensitive to the requirements of business - was guided by the very structural principles of an area of legal discourse. The structural principles suggested the future development of the law from case to case. Thus, it will be seen that what Balbus describes as the 'formalist' approach to legal history (changes being seen to result from some 'inner dynamism' of the law), is also a necessary

tool in the exposition of a materialist history of bankruptcy law.[1] Emphasis in this chapter will therefore be upon the doctrinal changes judges were prepared to make for the benefit of trade.

The present Chapter, then, will focus upon a specific aspect of 18th century bankruptcy law; namely, the financial consequences of a 'factor' becoming bankrupt. Firstly, we will describe the nature of 'factorage' in the 18th century, and indicate its importance to, especially, overseas commerce. Thereafter, we will discuss how, in their treatment of a factor's bankruptcy, judges accepted a derogation from an otherwise structural principle of bankruptcy law: that creditors should receive shares in a bankrupt's remaining assets in proportion to the debt owed. Judges allowed another structural principle, from another area of the law, to operate in the post-bankruptcy relationship between a 'factor' and his 'principal' (i.e. the person who had hired the factor). With reference to property law concepts, judges allowed the principal to recover the goods that he 'owned', which were merely held to be in the bankrupt factor's 'possession'. This was before the factor's general trade creditors could claim a proportion of the remaining estate. In response to the desires of merchants, and without damaging the structural integrity of the law, judges thusly placed principals of bankrupt factors in a uniquely privileged position vis-à-vis the recovery of debts.

As time progressed, judges allowed more and more forms of property to be recovered by principals before general trade creditors could claim under a bankruptcy. Bowing to merchants' wishes, and allowing the law to develop through logically justifiable deductions from previous cases, judges nevertheless found themselves bound by another structural principle in the law. For the arugment to work, by which factors were held merely to possess what their principals owned, principals could only be permitted to follow their clearly identifiable

property into their bankrupt factors' hands. In their refusal ever to derogate from this principle, judges will be seen to have altered the law in favour of trade, but not at the expense of the internal consistency of the law.

a) Factors

Factors were an anomaly in 18th century trade in that, unlike most other tradesmen, they operated neither with their own capital, nor with capital borrowed upon their own behalf.[2] Factors were hired by a 'principal' to conduct trade on his behalf and, unlike other agents,[3] they received a commission for their services.[4] Also unlike other agents, the law imputed a strong fiduciary relationship between factors and principals[5]; they often had considerable discretion over how they dealt with their principals' affairs[6]; and they could obtain credit from other merchants on the basis of their ostensibly owing their principals' goods. It was their capacity to gain credit in this way that was the common rationale for their being subject to bankruptcy law[7].

Sometimes factors were involved in domestic trade, particularly in maritime towns[8]. However, more commonly, they were involved in overseas trade, often living in a foreign town and organising their principals' affairs there.[9] The attractions of the use of such factors in foreign commerce were multifarious.

To some extent it was simply more convenient for a merchant to hire someone to do his adventuring for him.[10] Factorage could be used as a training for apprentice merchants[11]; or it could be carried out by independent merchants for each others mutual benefit.[12] Munday explains the popularity of the use of overseas factors with reference to their capacity to act as 'credit-insurers'. An English manufacturer

would sell his goods abroad through a factor who would give the foreign buyers credit. The factor then earned his 'commission' by lending money to the English manufacturer so that the latter could afford to continue to buy raw materials. The factor thus insured the English manufacturer against defaults by foreign purchasers; the 'premium' being the factor's interest/commission on his loan to the English manufacturer.[13] More typically, however, factors were hired by merchants rather than by manufacturers.[14] Westerfield's explanation of the mercantile predilliction for the separation of ownership and control of capital by the use of factors is probably the most convincing. The system of factorage allowed merchants to reduce risks in the particularly perilous overseas trade by allowing for the possibility of their hiring <u>specialists</u> in specific overseas market places:

> Special training and experience put [factors] in a position to aid both buyer and seller: they build up an acquaintance and correspondence with both classes, and ease the way for transactions between them.[15]

The desire to protect the system of factorage ('indispensable to trade and commerce'[16]), was the impetus for mercantile pressure upon the courts to place the principal of a bankrupt factor in a privileged position over general trade creditors. Merchants were aware of the possibilities for fraud available to factors - the falsification of accounts[17], the possibility that they might abscond[18], marriages of convenience followed by feigned bankruptcy under foreign jurisdictions[19], etc.[20] Merchants wished these risks, and the risks attached to poor overseas communications, to be offset against a privileged position for principals on their factors' bankruptcy. The fact that it would often have been <u>foreign</u>, as opposed to <u>English</u>, general trade

creditors who were placed in second place behind the factor's principal must also have been an encouragement for merchants to support this preferential treatment for principals.[21]

b) The derogation from the 'equality' principle of bankruptcy law.

In the previous chapter it was seen how legislators, judges and merchants were agreed that 'an equal proportion of the affects of the bankrupt amongst his creditors should be attained as far as possible'.[22] Nevertheless, as early as 1708 in L'Apostre v. Le Plaistrier[23], it was held that the principal of a bankrupt factor could recover his goods from his factor's assignees in bankruptcy[24] by an action of trover. All other creditors had them to come in under the commission of bankruptcy to share in the remaining assets 'rate and rate-like, according to the quality of their debt'.[25]

L'Apostre v Le Plaistrier concerned some diamonds that a factor was to sell on behalf of his principal. The factor became bankrupt before he had disposed of the diamonds, and it was held that:

> these jewels being originally the plaintiff's [i.e. the principal's], and the bankrupt having no more than a bare authority to sell them for the plaintiff's use, were not liable to the bankruptcy case.[26]

This decision rested upon the factor being held merely to possess specific goods over which his principal retained ownership. Other creditors could claim from the bankrupt factor's amalgamated assets as a result of the factor's contractual duty to repay them money or money's worth. The principal's claim, however, was not in contract law, but in property law - the factor and the principal, as we shall

see, were held to have been in a fiduciary relationship based upon the factor's bare authority to deal with the principal's diamonds.

This, then, was the formal, legal explanation for the judicial derogation from the equality principle in bankruptcy law in the special case of factors. A consideration of a line of cases concerning what a principal could 'trace' or 'follow' into his bankrupt factor's hands will demonstrate how judges were not only concerned with formal legal reasoning, but also took into account mercantile desires for low-risk capital managers in overseas trade. As will be seen to have been otherwise in the case of the judicial conception of the criminal nature of bankruptcy; in the case of factor's bankruptcies, judges were able to exploit the potential within the law's structural principles for internally consistent legal development in the interests of trade. The structural principles themselves contained an inner dynamic of development that coincided with mercantile wishes.

In a directly analogous situation to a factor's bankruptcy, Whitecombe v. Jacob[27] concerned claims by a principal, and by general trade creditors, upon the estate of a deceased factor. Before the general creditors took a share in the remaining estate, the principal was here permitted to reclaim goods for which his original goods had been exchanged. The factor had, in fact, sold the original goods; but instead of returning the money to the principal immediately as agreed, he had reinvested the money in other goods. Because of this clear reinvestment into other goods, the principal was able to point at his specific goods in the factor's remaining estate. This ability to point at specific goods was held to be essential for the operation of the property law structural principle that a factor possessed that which his principal owned. Thus, obiter, it was held that money could not be traced by a principal into his factor's estate:

> for in regard that money has no ear-mark, equity cannot follow that in behalf of him that employed the factor.[28]

By 1742, judges were prepared to extend the kind of property that principals could trace to include bills of exchange.[29] Willes C.J. found that, in accordance with the realities of trade, factors could exchange their principals' goods for credit notes even without express authority so to do: 'constant and daily experience shews that factors do sell upon credit'.[30] The decision could thusly be justified both according to the formal legal rationale of the rule in L'Apostre v. Le Plaistrier, and according to mercantile wishes.[31]

Lord Hardwicke followed this decision in Ryall v. Rolle (1749)[32]; and then, some five years later, extended the scope of the decision even further. In ex parte Dumas (1754)[33], Hardwicke allowed a principal to trace money that his factor's assignees in bankruptcy had recovered from the sale of the principal's bills of exchange. Ritualistically restating bankruptcy's 'equality' principle[34], Hardwicke justified this further derogation as a logical deduction from the rationale behind the rule in L'Apostre v. Le Plaistrier:

> the assignees under the commission take the estate of the bankrupt and any legal interest in the bankruptcy subject to all the same equities as it stood in the bankrupt at the time of the bankruptcy... [to do otherwise] would so change the property as not to be endured.[35]

The logically consistent development of kinds of property that a principal could follow, on the basis of his retention of ownership over it, continued with the case of ex parte Sayers (1800)[36]. This

case concerned a principal's goods which were converted into money by a factor. The factor then amalgamated that money with his general funds, but immediately withdrew it, and sent it to Portugal. Thurlow L.C. held that the money:

> acquires an identity and a distinction from the rest of the fund by the application of it, by sending it to Portugal.[37]

Thurlow stressed that normally, bankruptcy law treated creditors pari passu and, in deference to that principle, indicated that the case before him was 'very hard'.[38] Nevertheless, Thurlow held that the money in ex parte Sayers was sufficiently 'ear-marked'[39] for the principal to be able to point at it as being clearly his own.

The law on this subject was consolidated by Lord Ellenborough C.J. who, in Taylor v. Plumer (1815)[40], stated that:

> if the property in its original state and form was covered with a trust[41] in favour of the principal, no change of that state and form can divest it of such a trust, or give the factor, or those who represent him in right, any other more valid claim in respect of it, than they respectively had before such a change.[42]

This was under the condition that:

> so long as such property is capable of being identified and distinguished from all other property.[43]

And money <u>was</u> identifiable, unless 'mixed and confounded in a general mass of the same description'.[44]

So, based upon the structural principle borrowed from property law that a principal retained ownership over goods which his factor merely possessed, judges derogated from bankruptcy law's 'equality' principle, and placed principals in a privileged position over general trade creditors on the bankruptcy of a factor. Over time, judges allowed more and more types of property to be traced and recovered in this way. These developments were both in accord with, and also suggested by the very structural principle concerning the factor's mere possession of goods his principal owned. Through deductions from previous cases, judges took this aspect of the law to its natural conclusion. Principals were allowed to trace and to recover any of their property in their bankrupt factor's possession short of non-earmarked, and therefore non-identifiable property. For sure, judges could have held that, for example, bills of exchange were not goods <u>in specie</u>, and therefore not traceable in equity or law. However, it must be recalled at this point that judges were also keen to develop the law in line with mercantile interests. In the next part of this chapter, we will examine judicial sensitivity to (at least their own conception of) mercantile requirements.

c) <u>The judicial concern to satisfy the requirements of business</u>

The rationale for the decision in <u>Godfrey</u> v. <u>Furzo</u> (1733)[45], allowing a principal to recover his goods from his bankrupt factor's estate, is, by now, familiar to us:

> [a factor,] being only a servant or agent[46] for the merchant beyond sea, can have no property in such goods.[47]

However, in this case King L.C. is also reported to have said that:

> he had discoursed with merchants about the matter, who had held this to be the practice amongst them.[48]

King's decision was, thus, based not solely upon formal legal reasoning concerning the separation of ownership and possession; it also took into account merchants' wishes.

King was in a particularly good position to respond to the lobbying of merchants. John, Lord Campbell wrote of the virtual lack of Chancery Reports, systematic treatises on Equity, or references to Equity ('beyond the heads of 'Subpoena' and 'Chancery') in the Abridgements during King's Lord Chancellorship.[49] However, King was bound by past cases, and the law remained apparently discoverable, neutral, and relatively autonomous from merchants' wishes[50] in that Campbell informs us that King did have some precedent upon which to base his decisions:

> but Lord King, besides confidentially conversing with some practitioners in his court, borrowed M.S. treatises respecting Chancery, and M.S. reports of former Chancellors which were in private circulation. By a diligent pursual of these he made himself a pretty Equity lawyer, and he had a tolerable notion of the newest fashions which his predecessor had introduced.[51]

King was not unique in justifying the rule in L'Apostre v. Le Plaistrier with reference both to formal legal reasoning, and also to the interests of trade. We have already seen Willes, in his extension of the rule to

encompass bills of exchange, refer to the fact that 'constant and daily experience shews that factors do sell upon credit'[52]. More generally, Willes argued that:

> We ought always as much as we can and as far as is consistent with the rules of law [sic] to do every thing to promote the trade and commerce of the nation.[53]

In his judgments around the subject of the rule in L'Apostre v. Le Plaistrier, Hardwicke too displayed a concern not only with strict legal reasoning, but also with the protection of English commerce. In Ryall v. Rolle, he felt bound to state that this rule would not cause 'that false credit which is the destruction of trade'[54]; while in ex parte Dumas, he argued that the rule should apply so as 'not to interrupt the course of commerce'.[55]

Hardwicke also referred to trading practice in a case which represented the reverse side of the coin to L'Apostre v. Le Plaistrier. In Kruger v. Wilcox (1755)[56] Hardwicke held that when the principal became bankrupt whilst the factor held some of his goods, the factor was entitled to remove his commission from these goods before passing them on to the assignees in bankruptcy.[57] If the factor had already returned the goods, he could claim his commission alongside the other creditors to the bankruptcy. The basis for such a rule, according to Hardwicke, was that 'all merchants agree' that this was conventional commercial practice.[58]

The development of this derogation from bankruptcy's 'equality' principle, always undertaken by judges with professed reluctance, is thus seen to have been based not only upon formal legal arguments concerning the separation of ownership and possession, but also upon the

judicial conception of mercantile practice. Unlike many continental systems of 'law merchant', English law knew no separate court system nor body of law specifically for merchants. Whenever possible, and some of the parameters of this possibility will now be discussed, English judges assimilated merchants' wishes into the law, albeit on an ad hoc basis.[59]

d) The primary judicial concern to maintain the structural integrity of fields of legal discourse.

Despite a strong judicial concern to accommodate merchants' wishes over the law relating to a factors' bankruptcy[60], the maintenance of the internal consistency of the law remained of paramount importance to the judges. To lower the risks involved in overseas trade, judges perceived merchants to be keen that principals receive preferential treatment on their factors' bankruptcies. There was, however, no compelling reason why merchants would have wished principals only to have been able to recover property at which they could point as being their specific and identifiable goods in their bankrupt factors' hands.[61] However widely judges extended the definition of 'property' for the purposes of the rule in L'Apostre v. Le Plaistrier, any restriction on recoverable property must have remained merely a nuisance for merchants. This rule that only identifiable property could be traded was, then, not present to accommodate merchants, but to satisfy the formal legal rationale of the very rule in L'Apostre v. Le Plaistrier. If principals could recover goods which they owned, and which were merely possessed by their factors, then principals had to be able to identify these specific goods amongst their factors' remaining estates.

In attempting to justify the judicial refusal to allow principals to follow non-earmarked money into their bankrupt factors' hands,

Lord Ellenborough stated that the problem was one of fact, not law.[62] This comment can be read in either of two ways. Firstly, Ellenborough may have been expressing a fear that since it would be difficult to <u>prove</u> the extent of a principal's debt in a factor's amalgamated funds, an avenue for fraud would have been opened. Overseas bankrupts could have claimed to have been factors, and could thus have secured a means of smuggling money to fictitious friendly 'principals' in England before the general trade creditors could claim under the commission of bankruptcy.[63] If this was Ellenborough's fear, it went unstated by merchants who tolerated multifarious avenues for fraud in employing factors at all[64]. Furthermore, overseas traders could always have kept a separate account for some fictitious principal, and could thus have defrauded real creditors regardless of the rule against non-earmarked money being traceable.[65]

Secondly, Ellenborough may have been displaying so firm a belief in the structural principle that the principal had to be able to <u>point</u> at what was clearly his own property in his factor's hands, that the rule against tracing non-earmarked money appeared to him not to be a question of law at all, but as a self-evident principle; indeed, as 'fact'. This would certainly coincide with the nature of another 18th century structural principle in the law. Manifest criminality[66] evoked in judges' minds a quasi-tangible, visual image. Just as it was conceived as fact, not law, that thieves could be seen thieving; so too could it have been conceived as fact, not law, that a principal could identify his own belongings amongst his bankrupt factor's estate.

Whatever Ellenborough's exact meaning in his attempted justification for the 'pointing' rule; the judicial insistence (contrary to any possible trading interest) that non-earmarked money was untraceable, is suggestive of a relatively autonomous mode of development of the law relating to commerce.[67] Normally[68], judges steered the progress of

the rules generated by a structural principle towards merchants' wishes. However, they never did so at the expense of threatening the internal consistency of the law by questioning a structural principle. This questioning was quite unthinkable for judges for whom the very coherence of a field of legal discourse depended, by definition, on the continued existence of its structural integrity. Later, in contrast to the mode of development described in this chapter as being 'normal law change', we will see the consequence of an irreconcilable conflict between mercantile requirements, and the structural integrity of the judicial perception of bankruptcy as crime.

Chapter Five

The Swindling Moral Panic

Merchants were clear that bankruptcy law should redistribute a bankrupt's remaining estate ratably amongst his creditors[1], and that it should ensure the separation of unfortunate from fraudulent bankrupts so that the law could operate 'to encourage honest men and to punish knaves'.[2] By the 1780s, however, merchants had become cynical of bankruptcy law's capacity to satisfy these ends. One of the ways in which this disillusionment manifested itself was in what we shall describe as 'moral panics' over the prevalence of both 'swindling' (pre-bankruptcy fraud), and 'sham bankruptcy' (bankruptcies orchestrated solely to defraud creditors)[3]. Merchants perceived a technical breakdown in bankruptcy law which they saw not only as failing to prevent fraud, but actually acting as a vehicle for fraud.

There was, of course, a difference in judicial and mercantile notions of bankruptcy fraud. Whereas judges were solely concerned with the fraud in the act of bankruptcy that all bankrupts had committed to gain that status[4], merchants were also concerned that bankruptcy law should prevent credit-related fraud in pre-bankruptcy affairs.[5]

There was some legislative recognition of at least a few forms of pre-bankruptcy fraud as being relevant to bankruptcy law. Section 12 of the 1732 Act[6], inter alia, prohibited the granting of certificates of discharge to bankrupts who lost over £100 within a year prior to their bankruptcy through dealings with:

> ... any stock of any company or corporation whatsoever, or any parts or shares of any government or public funds or securities...

when that stock was never actually transferred in pursuance of a contract, or where the contract was not to be performed for over a week after its being made. Displaying contemporary attitudes towards finance capital[7], particularly in the wake of the South Sea Bubble crash[8], the same section denied a certificate to bankrupts who had lost, within a year of the bankruptcy, more than £5 in any one day at gambling:

> ... in playing at or with cards, dice, tables, bowls, billiards, shovelboard, or in or by cock-fighting, horse-races, dog-matches or foot-races, or other pastimes, game or games whatever.

Apart from this enactment, a bankrupt's behaviour prior to his bankruptcy had no legal consequence in his bankruptcy proceedings. It was, of course, open to creditors to refuse a certificate on grounds of fraud in pre-bankruptcy affairs. However we have already seen that merchants considered improper motives to come in the way of creditors basing the certificate decision on a bankrupt's culpability[9]. Thus, just as judges had been blinkered by the structural principle of manifest criminality from seeing unfortunate bankruptcy[10], so too did their focusing on the inevitable fraud in the act of bankruptcy blinker them from seeing the merchants' perception of this failure in the law to prevent pre-bankruptcy fraud.

The kind of fraud about which merchants were most concerned related to the various credit notes in circulation in the late 18th century. Early 18th century merchants had seen threats to trade from smuggling[11], false weights and measures[12], tricks by false pretences[13], to some failing to keep accounts or forming monopolies, and from stock-jobbing[14]. They were also concerned about credit-related fraud.[15]

By the 1780s, however, fraud increasingly came to suggest to merchants the abuse of bills of exchange, promissory notes and other forms of paper credit. Indeed, Hay explains the 'new' crimes and capital statutes of the 18th century aimed at preventing fraud and, particularly forgery, precisely with the increased use of these credit notes:

> Perhaps the most dramatic change in the organizational structure of British capital was the growth of promissory notes on banks as a medium of exchange, and the increase of negotiable paper of all kinds.[16]

With the increased use of credit notes, came the increased fear of their abuse.

In his autobiography George Parker recounted how, in his youth, he had taken advantage of promissory notes to defraud a creditor[17]. His story typifies the kinds of fraud that merchants feared arose from paper credit.

Parker, an itinerant actor, sat in one room whilst his creditors awaited payment in the next. Parker remembered:

> There are bills enough, thought I,
> which must all be satisfied; but how?-
> not with money, faith.[18]

Parker went into the next room and conversed with a tallow-chandler (a candlestick-maker). The tallow chandler, a Methodist, was so delighted to hear Parker say that he would give up the profane profession of a shewman (an actor and a lecturer), that he accepted Parker's offer to work with him for eight weeks to pay off all his debts. The anecdote ended with Parker receiving a certificate of

employment, an advance of a crown to buy new clothes, and setting off to London to lecture once more.

The growth in the use of credit notes, then,led to a 'moral panic' about their abuse. As will be argued in a later chapter[19], this panic, in turn, helped to lead to a crisis in bankruptcy law. Merchants came to see bankruptcy law as failing to achieve one of its major ends: the prevention of pre-bankruptcy fraud. The crisis was exacerbated by the judicial failure to comprehend the relevance of this pre-bankruptcy fraud to bankruptcy law.

I The swindling moral panic

In Policing the Crisis, Stuart Hall defines a moral panic as being a 'perceived or symbolic threat to society'.[20] Hall describes the creation of an apparent social fact of mugging as a new crime that is on the increase. He explains that the term 'mugging' is not new, it was taken from the United States of America, and that the 'crime' is, in fact, several varieties of existing offences branded under one heading which has no definition at law. Mugging becomes an issue and a fear for the public through the media's concern with crimes that fit into this heading, through the pronouncements of eminent (and therefore quotable) people on the subject, through the judiciary perceiving mugging as separable social action, and through police statistics that show mugging to be on the increase. These statistics act as a self-fulfilling prophesy as more separate crimes are included under the heading of mugging and as police attention and resources are concentrated on the prevention of mugging. In the face of decreasing numbers of crimes of violence, mugging appears to be increasing, and thus mugging appears to Hall to be a 'perceived threat' rather than an element of 'the world of hard facts - 'social facts as things'.'[21]

The overall effect of this particular moral panic, Hall argues, is to divert public attention from modern crises in capitalism.

The growth in the use of negotiable instruments in the late 18th century must certainly have brought with it a real increase in the number of frauds related to such bills. Hall's description of the nature of a 'moral panic', however, will be seen to coincide neatly with the merchant's perception of these frauds as being a threat to trade itself.

The term 'swindling' first appeared in general usage around 1781.[22] A contributor to the Gentleman's Magazine in 1785 asked readers to help him with the derivation of this word that while being less than twenty years old, 'is now, alas! domesticated amongst us.'[23] A reply came that it was derived from the German word 'schwindel' meaning 'to cheat'.[24] This, however, was a slang usage of the German word 'schwindel' which was translated by Bailey as being a dizziness in the head[25]; whilst he translated the English word 'swindle' into German, as best he could, with the word 'schwindel'.[26] The first English dictionary to include 'swindle' was Francis Grose's A Classical Dictionary of the Vulgar Tongue[27]. In his explanation of the word's derivation, he shows the link with the high German word 'schwindel', and displays the contemporary belief in the close relationship between swindling and bankruptcy:

> [swindling] is derived from the German word schwindeln, to totter, to be ready to fall, these arts being generally practised by persons on the totter, or just ready to break.

Thus, like 'mugging' the social reality of 'swindling' was reinforced by the fact of the word coming from another country that could be

assumed already to be suffering from the particular perceived threat.

There was also a similarity with the mugging panic in that swindling could be said to have existed before the generic term came into usage. George Parker's anecdote recounted above[28] was one example of paper-credit frauds preceding their redefinition as forms of swindling. Another example would be Sheridan's School for Scandal of 1777 in which one theme was the abuse of paper-credit:

> Careless:... but don't let that old block-head persuade you to squander any of that money on old musty debts, or any such nonsense; for tradesmen, Charles, are the most exhorbitant fellows!
>
> Charles: Very true, and paying them is only encouraging them.[29]

Although frauds with bills of credit were not new, it was not until about 1781 that comments appeared in periodicals and elsewhere warning that 'the cheats of swindlers cannot be too openly exposed, nor tradesmen guarded against their frauds'.[30]

The moral panics of mugging and swindling are also similar in that neither term could be easily defined. In 1781, Parker defined swindling as the 'obtaining of goods, credit or money upon feigned notes or other false pretences'.[31] Grose's definition was close to, but not the same as that of Parker: a swindler is 'one who obtains goods on credit by false pretences, and sells them for ready money at any price to make up a purse!.[32] Another author, in 1781, defined swindlers as being 'a set of men, getting cash, and obtaining notes on the credit of each others notes, etc.'[33] Such attempted definitions of swindling, however, were infrequent. The word gained its meaning

through usage and it is no surprise that a request in the Gentleman's Magazine for a lawyer to define swindling solicited no reply.[34] Like mugging, swindling was seen to be on the increase as the word encompassed more forms of social action: 'the term swindler has since been used to signify cheats of every kind'.[35] Indeed, The Universal Register[36] of 1786 offered some 'modern definitions' including a very wide definition of a swindler as:

> a person whether rich or poor, noble or plebeian, male or female, who raises money by dirty tricks or false pretences in any manner, or on any persons whatever.[37]

As is the case with 'mugging', the word 'swindler' gained currency through its usage in newspapers, magazines, pamphlets and literary works. One author claimed in 1788 that although 'swindling' was not to be found in dictionaries, 'we often meet with it in modern writers, and particularly in the newspapers'.[38] Later we will see how there was a press campaign against swindling that incidentally helped to fire the panic about swindling.[39]

As we have seen, Hall argues that the mugging panic is functional in distracting public attention from crises in capitalism. The swindling moral panic had other functions. Mainly, it acted to reinforce the system of paper credit.

The literature on swindling tended to concentrate on how the system of negotiable instruments could be protected from fraud. Price, however, argued that if credit notes led to swindling, then there should be no credit save 'debts of honour'[40], for 'all the legal penalties are insufficient to impede the progress of successful swindling'.[41] Price was in favour of re-establishing an agricultural society in England. An author in the Pamphleteer attacked credit notes

because,by making credit too easily obtainable, these notes undermined the economy by allowing people to spend 'money before it is earned'.[42] Against such attacks on the form of late 18th century trade, the moral panic about swindling helped to uphold the system of credit paper not so much by deterring the abuse of these bills, but by the very underlying assumption of the moral panic that the use of these bills was good trade practice.

The swindling moral panic further helped to reinforce the system of paper credit by the mere fact of the search for swindlers, enemies from within the trading community. As with other witches, the norm was reinforced as the witches were hunted.[43] This was all the more the case in that swindlers were considered to operate as well-organized gangs, or even as a separate class of fraudulent tradesmen.

In describing the contemporary belief in there being an organization of swindlers, we will underline the extent and the seriousness of the fear of the enemy from within the trading community. Furthermore, another analogy will be possible between the mugging and the swindling moral panics: in both cases, one section of English society was singled out as being the section from which muggers or swindlers were most likely to come.

a) <u>An organization of swindlers</u>?

Tobias argues that during the first half of the 19th century there was a gradual development of a belief in the existence of a criminal class.[44] By 1851 Mary Carter had established her <u>Reformatory</u> Schools for the <u>Children</u> of the Perishing and Dangerous Classes, and for Juvenile Offenders. Throughout the late 18th century swindling scare, however, there was a general belief in there being at least an organization, if not an actual class of swindlers.

References to swindlers as a '<u>set</u> of ... miscreants'[45], or as 'notorious gang[s]'[46] were frequent. One author cited the Lord Chancellor himself as endorsing this view:

> I speak here from the best authority having myself heard the Lord Chancellor very lately declare, in public court, that he had credible information of the existence of a gang of swindlers in the metropolis.[47]

This fear of 'a set of men conspiring to defraud the public'[48] coincided with contemporary fears of other conspiracies whether behind machine breaking[49], in combinations against employers[50], or to overthrow the State with Jacobin revolution.[51] Paley feared low life conspiracies in cities generally which:

> ... is commonly the introductory stage to other enormities, by collecting thieves and robbers into the same neighbourhood which enables them to form communications and confederacies, that increase their art and courage, as well as their strength and wickedness.[52]

It was against this background that one pamphleteer warned that 'the Society against Swindlers[53] is opposed by a Society of Swindlers'.[54]

In <u>The Times</u> of 1786, a column ran for eighteen articles called 'The Swindler' and allegedly written by a swindler. While the authenticity of the stories may be doubted[55], they nevertheless played upon and reinforced the swindling panic. The author of these articles claimed that he was 'appointed to a <u>post</u> among a set of men vulgarly

called swindlers'.[56] The organization was supposedly powerful, including a 'silent partner' who also worked in a reputable house of business.[57] The author referred to 'our company being divided in various parts of the country.'[58] Outside 'The Swindler' column, The Times commented that 'we hear that the swindlers convened a meeting at their head quarters in ------ street the other day'.[59] The Scots 'Friends of Commerce' - a society similar to the English Society against Swindlers - also believed in the existence of 'The Society of General Swindlers'[60]. The Friends claimed that 'the head quarters of this society is in London'.[61]

The belief that there was a well-organized Society of Swindlers was reinforced with reference to a suitable scapegoat community. Just as the typical mugger is said to be a black youth, so a typical swindler was said to be a member of the London Jewish community. If there was the perception of a 'class' of swindlers whose children would require reforming, the class was of the Jewish religion[62].

Parker complained of Jews who, he claimed, built up a false business reputation by buying old warehouses which they filled with boxes of sand. Accomplice clerks were said to have pretended to use books, that were in fact bought from waste-paper sales, to give the appearance of an established business. The owners travelled to large cities to buy linen for which they paid punctually for the first few times. They then asked for a large amount of linen on credit to sell abroad. They failed to repay these debts, but when the creditors issued a commission of bankruptcy, there were large numbers of Jewish swindlers who falsely claimed to be creditors:

> Petitions are ineffectually presented
> to the Chancellor, for a number of
> unjust creditors of the same profession
> and persuasion overswear the just ones,
> and by exceeding them in number and value,

> the House obtains its certificate
> [of discharge from past debts] and
> has again the power of swindling.[63]

Jewish moneylenders were a common focus for derision in contemporary literature[64]. The unscrupulous moneylender in The School for Scandal[65] was called Moses; and in Vanity Fair[66], Jewish names were synonymous with 'moneylender':

> ... before I was married I didn't care
> what bills I put my name to, and so
> long as Moses would wait, or Levy would
> renew for three months, I kept on never
> minding.[67]

Evidence to, and questions from, the 1817 Select Committee on the Bankrupt Laws is also suggestive of a fear of specifically Jewish swindlers. Thus, in his evidence, Joshua Mayhew, a solicitor of fifteen years standing, referred in particular to 'Jew commissions' of bankruptcy as being liable to involve several frauds.[68] He claimed, inter alia, that Jewish accountants knew how to prepare complete sets of fraudulent accounts. It should be noted, however, that although he singled out the Jewish community as deserving particular attention when discussing bankruptcy fraud, he also made the somewhat unlikely assertation that 'we seldom find any respectable Jew become a bankrupt'.[69] Mayhew appears to have believed that a Jewish bankruptcy was ipso facto a fraudulent bankruptcy. The Committee itself revealed its attitude towards Jewish bankruptcies in its questions put to Thomas Tilson:

> Q: Your professionsl experience [as a solicitor] has probably been confined to persons of importance and character in society?
> A: Not altogether persons of importance.
> Q: Have you ever had anything to do with Jew commissions of bankruptcy?[70]

Furthermore, at least one author considered the motives of Jewish swindlers to be more than purely financial. In The Jew Swindler[71], the 'Little Jew' had a religious motivation in his 'hopes of plundering Christians'.[72]

Partridge suggests that the word 'swindler' was, in fact, especially applied to German Jews living in London.[73] If he is correct, the social perception of a threat from a self-propagating 'class' of swindlers is all the more likely. If so, this swindling 'class' was believed to exist half a century before Tobias dates the commonly held belief in a criminal 'class'.[74]

It is impossible to determine the veracity of there being an organized Society of Swindlers made up mainly of London Jews.[75] While organized crime was not unknown to late 18th century England[76], the Guardians or Society for the Protection of Trade against Swindlers and Sharpers (more level-headed than their later Edinburgh counterparts, the Friends of Commerce[77]), made no mention of competition from a Society of Swindlers; The Times report of a meeting of the Society of Swindlers inexplicably excluded the name of the street[78]; the fear of a conspiracy of swindlers coincides too neatly with other contemporary conspiracy scares[79] for too strong a belief in the actual existence of a Society of Swindlers; and, as we shall go on to see, few of the swindles recorded by various authors required a particularly sophisticated organization. Nevertheless it is clear that there was a 'perceived threat' from an organization, if not a 'class' of swindlers.

The norm of the paper-credit system was reinforced as the highly organized witches from within the trading community were hunted.

Actual examples of late 18th century swindles abound in the literature. Their purposes were said to be, firstly, to warn the reader of particular frauds against which he should beware; and secondly, to give an overview of a phenomenon thought to be not only a threat to English commerce, but also to be on the increase. If these were the professed purposes of the media offering frequent examples of swindling, the effect was to fire the moral panic about swindling.

Swindles may be categorized into six general heads: those relating to bills of exchange, money lending, advertising for business partners, underselling, creating a false reputation, and swindling through audacity. Each of these heads concerns dealings which were thought inevitably to precede bankruptcy.[80] There are many references in the literature on the failure of specifically bankruptcy law in quelling swindling. To act as the background to a later discussion on late 18th century mercantile attitudes towards the failings of bankruptcy law vis-à-vis the prevention of fraud[81], and to concretise the moral panic of swindling, it is proposed to describe examples of swindling under each of these heads. It will be seen that merchants perceived a technical breakdown in bankruptcy law in as much as it failed to satisfy what judges saw as its major end, and merchants saw as an important end[82]: the deterrence of trade fraud.

b) Examples of swindles

Frauds relating to credit paper, originally the sole domain of 'swindling', remained the largest of the heads of swindles. Along with

promissory notes (transferable 'IOU's), bills of exchange were the most popular form of credit paper in the late 18th century. Bills of exchange offerred great scope for fraud. They operated in the following manner: A (a 'drawer') signed and handed a bill to B (the 'acceptor' or 'payor' and often a bank at which A had an account) to pay C (the 'payee' or 'holder') a sum of money immediately, or at a future, specified date. The bill was transferable: C could sign the back of the bill ('indorse' it) and pass it on to D (the 'indorsee' and new 'holder') in return for goods or services. A long chain of 'indorsors'/'indorsees' could be created in which the eventual 'holder' could claim his debt from any of the other parties to the bill.[83] Eventually, and usually approached firstly for payment, B (the 'acceptor' or 'payor') was liable to the final 'holder'.

A common fraud in the late 18th century was for a swindler to draw a bill upon a payor for a fictitious payee (i.e. A draws a bill on B for a non-existent C). The swindler would then use the bill to settle a debt with a third party (D). A would simply tell D that he had drawn the bill on B, but had not yet passed it on to C. Alternatively, A would pretend to be C. D, the third party, would indorse the bill, thus making himself liable to all future indorsees and to the bill's eventual holder. A fictitious credit was created that tumbled when the bill became due for payment. At this time A would either have vanished or become bankrupt. B (the payor) in all but one special case of male fides[84], would escape liability for the bill claiming that it was impossible to accept a bill to pay a non-existent person (C, the fictitious payes). The swindler/drawer (A) would have received money, goods or services from the first indorser (D) who was ultimately liable to all the indorsers who signed the bill below him.

The position may be clarified with reference to a case Stone v. Freeland[85] was heard before Lord Mansfield in 1769, shortly before the

swindling panic. Cox (A) had drawn a bill on Freeland (B) for Butler and Company (C), a fictitious payee.[86]

Stone (D) indorsed the bill as payment for goods given to Cox (A). Stone (D) later attempted to sue Freeland (B) for payment. Freeland (B) claimed that since Butler and Company (C) did not exist, he could not have accepted a bill for them,and was thus not liable for the bill either to Stone (D), or to any later indorsees/holders. Cox (A) had disappeared.

In the course of his judgement, Mansfield explained why Cox (A) drew bills upon fictitious payees, not simply upon himself:

> ... too many [bills drawn by Cox (A) on Freeland (B)] would have been in circulation at the same time, in the same name, which would have had the appearance of fictitious credit.[87]

Furthermore, Freeland (B) would never have escaped paying holders of such bills by the excuse he attempted to use against Stone (D) that he could not have accepted the payment of a bill to a non-existent person.

In Stone v. Freeland Mansfield refused to accept Freeland's (B's) argument that since title could not be traced to him because of the fictitious payee, he should therefore escape liability for the bill. Mansfield found that on the special facts of this case, since the acceptor (Freeland, B) knew that he was accepting a bill with a fictitious payee:

> ... it shall not lie in his [the acceptor's] mouth to make an objection that he has nothing to do with it.[88]

Freeland (B) was thereby liable to pay the value of the bill to Stone (D).

This decision was particularly important for a string of fictitious payee cases during the 1780s and 1790s 'nearly all arising out of the bankruptcy of two firms, Livesy and Co. and Gibson and Co.'[89] This specific set of swindles involved not only strong organization[90], but also vast sums of money:

> It appears that these two partnerships had drawn and accepted bills with fictitious names upon them to the extent of nearly a million pounds a year.[91]

It was not only the payees of bills of exchange that could be fictitious. The author of The Swindler Detected discussed bills drawn on houses that contained no money of the drawer.[92] Indeed, the Friends of Commerce warned of bills that were 'drawn, accepted and indorsed by men of straw'.[93]

An imminent maturity date would have encouraged unwary merchants to indorse bills of exchange. In The Swindler - a Comedy, Sharp planned to exploit this:

> O! have you prepared those fictitious tradesmen's bills and likewise those bills of exhange that are not due until tomorrow?[94]

Sharp required at least one day to vanish.

There was, in fact, a great trade in exchanging imminently due bills of exchange for ones not payable for several months. For money soon to be realised, the holder of a bill not due for some time would be prepared to accept bills of a lower face value than his own. The

transaction often took place through the intermediary of a 'discount house' where money too was offered for bills of exchange. Advertisements appeared in newspapers offering this service:

> Bills and Notes Discounted
> Noblemen, Gentlemen and Merchants, may be supplied with sums of money (not less than 500 l) and from that to 10,000 l on their bond, bills and notes of hand on very easy terms, with the utmost secrecy and dispatch, by letters directed for T.W. at the New England Coffee-House, near the Royal Exchange.[95]

The author of 'The Swindler' column in The Times of 1786 claimed to have been forced into a career as a swindler because of a fraud perpetrated on him by a discounter.[96] Impecunious, the author held bils of exchange not due for some time. He decided to follow up an advertisement whereby 'A.B.' would offer ready money for bills of exchange. The author agreed to lose 25% of the face value of the bills, and accepted 10 gns. for £100 worth of bills, the remainder to be paid the next day. Thereafter A.B., whom the author had to seek at his home, always had better excuses as to why he could not pay the rest of the money. Other creditors then imprisoned the author for debt and he was forced to settle with A.B. for only 5 gns. more to secure his release from gaol.

An earlier reference to an ingenious fraud with bills of exchange is to be found in Samuel Foote's play The Bankrupt[97], that was first performed in 1773. Partridge accredits Foote with the first use of the term 'swindler' in a standard English text (in 1776)[98]. His credentials for talking about debt were impeccable: he was constantly on the verge of insolvency. Until he was demoralised by an unsuccessful bankruptcy petition against him in the last years of his life[99], he took his debts

as lightly as is suggested by some correspondence with his mother:

> Dear Sam,
> I am in prison: come and assist
> your loving mother.
> E.Foote
>
> Dear Mother,
> So am I; which prevents his duty
> being paid to his loving mother by
> her affectionate son.
> Sam Foote
> P.S. I have sent my attorney to assist
> you; in the mean time let us hope for
> better days.[100]

Friend to Dr.Johnson and Garrick (although both respected rather than liked him), he was well-known in late 18th century London, but has been out of print in England since the Jon Bee (pseudonym of Jon Badcock) edition of 1830.[101] In 1950 Grzegoz Sinko published an aptly titled article on Foote - 'Samuel Foote - The Satirist of Rising Capitalism' - in which he rightly claims that 'this nearly-forgotten author deserves better treatment than has been his share heretofore'.[102]

We will return to Foote's work throughout, but of particular interest here is the description in The Bankrupt of a fraud relating to bills of exchange. Two scoundrels, Pillage and Resource advice to a bemused Sir Robert Riscounter whose business was tumbling. Part of their recommendations was to:

> ... summon your creditors, lay your
> conditions fully before them, convince
> them you have a fund to answer all their
> demands, and crave a respite for three or
> four years.[103]

Pillage explained that the creditors, within the three to four years, would be bound to want to sell the bills, even at a thirty to forty per cent loss, to replace them with ready money. Sir Robert could not see how this would help him. Pillage asked: 'what hinders you from privately buying the debts?'[104]

Swindles relating to bills of exchange were particularly worrying for merchants. Duffy has shown how late 18th century merchants were interconnected by diverse ties created by the use of these bills.[105] He has demonstrated how bankruptcy itself proved contagious because of these interconnections. It is not surprising that a moral panic arose around fraudulent bills of exchange - a set of fraudulent bills threatened not only the hapless holders of these bills, but also their creditors, and the creditors of their creditors.

Our second head of swindles relates to money-lending. The most simple swindle under this heading was described by The Times in 1794.[106] The money-lender took a security of twenty times the loan when, The Times alleged, the offer of money 'at an hour's notice' was advertised. The money-lender took the security, handed over a little desperately required money before returning to his house promising to bring the rest, but then vanished. Whether or not anyone was sufficiently gullible to be fooled in this way, this description of a swindle nevertheless found a readership amongst purchasers of The Times.

Money-lenders, according to the author of The Swindler Detected, often operated from Fleet debtor's prison.[107] Gaol was little deterrence to swindlers according to contemporaries caught up in the panic. The author explained how the lender would insist upon the borrower first taking out an insurance policy. A deposit was paid to the insurance company that turned out to be a sham run by the money-lending swindler himself. The borrower, usually already on the brink of insolvency, lost the deposit to someone already in debtor's prison

and therefore not liable to be arrested for debt.

The attitude towards money-lenders in the late 18th century is evoked in Sheridan's School for Scandal. Sir Oliver sought to trick his nephew, Charles, into thinking that he was a money-lender:

> Sir Oliver: Ain't I rather too smartly dressed to look like a money-lender?
>
> Sir Peter: Not at all; 'twould not be out of character if you went in your own carriage. Would it Moses?
>
> Moses: Not in the least.[108]

Moses, a real money-lender, explained to Sir Oliver that the credibility of the ruse depended upon his asking for 40-50% interest, unless Charles was in distress, in which case he should ask for 80-100% interest. The 18th century money-lender was considered to be wealthy, unscrupulous, and often Jewish.[109]

The third head of swindles concerns advertising for partners in a firm that the swindler has no intention of establishing. The Times of 1794 gave an example of the kind of advertisement used, and then explained the fraud:

> "Any person having four or five thousand pounds at his disposal will be taken in a lucrative business, where he may with very little trouble, make 20 p.c. of his capital." The advertiser, when he procures the new partner's money, becomes bankrupt, and by fictitious books and fictiticus creditors[110], gets his certificate and sets up in business on the deluded man who sought for 20 p.c.[111]

Again, the actual frequency of this fraud is less significant to the swindling panic than the fact that people, if they believed the press, perceived such adverts as examples of attempted swindling.

Fourthly, there were the set of swindles relating to underselling. Hibbert-Ware explained that when a tradesman realised that he was on the brink of insolvency, he tried to put off the day as long as possible:

> ... he will be induced to seek for credit elsewhere, and treat for more commodities than his capital can possibly sanction, in order to sacrifice them to <u>loss</u> for the temporary convenience of ready money.[112]

He will have stolen customers from honest traders, whom he has undersold, and he will have defrauded his creditors whom he will be unable to repay. Sweet was so concerned about this fraud that he wished it to be included in the Bankruptcy Acts as a fraud denying the perpetrator the hope of discharge.[113]

There was also a fear that there were ware-houses where stolen goods were received and then re-sold at a price no honest trader could afford to offer.[114] The ware-house owner would pay for the stolen goods only one-third of their value; half of this would be in cash, the other half in bills useless to anyone but fellow swindlers.

In an analogous fraud to underselling, a 'petty swindler' would gain goods on credit and then, instead of dealing with them, pledge them for cash in hand, often to repay earlier, troublesome creditors.[115] Adam Smith argued that if stock was lent, it could validly be used as capital by a tradesman seeking a profit, but:

> If he uses it as stock reserved for immediate consumption, he acts the part

> of a prodigal, and dissipates in the maintenance of the idle what was destined for the industrious.[116]

The fifth head of swindles were ones involving false reputation. Frauds of this nature were a particular worry in the 18th century. As we have[117] and will see[118], reputation was essential to the operation of the 18th century market. Lady Sneerwell's description of Charles in The School for Scandal tied together one's place in the business world with one's reputation: 'Charles, that libertine, that extravagent, that bankrupt in fortune and reputation.'[119] Reputation was the pre-requisite for business success and, indeed, Payne (referring to Adam Smith [and Perkin]) has argued that reputation itself represented success to the Georgian mind: 'the pursuit of wealth was the pursuit of social status, not merely for oneself but for one's family'.[120]

False titles[121], and living in high society brought with them greater creditworthiness. People in this position were said to pay their bills promptly, and then to ask for large amounts of credit for, for example, an impending marriage.[122] The goods were then auctioned, the swindler advertising that a gentleman planned to go abroad and sought to sell up in this country.

Several swindles are described in Vanity Fair.[123] Rebecca Crawley (née, notably, Sharp) contrived a false reputation for herself and her husband. They patronised the tradesmen of their wealthy Aunt Crawley who was a half-sister to a baronet.[124] The goods they received on credit gave them sufficient reputation of grandeur to obtain more credit.[125] As for these debts:

> Every servant...was owed the greater part of his wages, and thus kept up perforce an interest in the house. Nobody in fact was

> paid... and this I am given to understand
> is not infrequently the way in which people
> live elegantly on nothing a year.[126]

Other reputation-based swindles involved claims to inheritance. The Examiner reported that two men discussed the death of a rich Bolton gentleman in a public house in a nearby village.[127] A third man apparently overheard this and wondered if it was his Uncle Mather. The other two said that it was, and the 'specious appearance'[128] of the three gained them credibility in the public house. The 'nephew' borrowed money from his fellow drinkers for his journey to Bolton. On his return, he gained a reputation by his claims that the house alone was worth £120,000 and 'upon the credit of this statement he obtained goods to a considerable amount'.[129] Having secured, the paper claimed, £6,000 worth of credit ('in millinery alone £600 was contracted'[130]), the 'nephew' inevitably disappeared. He was supposedly a coal-miner.

While these swindles give a taste of the 18th century fear of false reputation, whether of a trader or his customers, the concomitant fear of anonymity was played upon in The Swindler - A Comedy.[131] Sharp planned to carry out a series of swindles after which, perhaps wisely, he intended to change his name by private Act of Parliament and to swindle once more.[132]

Sixthly, and finally, there were swindles that can only be described as being audacious. Tradesmen had to be constantly on guard. Examples range from Foote's villains' plans in The Bankrupt:

> Pillage: ... and now we talk of the fire,
> for a present supply [of money], you
> may burn a warehouse or two, after it
> has been gutted of all its contents.
> Resource: And recover the full amount of
> the [insurance] policy,[133]

to simple tricks such as James Pitt defrauding the Misses Lewis of £4. 15/6d by falsely claiming to have packages for them from the East Indies 'the landing of which had cost him that sum'.[134]

Other examples of audacious swindles abound. A magistrate tried to swindle an illiterate woman of £50 by showing her letters, that he claimed only he could revoke, allegedly stating that her brother's executed body was to be taken to Surgeon's Hall for dissection.[135] A doctor saw through the fraud, and the swindling magistrate (so serious was swindling held to be) offerred no excuse but that he wanted the money for a 'private charity'.[136] Masters would accept fees from parents for apprentices whom they would maltreat until they absconded.[137] People would enter Parliament to escape liability for imprisonment for debt.[138] And publishers offerred rewards for information 'if any Swindling Printer brings into the world an illegitimate issue [of a book]'.[139]

The novella, The Fashionable Swindler[140], describes many audacious swindles. The 'celebrated and elegant sharper'[141] George R. had a series of adventures in which he feigned a secure income to win the hand of a wealthy widow, he dealt in counterfeit diamonds, he lived in luxury paid for by credit, he scoffed at section 12 of the Bankruptcy Act[142]:'he had been known to bet £5 on the turn-up of a single card',[143] but he always escaped his creditors.

Thackeray devoted two chapters of Vanity Fair to 'How to Live Well on Nothing a Year'.[144] There are, in all, twelve suggestions. Successful gambling, finding a sinecure, and waiting on dying rich relations are the first three. The fourth was peculiar to the years post Waterloo when 'a broad of hardy English adventurers... swindled in all the capitals of Europe'.[145] The swindles they committed were multifarious:

> ... swindling inn-landlords, passing fictitious cheques upon credulous bankers, robbing coachmakers of their carriages, goldsmiths of their trinkets, easing travellers of their money at cards - even public libraries of their books.[146]

The fifth swindle was more ingenious. Rebecca persuaded English creditors to accept a tenth of their due because, she convinced them, 'Colonel Crawley would prefer a perpetual retirement on the Continent to a residence in this country with his debts unsettled'.[147] Indeed, she did not even employ her own lawyers but made use of those of the creditors.[148] The other ways to live well on nothing a year were: to use the reputation of family friends to gain lodgings, to gain and keep a reputation and thereby credit from tradesmen, not to pay servants' wages, to look wealthy to attract more credit, to be fashionable and noticed, to be on friendly terms with rich relations, and to be sponsored by some wealthy relation into London society.

This, then, was the moral panic about swindling as it was fired by the media. Throughout the literature there are references to the failure of specifically bankruptcy law in abating swindling that was thought inevitably to lead to bankruptcy.[149] A discussion of this perceived failing of bankruptcy law will demonstrate the extent to which late 18th century merchants saw a technical breakdown in bankruptcy law, and will help to contextualise their calls for bankruptcy reform to be discussed in later chapters.[150] Further contextualisation of mercantile dissatisfaction with bankruptcy law will be possible by discussion of two quite different extra-judicial approaches to the deterrence of swindling: campaigns by the press, and by the Society against Swindling.

II. Dissatisfaction with bankruptcy law

a) Bankruptcy law as failing to deter swindling

In 1819, the Pamphleteer included an article about credit in which it was suggested that 'nothing is more likely to give energy and spirit to commerce'.[151] A proviso was added, however, that this was only if:

> ... it is securely protected by the vigilance of the law, confined in proper hands, and kept within its legitimate bounds.[152]

At the end of the 18th and beginning of the 19th centuries, the protection of credit from swindling was thought to be the domain of bankruptcy law which, in turn, was thought to be unsuccessful in fulfilling this role.

Writing specifically about the law of debtor and creditor, Price claimed that 'all the legal penalties are insufficient to impede the progress of successful swindling'.[153] Indeed, 'the bankrupt stands excused on the plea of universal speculation'.[154] The Friends of Commerce argued that bankruptcy laws generally 'have been found to work but very indifferently'.[155] While 'insolvencies and bankruptcies daily increase'[156], debtors use bankruptcy laws for 'the old and well tried trade of profitable insolvency'.[157]

In an ironical and bitter address to 'Mr Alderman', the author of The Swindler Detected attacked the failure of the 'stern face of justice'[158] in stemming swingling. The fictitious swindler George R. displayed a similar contempt for the law. Finally tracked down by his creditors who attempted to arrest him for debt:

> He mounted his horse, and away they all rode together to the house of the officer; from whence he removed himself by a habeas, and the action was brought to trial, and defended, and the Plaintiff nonsuited, owing to the statute of limitation; six years having expired without any effort or promise being made to recover the debt. There were numerous detainers ready, waiting the event of the trial, but the fate of this one determined the rest and he was set at liberty, highly exulting at being a match for this banditti of brutes, as he called them.[159]

Willes J., in 1769, had accepted that bankruptcy law did not take sufficient cognizance of pre-bankruptcy frauds.[160] Seeing bankruptcy proceedings as a criminal action, he admitted that some frauds by insolvents did not constitute acts of bankruptcy and therefore did not make the perpetrator liable to this action.[161] Later, in 1811, Eldon L.C. too took note of pre-bankruptcy frauds; however, despite seeing the withholding of certificates of discharge as the appropriate punishment for swindling, he denied any responsibility of the judiciary to ensure that this punishment occurred:

> I have often had occasion to observe, and I believe I am not much mistaken, that it does not belong to me to look into the moral life of the bankrupt, and the nature and quality of his acts before the bankruptcy. The Legislature has left it entirely to the caprice of creditors, who may be under a moral, but are certainly under no legal obligation to sign his certificate.[162]

Further evidence of dissatisfaction with bankruptcy law in preventing the increase in swindling is evident in the anti-swindling campaigns of the press and the Society against Swindlers.

b) Extra-judicial attempts at quelling swindling.

The press campaign against swindling sought to warn about the overall situation with references to specific swindles or swindlers. The alternative campaign, a self-help society of merchants called The Guardians or Society for the Protection of Trade against Swindlers and Sharpers, sought to prevent individual swindlers from practising trade, and only infrequently made reference to the overall situation. The press approach, then, was aimed at the individual tradesman and its message was caveat emptor. The Guardian's approach was collectivist, seeking to rid the market of individual miscreants. Whether the approach was individualistic or collectivist, these campaigns both displayed contemporary despair at bankruptcy law's inability to deal with swindling unaided.

The press, which had helped to create the moral panic about swindling, maintained the newsworthiness of swindling with such editorial comment as:

> The number of rogues in this metropolis [London] comprising housebreakers, highwaymen, footpads, pick-pockets, sharpers, swindlers, shop lifters, etc. etc. added to the frail sisterhood are computed to compose one-sixth part of its inhabitants.[163]

The Times campaign included claims that powerful swindlers had attempted to suppress 'the swindler' column of 1786 with libel actions.

His editor extolling the virtues of a free press[164], and being congratulated by 'an attorney'[165], the author of this column claimed that:

> I have received a letter ... threatening me in high sounding threats and technical language with no less than nineteen accusations.[166]

Since names were not named, this claim, like much of 'the swindler' column, was more intended to cause worry than to report facts.

The column ran from 15th July to 14th October 1786 and included some eighteen articles. They were supposedly written by a swindler who, as may be recalled, was tricked out of his money by 'A.B.'[167]. He had intended to 'crab-stick' A.B., but, having been in prison which are for swindlers 'as schools are to form the minds of authors'[168], he instead begged A.B. to employ him. Gaol, far from preventing swindling, was seen to be the seed bed of swindlers.[169]

In another article, the swindler perjured himself to secure the escape of a fellow swindler from a charge of creating fraudulent bills of exchange.[170] The author hinted that the law could not prevent swindling, only the press campaign could hope to do this. Thus Mr Trifle[171], who had failed to rid his neighbourhood of a swindler by use of the law, was advised by 'the swindler':

> If Mr Trifle will send a description of the gentleman's person alluded to, directed to the Swindler [at The Times], it shall appear in one of his numbers, which he doubts not will prove of more use to the neighbourhood than twenty indictments.[172]

The column continued with anecdotes, letters and threats[173] that the author had received. They played on the fear of anonymity[174] and described swindlers in terms appropriate to a Gothic horror.[175]

On 14th August 1786, the paper declared that:

> The Swindling Mania [sic] is rapidly decreasing. The periodical numbers in this paper, under the title The Swindler are operating as a coup de grace to that very honourable family.[176]

Later that month, the Society of Swindlers reportedly met to discuss the threat to them posed by The Times.[177]

Some four years later the campaign continued, as did The Times' air of self-congratualtion at helping to destory swindling. In 1790, the paper reviewed The Jew Swindler ensuring that Little Jews' comment about his fraudulent advertisements was included: 'my advertisements begin to fail - The Times is up to me.'[178]

In these ways the newspapers campaigned against swindling. Taking examples from the papers, the individual tradesman himself had to ensure that he was not defrauded by a swindler. The law was too soft[179], deportation a mere foreign visit[180], and prison, 'the only security the public have'[181], seed beds for new swindlers.[182]

The press warned about the overall situation of swindling. In so doing, the press often focused upon the history of one 'swindler' not so much to prevent that swindler from re-entering trade (as was the policy of the Guardians), but to act as both a caution and an entertainment for its readership. The effect on the individual 'swindler's' reputation, so vital to trade in the 18th century, was nevertheless devastating:

> A land of liberty this! I will maintain it, the tyranny exercised by that fellow [an editor] and those of his tribe is more despotic and galling than the most absolute monarch's in Asia... Their thrones claim right only over your persons and property, whilst this mongrel, squatting on his joint stool, by a single line proscribes and ruins great reputations at once.[183]

Miss Eliza Francis Robertson was one person whose reputation suffered irretrievably from the press campaign against swindlers. She was imprisoned for debt in 1801 and spent the last four years of her life in debtors prisons writing about her past life.[184] She accused the newspapers, and in particular the Sun, of 'endeavouring to prove me a swindler'[185], and she sought to deny this charge.

As a swindler, she was accused of other nefarious activity. To innuendoes about her relationship with Miss Charlotte Sharpe, she replied:

> Our Saviour not only approved of an attachment between persons of the same sex, but has himself consecrated friendship by divine example.[186]

The papers insinuated other disapproved sexual practice upon Miss Robertson:

> Among other ludicrous things that have appeared in the newspapers, is a paragraph that I went about to obtain credit in men's clothes.[187]

She went on to defend herself by stating that 'surely in this attire I could not ask credit on Miss Robertson's account!'.[188]

Although already imprisoned for debt and referred to by the Universal Magazine as 'a femal swindler'[189], it was the case of Haycroft v. Creasy (1801)[190] that finally ruined her reputation. That case concerned Haycroft giving Miss Robertson credit on the strength of Creasy's recommendations as to her creditworthiness. Since Creasy had said that he knew, as opposed to thought, that Robertson was credit-worthy, and since Creasy knew that Haycroft had relied upon his word, Lord Kenyon held Creasy liable to pay Haycroft £485. 8/4d damages - the extent of Haycroft's lost loan to Robertson.[191]

Since the case endorsed the press' campaign that there were swindlers, and that Miss Robertson was one of them, the case was well reported in the papers of the next day.[192] The Morning Herald headed its report of the case: 'The Fair Swindler of Blackheath'.[193]

Robertson borrowed money from Haycroft to have her house in Blackheath decorated and re-furnished. She gained credit on the strength of Creasy's word whose son was taught by her at Charlotte Sharpé's school. She gained a reputation for creditworthiness through the alleged death of her wealthy mother, her claims to a valuable estate in Scotland, her high living, and her carriage which allegedly had three coronets on it with a coat of arms in each. Having decorated and re-furnished, she found herself unable to repay her debt to Haycroft who imprisoned her for debt.

Robertson's reputation was ruined by Haycroft v. Creasy because both Erskine for the plaintiff, and the Attorney-General for the defendant sought to prove her a swindler. Erskine tried to prove that Robertson was so notorious a swindler that Creasy had been negligent in the extreme in having recommended her as being creditworthy to Haycroft. Erskine relied upon newspaper reports as evidence of

Robertson's notoriety:

> Mr Erskine opened the case on the part of the plaintiff, and said it arose out of the adventures of a female swindler, who had lately resided at Blackheath, and whose history was made known to the public through the medium of the newspapers.[194]

The Attorney-General attempted to establish that Robertson was not only a swindler, but so successful a swindler that she had also taken in his client, Creasy. He described her as

> ... this artful and wicked woman who had swindled every body who ever gave her credit.[195]

Like Erskine, the Attorney-General referred to the recent press campaign against Robertson and could not hide his delight at having tracked down a witch:

> The evidence he called gave an account of that which the public knew pretty well already, namely, the Swindling practices of Miss Robertson at Blackheath, etc., the recital of which, however, excited, in some instances, a great deal of mirth, although to the losers it was a very serious thing.[196]

The editors of the papers were doubtlessly pleased with Mrs Neale's evidence, in particular, that coincided with their thesis that everyone should beware: 'Miss Robertson appeared to to be a very amiable, sensible woman'.[197]

The evidence solely concerned how bad a swindler Miss Robertson

was. Even though he found for Haycroft, Lord Kenyon accepted that Robertson had taken in Creasy: 'he imputed no intentional evil to Mr Creasy'.[198] And despite his 'apprehension [that] a great deal of the evidence went beside the question'[199], this case, nevertheless, destroyed Robertson's reputation.

Miss Robertson's pamphlets were the means by which she financed herself in prison.[200] She attempted to prove her innocence stating that her persecutors should 'judge not with the imagination but with understanding'.[201] She threw doubt on some of the witnesses in Haycroft v. Creasy asserting that many were themselves in debt, that one witness (Philly, a milliner) had previously said that Robertson 'deserved to be hanged, because she hated Presbyterians'[202], and that another witness had a drunkard husband. As for her own background:

> Let me ask the reader, if it appeared probable, that a woman who had resided seven years on the same spot, esteemed and respected, who was...punctual in the payment of her bills [could possibly be a swindler]?[203]

It was vital to her case that she should re-establish her reputation.

Robertson then attempted to verify each of her claims to credit-worthiness. For example, she explained the presence of the insignia on her carriage that had been so heavily relied upon in Haycroft v. Creasy as evidence of her attempts to build up a false reputation. She had bought the carriage from an Earl and had not had time to remove his insignia:

> ... but could anyone prove I had put [the coronets] on, with a view to defraud or deceive any creditors?[204]

She had become insolvent, she claimed, because more work was done on her house than she had ever asked for. Even as an insolvent, she was exemplary:

> I am an exception to most insolvents,
> I can give an honest and just account...
> of all the money I have received and
> expended for the last two years.[205]

Perhaps fairly, she concluded, 'if I was an artful swindler they [her creditors] proved themselves egregious fools'.[206]

By the time Robertson v. Oakley[207] was heard at the High Court of Pleas in the Kent Assizes at Maidstone on August 7th 1801 (Haycroft v. Creasy was heard on 14th July 1801), Robertson's reputation had been quite destroyed by the press. Robertson brought an action of trover against one of her creditors, Oakley, who, she alleged, had seized furniture and goods from her well beyond her debts to him.

Oakley's counsel, on home ground, told the jury that everyone had the right to the protection of the law. Ignoring inventories[208], he then went on to base his entire case upon the characters of the suitors.[209] He argued that although the jury would have read 'in the newspapers of the Blackheath Swindler, the Female Imposter'[210], Macdonald C.B. should fear no bias because as counsel in Maidstone, he had:

> ...seen too much of the jury he was
> addressing to suppose they could be
> influenced by the prejudice he had
> been describing.[211]

He then went on to accuse Robertson, Sharpe and even Creasy, who, he claimed had gone on holiday with Robertson and Sharpe to Margate, of

being swindlers.

The Chief Baron did not object to the way that the evidence was going. Nonsuiting Robertson, he stated, in accord with the opinion of the press, that he 'considered both Miss Robertson and her companion Miss Sharpe, as two of the most bare-faced swindlers that ever existed.'[212]

Miss Robertson's history demonstrates the power of the press' campaign against swindling in destroying the all-important reputation of an alleged swindler. It is an example of the press' use of individual cases to act as warnings for others about swindling in general. It also shows how the press' campaign, and the swindling panic, affected judges in their decision-making in cases concerning caught swindlers. Macdonald C.B. appeared to be more afraid of a swindler using the law in her favour, than he was concerned that a fair trial took place in his court.

Robertson's last years were spent writing pamphlets in Huntingdon[213] and Fleet prisons to keep herself and Miss Sharpe. To the last she chose clever methods of seeking to establish her <u>bona fides</u>. She wrote explanatory poetry dedicated to nobles of repute (including Lady Dudley and the Marchioness of Buckingham), and even received benevolence from the Earl of Sandwich.[214] Three years after her death someone, protecting their own reputation by anonymity, attempted to resurrect hers.[215] It is not impossible that Thackeray's protagonist in <u>Vanity Fair</u>, Rebecca <u>Sharp</u>, was a reference to the reported exploits of the Misses Robertson and Sharpe.

This, then, was the press' response to a perceived failure of bankruptcy law in preventing swindling. Individual swindles and swindlers were exposed, and the readers were impliedly warned to be careful in their financial dealings. <u>Caveat emptor</u> had to compensate for the inadequacies of bankruptcy law.

In a different manner, the Guardians or Society for the Protection

of Trade against Swindlers and Sharpers also attempted to counter perceived deficiencies in bankruptcy law. While the press encouraged individual merchants to be wary in their relationships with fellow merchants, the Guardians aimed at a brotherhood of good merchants, with detected swindlers unable to participate in this community.[216]

The Guardians were established as early as 25th March 1776. By 1786 its funds amounted to £882. 8/6d made up of investments and no more than 1 gn. per year subscription fees from each of its members.[217] In 1799 its membership lists included 325 names, including twelve honorary members and the committee.[218] Amongst its ranks were the Chamberlain of London as its chairman, an alderman who was also a Member of Parliament as its vice-chairman, and amongst its honorary members were three knights, a Lord, and the Member of Parliament for Newcastle.

The Guardians sought to prevent swindling in three ways. Firstly, they attempted to ensure that only fair tradesmen could join[219]; secondly, they issued lists of fraudulent tradesmen; and thirdly, they helped to finance private prosecutions and petitions of bankruptcy taken out by members.

Membership of the Guardians entitled the trader to an advertisement of his honesty in the form of a certificate stating him to be 'a person of good credit and reputation'.[220] This would probably be displayed at the trader's business premises.

Not only did membership offer this certificate of a trader's good name, it also provided an opportunity for traders to build up friendships with other fair traders to the benefit of their mutual business interests at the Society's informal dinners. An advertisement for an annual dinner of the club appeared in The Times of 25th April 1786[221], of which it was said in The Times of 29th April that 'the meeting was numerous and a very spirited subscription entered into'.[222]

The Guardian's concern that all of its members were entirely trustworthy is underlined by rule 24 of the 1816 edition of its Rules and Orders. By that rule, the Society's funds could be used to reward any member to the extent of 10 gns. for detecting a swindler in the club. The fear of infiltration by swindlers was such that this reward was over twenty times the amount that the committee was empowered to spend towards alleviating the losses of a member who had fallen victim to a swindler.

The club, then, firstly sought to deter swindling by extending its membership to establish a sizable community of trustworthy traders. This method of preventing swindles relied not upon the law, but upon mutual confidence amongst merchants.

This self-help approach is also apparent in the second method of deterring swindling: the issuing of lists of untrustworthy traders. Thus, rule 21 placed a duty on the club's secretary to keep a record of people not to be considered for membership of the club 'and also better to inform the members of the names of such persons who may fall under the above description'. Further, advertisements were taken out in newspapers to warn merchants generally about specific people or bills of exchange. For example, in The Times of 12th January 1786 the Guardians warned against bills 'drawn upon or appearing to be accepted by Mess. Wagstaffe and Co., No 80 Cornhill'.[223]

The third means for preventing swindling demonstrates how the Guardians, unlike the press, held the law in some respect. Should the secretary receive a complaint from a member about an alleged swindler, he was to take such measures 'as are proper and legal'.[224] Indeed, a professed aim of the Society was 'to detect and prosecute the offenders and if possible to extirpate that series of villainy'.[225]

The press' dissatisfaction with the law was that since swindling continued, the law was, quite simply, unsatisfactory. Punishments were

too light. The Guardians, however, were apparently dissatisfied with the law's inability to _detect_ swindling and with the _costs_ of prosecution.

The detection of swindling was to occur through the Guardian's lists of bad merchants, compiled with the help of the membership. The costs of prosecution were to be alleviated by the Society acting as both a moral crusader, and as a form of insurance policy for its members. Although the actual legal provisions employed by the Society against swindlers are obscure, the Society was empowered to fund prosecutions of swindlers on behalf of its members, and to give relief to a member of more than three years standing a sum up to 50/-.[226] The Society could also provide money for the defence of a member accused of swindling.[227]

The press reaction to the Guardians was favourable. They maintained the newsworthiness of swindling, and provided examples for the press' general thesis of an age of swingling. _The Times_ of 1st May 1786 claimed that 'few institutions have been found of greater utility'.[228] While on 22nd March 1791, the paper acknowledged that even though James Kelly had only just been convicted of 'swindling' the Guardians had advertised his name some years previously 'on suspicion of having committed several frauds'.[229]

The Guardians themselves confidently expected their activities actually to _end_ swindling. In the Chairman's speech of April 1786, he announced that:

> The increase in swindles in every class of cheating and imposition was alarming, but an increase in the Society would soon decrease them.[230]

The mere existence of the Society was held to be a deterrence to swindlers.

Perhaps the last mention of the Guardians is to be found in the 1831 pamphlet, printed in Edinburgh, A Caution to Bankers, Merchants, and Manufacturers. In it, the 'Friends of Commerce' alluded to a London Society for the Protection of Trade 'already' established. The Friends called for similar Societies to be established in Scotland, but only so that they could print 'good' and 'bad' trader lists. The Friends did not envisage aiding members with private prosecutions.

Less pragmatic than the Guardians, the Friends of Commerce hoped that the new Scots Societies would 'supersede' the insolvency and bankruptcy laws. The desired change was, in fact, quite revolutionary:

> Having an accurate knowledge of the circumstances and character of all insolvents, the societies for the protection of trade would divide them into two classes - the unfortunate and the fraudulent.[231]

This aspiration represented complete dissillusionment with at least the Scots Insolvency and Bankruptcy Laws which were considered to have a role in preventing swindling, and were seen to have failed in achieving this end.

Collective approaches to law enforcement, or, indeed, as alternative crime prevention agencies to the legal system, were not universally popular. The Reverend Sydney Smith was concerned that such societies (his own example was Societies for the Suppression of Vice) had sufficient funds to be careless in whom they prosecuted.[232] Even an unsuccessful prosecution could ruin a man's reputation. Further,

Smith was concerned that once caught up in day to day business, these societies would seek vice (or swindling) where none was to be found for 'men whose trade is rat-catching, love to catch rats'.[233] Whereas the individualism and inter-personal distrust recommended by the press went largely without comment, Smith, at least, saw collectivism as conspiratorial and paving the way for 'Methodist Jacobinism'.[234]

The press campaign against swindling, and the activities of the Guardians or Society for the Protection of Trade against Swindlers and Sharpers are both representative of extra-judicial attempts to stem the tide of what was seen to be a surge of swindling. Swindling itself was a moral panic in the late 18th century: there was a widely held fear that organisations of swindlers would undermine, in particular, the various forms of credit paper that were so essential to the late 18th century market place. This panic - no doubt, in part, coinciding with an actual increase in credit-related fraud - had the effect of protecting the practice of using negotiable instruments by the panic's underlying assumption that swindles with these bills should be curtailed.

The perceived growth of swindling was largely blamed upon bankruptcy law which was held to take insufficient account of pre-bankruptcy frauds and, as will be seen, was actually thought to be a vehicle for fraud. The moral panic about swindling, then, was not only the context in which calls for reform of bankruptcy took place; it also represented, as far as the merchants were concerned, a technical breakdown of bankruptcy law itself. For the merchants, bankruptcy law should redistribute the bankrupt's remaining estate ratably amongst his creditors, should reward honest with a certificate, and should punish fraud through the denial of a certificate. Bankruptcy law was thought to be singularly failing with respect to this last object. As will be argued later, the swindling panic, the belief that 'sham' (or friendly)

bankruptcies preponderated, and the increasing number of bankruptcies per year during the Napoleonic Wars, led to a crisis in the judicial view of the meaning of bankruptcy law.

Chapter Six

The Experience of Sham Bankruptcy

It has been seen that early 18th century merchants considered most bankruptcies to be the result of misfortune. Beawes concurred with Savary's opinion that 'the failures of merchants oftener proceed from ignorance, imprudence and ambition, than from malice and design'.[1] However by the late 18th century there was a generally held view amongst merchants that bankruptcy law was being used mainly as a vehicle for fraud. In Sam Foote's The Bankrupt, Sir Robert Riscounter directed a comment at the two swindlers, Pillage and Resource:

> You seem to think then, gentlemen, that it is the duty of every honest merchant to break once, at least, in his life, for the good of his family.[2]

In character, Resource replied: 'not the least question of that'.[3]

Alongside the swindling moral panic, and part of the perceived technical breakdown of bankruptcy law, was the merchants' belief that most bankruptcies were 'sham' bankruptcies orchestrated by the bankrupt himself in order to have himself 'white-washed, according to the common phrase'.[4] The present chapter will briefly survey the mercantile belief in the preponderance of sham bankruptcy. This will help further to contextualise the merchants' calls for bankruptcy reform, and will also display the extent to which merchants were of the opinion that bankruptcy law, as it stood, worked against, rather than in the interests of English trade. The chapter will continue with a discussion of firstly, how it was unlikely that sham bankruptcies in fact prevailed, and secondly how, nevertheless, merchants experienced sham

bankruptcies as being the norm. Finally, a radical proposal for the reform of bankruptcy law will be considered. This proposal will be seen to have offered not only the end of sham bankruptcy, but also an entirely new form of bankruptcy law.

I Sham Bankruptcy

The most common way that a bankrupt could ensure that 'a failure [was] the means of making his fortune'[5] was through a sham bankruptcy. As noted: creditors had prima facie control over the granting or withholding of certificates of discharge. The beneficial consequences for a bankrupt of having friends, or people in his pay[6], as creditors to his bankruptcy are obvious. The friendly 'creditors' could take out a commission of bankruptcy and clear the bankrupt of all past debts so quickly as to deny the real creditors any dividend under a commission.[7] If the bankrupt had borrowed furiously before his bankruptcy, he would have made his fortune. Alternatively, real creditors could have taken out a commission of bankruptcy against an insolvent trader. Again the certificate would be ensured, and at least some of the remaining estate kept by the bankrupt, if he could procure friendly creditors of such number and value as to outweigh the real creditors.

To establish friendly creditors and a 'sham' bankruptcy, then, a bankrupt had to allow fictitious debts to be proved against him. Since the proof was solely between the bankrupt and his friendly creditor, and since 'the crowd and pressure of business renders it impossible for commissioners to give [the proof of debts] that time they ought',[8] it was relatively easy to set up fictitious debts. The method generally adopted was:

> ... the issue of accommodation bills, or in other words, bills for which the bankrupt has received no value whatever. These bills are passed into third hands, apparently for a valuable consideration, and being provable debts, exceeding in amount the debts of bona fide creditors, carry the choice of assignees and the certificate.[9]

The centrality of accommodation bills to the fraud of sham bankruptcy invites some consideration of their operation.

a) Accommodation Bills

As today, an accommodation bill was a bill drawn, accepted or indorsed without any consideration moving towards the party making himself liable to the bill so as:

> to accommodate the drawer or some other party; i.e. that the party accommodated may raise money upon it, or otherwise make use of it.[10]

Mayhew explained how accommodation paper operated in the normal course of trade, with the accommodator in the position of acceptor: with accommodation bills, 'bills without any consideration passing between the drawer and acceptor',[11] 'the acceptor comes forward as the surety or guarantee of the drawer'.[12]

The object of such bills was not generally fraudulent, but 'the creation of a security to raise money on'.[13] A question posed by the Select Committee of 1818 helps to explain the use of such paper:

> You must be aware that cases sometimes occur, when individuals of wealth and character, out of kindness, accept from a person in lower life a certain number of bills?[14]

Thus, a wealthy merchant or landowner might lend his name to someone starting off in business or about to undertake a venture beyond his own capital.

In Sweet's explanation of the method most commonly used to create fictitious debts[15] in a sham bankruptcy, the bankrupt was ostensibly in the position of acceptor and accommodator. On the face of it, A was impecunious and owed money to C. A went to B (the future bankrupt) for assistance. Out of kindness B agreed to accept, without consideration, a bill drawn on him by A for the benefit of C.

One of two events now occurred. In the first instance (that of the <u>wholly</u> sham bankruptcy), C demanded payment from B who committed an act of bankruptcy. C took out a commission of bankruptcy against B. In the second instance (that of the <u>partly</u> sham bankruptcy), a commission of bankruptcy was taken out against B by other creditors. C entered the commission as one of the creditors.

In reality A (if he existed) and C were in the pay of, or were friends of B. B, the bankrupt, had established debts against himself for which he had received neither goods nor services. C was set up as a friendly creditor 'for the purpose of carrying the choice of assignees, and getting possession of the property, and obtaining the bankrupt's certificate'.[16] Furthermore, there was little to prevent the bankrupt and his friendly creditor from placing an earlier date on the accommodation bill so as to avoid suspicion that the bill was created solely for the purposes of the bankruptcy.[17]

The use of accommodation paper to establish fictitious debts was altogether more subtle than the use of bare IOUs. Firstly, the bankrupt would have had to have proved that he had received valuable consideration for an IOU. Secondly, the bona fide holder of an accommodation bill was, at law, in an exalted position. He had given valuable consideration to the drawer from whom he received a bill. If a third party (i.e. the fraudulent bankrupt in this instance) had accepted the bill to accommodate the drawer, whether or not the bona fide holder knew of this transaction, it was held that he should not lose the value of the goods or services given to the drawer. Thus, in a case concerning accommodation paper, Eldon L.C. found that:

> ... the holder, if he gave a bona fide consideration for it, is entitled to recover the amount, though he had full knowledge of the [accommodating] transaction.[18]

Indeed, as the historian of negotiable instruments commented:

> The unassailable position of the bona fide holder for value is one of the most conspicuous features of the law relating to negotiable instruments. In case after case his privileged status has been recognised.[19]

Hence a conflict to which we will return when we consider the merchants' proposals for reform of bankruptcy to prevent sham bankruptcy. On the one hand, accommodation bills represented a respectable method of lending one's names to another, with the eventual holder of the bill seen as properly being in an 'unassailable position'. On the other

hand, accommodation bills opened the opportunity for sham bankruptcy and for breaking to make one's fortune.

b) Bankruptcy as a vehicle for fraud

As we know, merchants saw bankruptcy law's proper ends to be the redistribution of the bankrupt's remaining estate ratably amongst his creditors, and the separation of fraudulent and unfortunate bankrupts for different treatment. The late 18th and early 19th century mercantile perception of the prevalence of sham bankruptcy was clearly in contravention of their aspiration that bankruptcy law should punish the fraudulent and launder the fair. Far from punishing fraudulent bankrupts, bankruptcy law was seen as being a vehicle for the fraudulent to recommence trade afresh, and a sham bankruptcy as being an insolvent trader's only realistic hope of obtaining a certificate:

> ... most bankrupts are previously provided with number and value of fictitious creditors, to counteract the malice of the real ones.[20]

This perceived technical breakdown of bankruptcy law manifested itself in a moral panic about sham bankruptcy similar in form to the contemporaneous panic about swindling. This is not to say that sham bankruptcy was a new concern for merchants. One pamphleteer in 1707 recommended the death penalty for bankrupts establishing 'pretended creditors'[21], and Defoe was angered by the 'vile corruption of a good law' of 'taking out friendly statutes'.[22] Nevertheless, it was not until the late 18th century that sham bankruptcy was seen to be the norm, and bankruptcy law itself:

> ... an infallible method for one in tattered circumstances to make himself whole again: It is called, the Emetic of an undone man.[23]

For the merchants, the inability of bankruptcy law to prevent sham bankruptcies turned the law on its head: 'certificates are become the reverse of what they were originally intended'.[24] John King saw an insolvent trader as being faced with two possibilities; he was 'either fraudulent and free, or scrupulous and in custody ... a martyr to his own integrity'.[25] Far from bankruptcy law punishing and deterring fraud through the denial of certificates, 'the dishonest are always certain of procuring them'.[26] And far from bankruptcy law rewarding and encouraging honesty, a bankrupt had nothing to gain by his being fair:

> ... when bankruptcy becomes a lucrative traffic, and men are seen to fail with a view to making their fortunes, the unhappy and fraudulent will be confounded together, and punishment fall on his head, who has a title to pity.[27]

Both the sham bankruptcy and the swindling panics posited bankruptcy as failing to deter fraud and to encourage honesty. Similar too was the belief in both panics of the existence of organizations of miscreants. References were made to 'a <u>gang</u> of swindlers in the metropolis, <u>associated</u> for the purpose of fabricating [accommodation paper]'.[28] The specificity of the belief in a gang of would-be friendly creditors, and the vaguness of any concrete evidence to this effect, was well demonstrated in an exchange between the 1817 Select Committee and the solicitor, Mayhew:

> Q: Is it not understood that there is an office in Doctors' Commons, where bills of this description can be purchased?
>
> A: I have heard that there is such an office in the city where proofs of this kind are manufactured, but I do not know it.[29]

As seen, however, it was also believed that amongst the crowds at the rooms of the commissioners of bankruptcy there were always people ready to prove fictitious debts for small fees.[30] Montagu referred to a labourer 'never worth a farthing in the world'[31] proving a debt of £1,000; a man who called 'old clothes' proving debts of several hundreds of pounds[32]; and a bankrupt who claimed that:

> ... he could obtain the signature of any number of persons to his certificate, and that nothing was more easy than to obtain the proof of fictitious debts, and that there were persons who lived by proving debts, and signing certificates.[33]

As with the swindling panic, then, there was a belief in gangs of fraudsters, and that the frauds were easily perpetrated. Another similarity between the panics was the belief that the Jewish community was especially involved. Parker considered that Jews were involved in sham bankruptcies both as provers and as bankrupts.[34] Mayhew too was clear that Jews were largely to blame for sham bankruptcy:

> ... you never find a commission executed, if it is a commission of any moment at all, but Jews are there receiving their education.[35]

Montagu [36] described the effect of the alleged preponderance of sham bankruptcy upon trading confidence in general. The 'frauds and perjuries in proofs on accommodation bills' were said to lead to 'the evil, to the community, from sapping and undermining all good feeling'.[37] Sham bankruptcy, then, was seen not only as cheating creditors to individual bankruptcies, but also as threatening that very fabric of late 18th century English trade, namely credit.

Like the swindling panic, the panic about sham bankruptcy centred around the recent growth in the use of various forms of negotiable instruments; as with the swindling panic, bankruptcy law was seen as singularly failing in its perceived purpose of repaying creditors and rewarding the honesty but punishing the frauds of insolvent traders (indeed, the sham bankruptcy panic saw bankruptcy as actually achieving precisely the opposite effect); both panics revealed a fear of a conspiracy to undermine fair trading either through ignoring (in the swindling panic) or employing (as with the sham bankruptcy panic) bankruptcy law; and both panics saw bankruptcy law's failings as jeopardising the very continuance of trade.

Now, throughout the 18th century[38], the <u>judicial</u> view of bankruptcy law remained that bankruptcy should ensure repayment of creditors, that it should punish the 'manifest' fraud in the act of bankruptcy, and that it should offer creditors, in the certificate decision, the opportunity to demonstrate vengeance or humanity towards their debtor.[39] Against the late 18th century background of a mercantile belief that bankruptcy law, as it stood, was a <u>vehicle</u> for fraud to the extent of actually endangering the credit system itself, it is not surprising that, as will be seen, the judicial view of bankruptcy law was thrown into crisis.[40]

II The Experience of Sham Bankruptcy

Having identified a moral panic about sham bankruptcy and having seen how merchants saw sham bankruptcy as epitomising how bankruptcy law had become a hindrance to, as opposed to a help to contemporary English commerce, it is now important to ascertain the reality of this perceived major threat to trade. It will be seen that it was the experience as opposed to the reality of a prevalence of sham bankruptcy that was to help to create a concerted effort on the part of merchants (both at the levels of argument and action) for the reconstruction of bankruptcy law.[41] This has implications for our more general discussion of the way that socio-economic conditions influenced commercial law change during the 18th century - namely, through the mediation of the experience of the interested actors.[42]

a) The Statistical Unlikelihood of a Prevalence of Sham Bankruptcies

Basil Montagu offered the 1818 Select Committee an 'exact list'[43] of bankruptcy figures from 1786-1805.[44] Without actually citing his source, he assured the Committee that:

> ...this may without difficulty be ascertained, for every year, by an examination of a work which is annually published.[45]

While Montagu's figures may differ from other sets of bankruptcy statistics[46], let us assume them to be internally consistent.

Table 1

B Montagu's Bankruptcy Statistics (1818SC, p.97)

Columns	1	2	3	4
	Year	Number of Bankrupts	Number of Certified Bankrupts	Number of Uncertified Bankrupts
	1786	530	332	198
	1787	533	307	226
	1788	812	539	273
	1789	605	387	218
	1790	604	361	243
	1791	637	410	227
	1792	668	401	267
	1793	1422	893	529
	1794	882	522	360
	1795	748	435	313
	1796	826	484	342
	1797	941	575	366
	1798	757	454	303
	1799	605	368	237
	1800	801	454	347
	1801	937	552	385
	1802	966	571	395
	1803	1031	585	446
	1804	957	524	433
	1805	940	451	489
Total		16202	9605	6597

It should be noted that since columns 3 and 4 in table 1 always add up to the corresponding figure in column 2, Montagu was indicating the ultimate outcome of any one year's bankruptcies. Thus, for example, the number of 'uncertified bankrupts' in 1787 does not include those people who bacame bankrupt in 1786 and who were stil trying to obtain their certificates in 1787. How Montagu's unnamed source obtained these figures is unclear. Nevertheless, in table 2, Montagu's statistics have been used to establish a table of the percentage of certified bankrupts per year from 1786 to 1805.

Table 2

Percentages of Certified and Uncertified Bankrupts per year (1786-1805)

Year	Percentage: Certified Bankrupts	Percentage: Uncertified Bankrupts
1786	62.6	37.4
1787	57.6	42.4
1788	66.4	33.6
1789	64.0	36.0
1790	60.0	40.0
1791	64.4	35.6
1792	60.0	40.0
1793	62.8	37.2
1794	59.2	40.8
1795	58.2	41.8
1796	58.6	41.4
1797	61.1	38.9
1798	60.0	40.0
1799	60.8	39.2
1800	56.7	43.3
1801	58.9	41.1
1802	59.1	40.9
1803	56.7	43.3
1804	54.8	45.2
1805	48.0	52.0

On the basis of additions made with the actual figures in table 1:

Total percentages for the 20 years (1786-1805):

certified: 59.3; uncertified 40.7

Total percentages for the first 10 years (1786-1795):

certified 61.6; uncertified 38.4.

Total percentages for the second 10 years (1796-1805):

certified 57.3; uncertified 42.7

Using these statistics as the basis for discussion as to the actual prevalence or otherwise of sham bankruptcy in the late 18th and early 19th centuries, three options are presented. Firstly, it is possible that over the twenty years (1786-1805) the 59.3% who received certificates were <u>all</u> involved in sham bankruptcies. The 40.7% uncertified were all fair, if foolish tradesmen. Secondly, it is possible that most of the 59.3% were sham bankruptcies, but that some fair also received certificates. The 40.7% uncertified were mostly fair men, but this percentage included some sham bankruptcies for which the Commissioners or the Lord Chancellor, having detected the sham, would not allow a certificate. Thirdly, <u>some</u> fair and some sham bankruptcies made up the 59.3% who received certificates. Some fair and some (detected) sham bankruptcies made up the 40.7% who did not receive discharge.

Now, as was seen in the previous chapter on the swindling panic, the unusual, the outrageous, or the spectacular is often remembered and taken as the norm. Hay has made a similar point in a different context: the Reverend Dr Dodd was a wealthy and influential man who died at the gallows:

> Dodd died at Tyburn in 1777 but he lived in popular culture for a long time, his case persuasive evidence that the law treated rich and poor alike.[47]

Appearance can belie reality.

The late 18th and early 19th century merchants and reforming lawyers[48] believed that sham bankruptcies were the norm in commissions of bankruptcy. There are three possible sources for the conviction that sham bankruptcy predominated. Firstly, such concrete evidence as was presented to the Select Committee by Montagu ; secondly, from a blind acceptance of the moral panic's claimed social fact of sham bankruptcies predominating; and thirdly, from personal experience. Let us firstly consider the available concrete evidence.

The three options will be recalled: 1) all certificates arose from sham bankruptcies, all who failed to receive certificates were fair traders; 2) most certificates were from sham bankruptcies, most failures to obtain certificates represented fair bankruptcies; 3) some certificates were sham, some fair, and some failures to receive certificates were sham, some fair.

The first option, that <u>all</u> certificates arose from sham bankruptcies, is untenable as the basis for the mercantile belief in sham bankruptcy being the norm in bankruptcy proceedings. Table 3 indicates how the percentage of bankrupts receiving certificates per year declined over the twenty year period. For the first option, this could only mean that there were proportionately less sham bankruptcies to fair bankruptcies per year. This was part of few merchants' beliefs about sham bankruptcy.

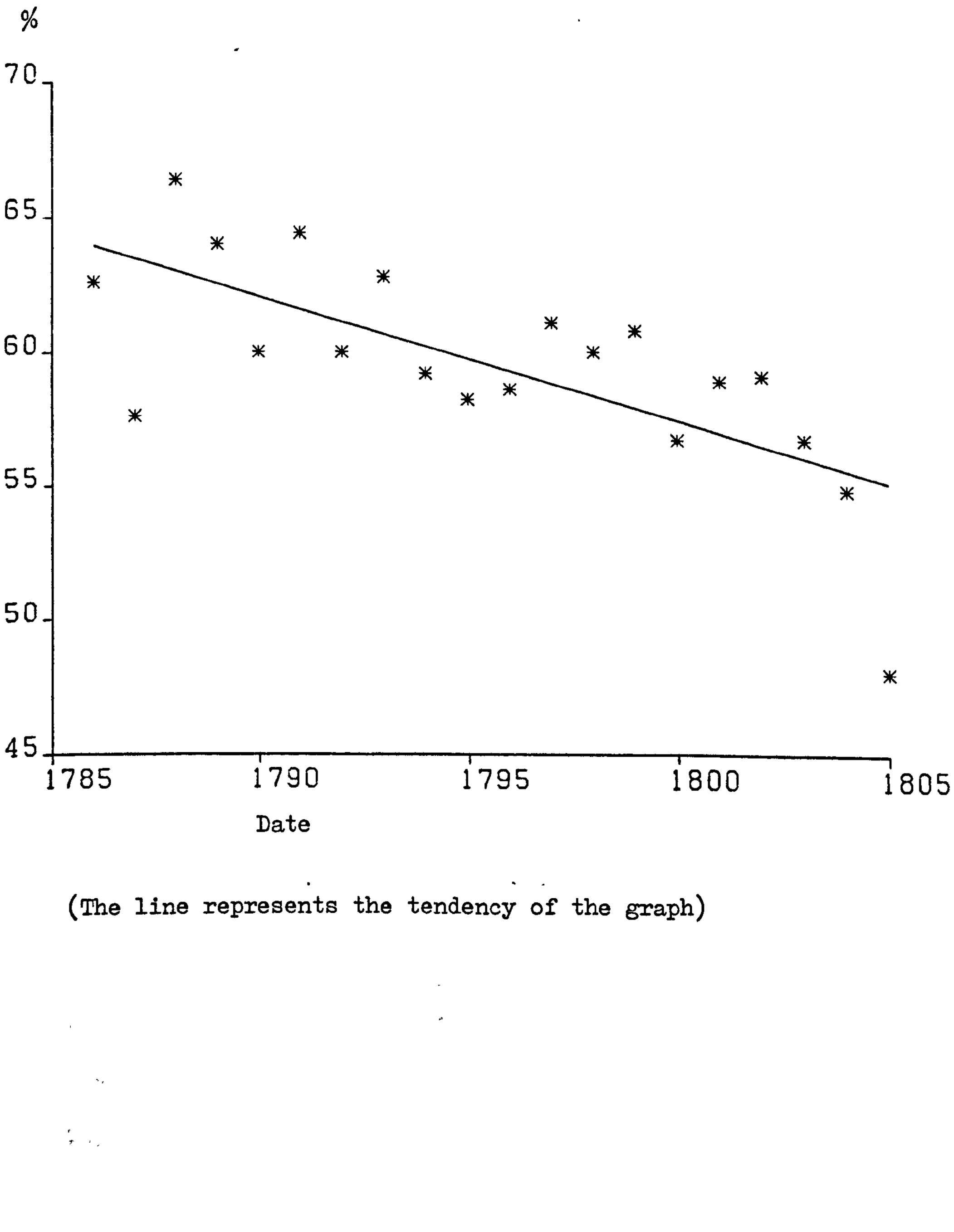
The second option, that <u>most</u> certificates arose from sham bankruptcies, offers an alternative way of looking at the decline in the percentage of certified bankrupts per year. The Commissioners or the

Lord Chancellor might have been improving in detecting sham bankruptcies and have been refusing certificates to such bankrupts. Again, this was not part of the belief of merchants or refroming lawyers.[49] Furthermore, if more sham bankruptcies were being detected, one would expect there to have been less attempts at sham bankruptcy. The consequences of being an undischarged bankrupt were severe. This does not conform with the fact that there was an increasing bankruptcy rate, particularly during the Napoleonic Wars.[50] Since most bankruptcies were sham, according to this, second option, more people were attempting sham bankruptcies per year despite the greater chance of their detection.[51]

On the basis of the concrete evidence about the number of certified bankrupts per year, the first and second options fail to account for merchants' beliefs in the prevalence of sham bankruptcy. Neither all, nor most,certificates could have arisen from sham bankruptcies. This leaves the third, soft option that <u>some</u> certificates arose from sham bankruptcy. Whilst this option is the most likely based upon statistical evidence available at the time, it does not represent the merchants' belief in the predominance of sham bankruptcy. If the merchants' belief was not based upon concrete contemporary evidence, it must either have been based upon the blind acceptance of the moral panic's 'social fact' of the prevalence of sham bankruptcy, or upon the personal experience of merchants that was somehow out of step with the reality of the situation.

Table 3

The percentage of certified bankrupts per year (1786-1805)



(The line represents the tendency of the graph)

b) The Experience of a Prevalence of Sham Bankruptcies

In the previous chapter the creation of moral panics was discussed. 'Swindling' and 'sham bankruptcy' differed in that the latter was not a generic term covering several frauds, but referred to one specific fraud. Nevertheless, the very fact that the contemporary statistical evidence was in conflict with the merchants' beliefs and fears about the preponderance of sham bankruptcy, suggests that sham bankruptcy was indeed a moral panic: a social fact that bore no direct relationship with material circumstances. Not surprisingly, the social fact of sham bankruptcy is explicable with reference to less direct material circumstances, and to sets of ideas relating to these circumstances.

In a later chapter, it will be argued that alongside the depersonalisation of English commerce, there arose a merchants' case for bankruptcy reform[52] separable from their predecessors' case of the early 18th century.[53] Inter alia, early 18th century merchants had argued that the certificate of discharge decision should be placed upon a more judicial footing so that bankruptcy law would not injure English trade by punishing unfortunate bankrupts. As will be seen, by the late 18th century a new form of merchant community with a new political economy had developed. The late 18th century merchants did not talk of bankrupts receiving their just deserts, but argued that honesty amongst traders could be created if the the certificate of discharge was held out as an incentive for honesty prior to and during bankruptcy proceedings. As commerce grew more impersonal, the breach of special relationships came to be seen as being less important than that creditors should be assured of large and speedy dividends following their debtors' unsuccessful business ventures.[54]

Sham bankruptcy, then, epitomised mercantile frustration at bankruptcy law's inability to guarantee a certificate for honesty. Not

only were real creditors cheated of any dividend by a sham bankruptcy, not only could sham bankrupts recommence trade as new men, but the debt-clearing potential of the certificate as an inducement to honesty was lost to the detriment of both creditors and bankrupts when the certificate became 'a false beacon, which, instead of leading to a safe haven, wrecks [the honest bankrupt].'[55]

The panic about the primacy of sham bankruptcy bore no direct relationship to any reality of sham bankruptcies in fact prevailing. Its relationship was to material circumstances and to concomitant ideas concerning bankruptcy law's general failure to guarantee certificates for honesty. Merchants did not plan a panic about sham bankruptcy because this was bankruptcy law's most glaring failure in offering certificates only to the fair. At the very least, however, it is not surprising that a panic grew about <u>sham</u> bankruptcy predominating, despite the destabilising effects of the Napoleonic Wars, and despite the evidence available at the time seeming to deny the prevalence of this form of bankruptcy proceeding.

The merchants' panic fired, and no doubt was fired by the press' conviction that sham bankruptcy dominated bankruptcy proceedings. Whereas the press, with its references to the 'Pandora's box of accommodation bills'[56] and to gangs of would-be friendly creditors[57], mainly represented the blind (or blinkered) acceptance of a moral panic[58], a question arises as to how merchants and reforming lawyers (some of whom were Commissioners of Bankruptcy) could have experienced sham bankruptcy as the norm, when the available concrete evidence suggested otherwise?

E.P. Thompson puts much weight upon the <u>experience</u> of material conditions as one factor in the determination of an ideology:

> ... experience is a necessary middle term between social being and social consciousness: it is experience (often class experience) which gives a coloration to culture, to values and to thought: it is by means of experience that the mode of production exerts a determining pressure upon other activities: and it is by practice that production is sustained.[59]

Using other terminology: the material base of a society is the arena in which human agents as individuals, or as members of a class, act out their lives. The very fact of this arena means that in acting out their lives, the human agents will help to create a world-view concomitant with the material base. Often a class-based world-view. Furthermore, in acting out their lives according to a particular material base, the human agents will maintain and reproduce that base.

Thompson then separates 'acting out one's life' into two concepts: practice and experience. The concept of practice in Thompson's scheme is unproblematical. It can be explained by a simple example: if a proletarian class continues to sell its labour to a capitalist class, the very system by which there is a proletarian and a capitalist class will also continue.[60] The concept of experience, however, is highly problematical.

Thompson's failure to consider this concept adequately in 'The Poverty of Theory' is easily explained: in that <u>polemic</u>[61] against Althusserian Marxism, Thompson's main end in introducing the concept of experience was to deny Althusser's 'Stalinist' doctrine (through which ideology was merely 'reduced to confirming or legitimating a base'[62]), by 'reinstating' human agency into Marxist theory: 'through the missing term, 'experience', structure is transmuted into process, and the subject re-enters history'.[63] For the purposes of the polemic,

Thompson merely threw down the glove of 'experience', asserting that while the experience of human agents does not create ideology, it certainly helps in the development of ideology ('a determining pressure'). Let us consider 'experience' more closely.

Late 18th century merchants and reforming lawyers wrote of their experience of a preponderance of sham bankruptcies:

> ... whether [bankruptcy law] has operated (as it was always intended) as a punishment to the nefarious and unjust, or as an encouragement to their mal principles and practices, experience and opinion were never more at variance.[64]

This 'experience' of bankruptcy as mainly being a vehicle for fraud (as opposed to the 'opinion' that it should punish fraud) existed despite Montagu's contemporary statistics suggesting that sham bankruptcy did not in fact dominate commissions of bankruptcy. 'False' experience is apparently possible. This can only be the case if 'experience' is seen as a combination of two elements: empirically provable data, and ideology.[65]

If 'experience' itself has an ideological content, then it acts not only as a middle term taking us from base to helping to determine superstructure, but also as a middle term in the other direction of the dialectic. An ideology, perhaps relating to a separable set of material circumstances, may be encapsulated in human agents' experience of a situation (thus, the 'social fact' of a preponderance of sham bankruptcy related not to the actuality of sham bankruptcy, but to more general arguments about bankruptcy reform generated by the growing depersonalisation of trade). In a sense, this ideological aspect of experience may help to determine a situation, at least for the actors involved. Further, the ideological aspect of experience may in fact

conflict with the empirically provable data about a situation[66] (as was precisely the case with merchants 'falsely' experiencing a preponderance of sham bankruptcies). Whereas 'practice' is purely about people 'doing', 'experience' also includes human agents' attitudes towards what appears to be happening - people 'also experience their own experience as <u>feeling</u>'.[67]

However, having said this, it is important to note that people are not stupid. The empirically provable data of a situation would have to be <u>sufficient</u> to ensure the continuance of the ideological aspect of experience. The amount of empirically provable data sufficient to sustain the ideological aspect of experience is dependent upon any, or all of three factors.

Firstly, there is the strength of the actors' culture ('affective and moral consciousness'[68]). Thompson explains, that people,

> ... handle their feelings within their culture, as norms, familial and kinship obligations and reciprocities, as values or (through more elaborated forms) within art or religious beliefs.[69]

The stronger the culture[70], the less empirically provable data necessary to maintain the ideological aspect of experience.

The second factor is the success of socialisation. The ideological aspect of experience may be deeply ingrained in human actors by such 'positive' mechanisms as education, or by such 'negative' mechanisms as law.[71]

Thirdly, and of most relevance to us here, the amount of empirically provable data necessary to sustain the ideological aspect of experience is dependent upon how badly people want to maintain that ideological aspect: how badly people want to experience something

that is not really happening by their own criteria of truth. The late 18th and early 19th century merchants and reforming lawyers wanted, for reasons already given, to believe in the primacy of sham bankruptcy very badly indeed. One case of sham bankruptcy out of many cases may, consequently, have been sufficient for the merchants and reforming lawyers involved to characterise most bankruptcy as sham. Even more so when they saw a supposed sham bankruptcy succeed.

The merchants and reforming lawyers were not lying when they described their personal experience of the primacy of sham bankruptcy. In all likelihood this was precisely their experience.

III Proposals for the Reform of Bankruptcy Law to end Sham Bankruptcy

At a cursory glance, late 18th century bankruptcy law was well-equipped to prevent sham bankruptcy. Firstly, the fictitious debts had to be proved before the Commissioners of Bankruptcy.[72] Secondly, the Commissioners had the opportunity of a second check of the proceedings before they signed the certificate of discharge agreed upon by the creditors.[73] Thirdly, the Lord Chancellor had to confirm and allow the certificate.[74] And fourthly, any creditor could petition the Lord Chancellor for a decision about the honesty of the bankrupt's behaviour during his bankruptcy.[75]

However these checks were insufficient, in the merchants' eyes, to prevent sham bankruptcy. The proof of the debt was solely between the bankrupt and the friendly creditor and it took place in the tumult of the Commissioners rooms.[76] The excited atmosphere in the Commissioners rooms also denied the Commissioners any real chance of checking the proceedings before signing the certificates.[77] The inefficiency of the Chancery division of the courts meant that the Lord Chancellor was unlikely to find the time to detect a sham bankruptcy before signing

a certificate.[78] The petitions of fair creditors also failed to prevent sham bankruptcy in that the bankruptcy was often completed by the time the real creditors heard of it, and Lord Chancellors were reluctant to revoke certificates already awarded.[79] Allied with the merchants' belief that:

> It is almost impossible to discover whether the holder of a bill is a bona fide holder or not, where fraud is intended, as the most plausible accounts have been often set up, which I believe to have been false, though it has been quite impossible to discover the falsehood,[80]

the existing checks to prevent sham bankruptcy were considered to be wholly inadequate.

For merchants and reforming lawyers, sham bankruptcy had to be prevented. It epitomised the irrationality of bankruptcy law in failing to guarantee a certificate for fair, and only for fair bankrupts. Their proposals for the reform of bankruptcy law to prevent sham bankruptcy fall into three categories. Firstly, the destruction of the 'Pandora's box' of accommodation paper. Secondly, not allowing holders of accommodation paper to have any say in the certificate decision. And thirdly, a radical proposal to be considered in some depth in a later chapter[81], entirely removing the certificate decision from creditors.

The first proposal was advocated by Mayhew:

> I think that the destroying of accommodation paper altogether would remedy [sham bankruptcy]; we all know the bane of it in commercial life.[82]

Indeed, Mayhew recommended that the making of accommodation bills be made a criminal offence.[83] For Mayhew the 'evils' growing out of the use of accommodation paper overcame the value of such paper in, at a 'moderate expense'[84], providing the opportunity for one merchant to lend his name to another.

Lavie's response to Mayhew's suggestion was typical. To ignore the benefits of accommodation paper was said to be against 'the vital interests in this country in its present paper circulation'.[85] Accommodation paper was both a traditional mode of lending one's name to another, and also but one form of negotiable instrument all of which were jealously guarded at a time when 'scarcity of money has naturally caused all credit to stretch'.[86] In the absence of a gold standard, the destruction of any form of credit note was not to be taken lightly.[87] Indeed, in the previous chapter it was argued that the latent function of the swindling panic was precisely to protect negotiable instruments of all kinds.

The second proposal for reform was advocated by Montagu:

> It might be expedient that creditors on accommodation bills should not be permitted to vote in the choice of assignees, and that they should not, either at any time or until the lapse of a certain time, be permitted to exercise any influence with respect to the certificate.[88]

The obvious objection to this scheme was raised by Mayhew:

> ... the injustice would never be avoided, because the <u>bona fide</u> creditors' property is consumed in payment of dividends which are no charge on the estate.[89]

This raised the question for the Committee as to whether, as Mayhew suggested, sham bankruptcy was aimed at providing the bankrupt with a dividend from his own estate, or whether it was undertaken by fraudulent tradesmen to receive a certificate? Trebeck concluded that the frauds were inextricably tied together:

> ... if fictitious debts are proved, I should think it was both with a view to the certificate and the dividend.[90]

Montagu , however, saw sham bankruptcy as being aimed at the obtaining of a certificate of discharge ('to control the choice of assignees and the certificate'[91]).

If sham bankruptcy was aimed at obtaining certificates, Montagu's only worry about denying accommodation bill holders the right to vote on the certificate was whether this was, in fact, fair on them (the contemporary insistence on the unassailability of bona fide holders of accommodation paper has been noted[92]). Montagu argued that it was fair in as much as they would have an interest in the prevention of sham bankruptcy.[93] Alternatively, Montagu proposed, the certificate should only be awarded with the agreement of 3/5 in number and value of both accommodation paper creditors, and other creditors.[94]

William Cooke, a barrister with bankruptcy experience, denied the efficacy of either of the first two proposals for preventing sham bankruptcy. The fictitious creditors, he argued:

> ... will be found fertile enough to devise other means of fraudulent proof, that will be as difficult to be got at as those arising from accommodation bills.[95]

For Cooke, the only viable means of preventing sham bankruptcy was by completely overhauling bankruptcy law in entirely removing from creditors the decision over whether or not a certificate should be granted. Dividends would be paid to real creditors, and the certificate ('the great inducement to bankrupts to concert commissions to be issued against them'[96]) would only be available to the fair if certificates were granted 'by the commissioners only'[97] Vandercom agreed, and added:

> ... it would put an end to the great mischief arising to the public from the practice that has been alluded to in this place, and which we have all had occasion to see at Guildhall, of proving debts for the purpose of voting in the choice of assignees, and to give the bankrupt a certificate.[98]

This important proposal for bankruptcy reform, arising out of the debate as to how sham bankruptcy could be prevented, will be part of the subject matter of a later chapter.[99] It will be seen that this proposed reform, which apparently offered merchants exactly what they wanted (the possibility of honesty being created through the guarantee of a certificate judicially awarded for merit), was nevertheless unpopular amongst late 18th century merchants.

Sham bankruptcy, then, was a moral panic in the late 18th century. Merchants experienced sham bankruptcy as the norm in bankruptcy proceedings, despite the unlikelihood of this situation. Sham bankruptcy was a major issue in their expressions of dissatisfaction with bankruptcy law in its inability to guarantee certificates for honesty. Arising out of the debates as to how to prevent sham bankruptcy was a proposal that would have helped to guarantee certificates for honesty. Later, we will see why merchants would not accept

this proposal; why they insisted upon creditors maintaining their say in the granting or withholding of certificates.

Chapter Seven

The Depersonalisation of Trade, Rationality and Ritual

Early 18th century merchants had been concerned that unfortunate and fraudulent bankrupts be separated for different treatment.[1] While fraud, they argued, should be punished; honest but unfortunate bankrupts should receive their just desert of a certificate of discharge. Not only was this seen to be in merchants' own self-interest in that each lived with the possibility of his own unfortunate bankruptcy; not only was this seen to be humane; but, most importantly, merchants pressed for certificates for unfortunate bankrupts so as to protect English trade: the risks attached to trade, especially to overseas trade, should not be pitched too high, and individual tradesmen should not be lost to English commerce through mischance. For these reasons, merchants had argued for a judicial decision over the certificate of discharge to avoid the possibility of creditors, with their improper motives, standing in the way of certificates being awarded to the honest, but withheld from the fraudulent.

As will be seen, late 18th and early 19th century merchants too stressed the demerits of having creditors decide upon the certificate of discharge. However, two important points of difference between the early and late 18th century merchants must be discussed before we can later understand how late 18th century merchants influenced the development of bankruptcy law.

Firstly, late 18th century merchants argued that a more rational certificate decision with judicial supervision would benefit trade not by encouraging entrepreneurial zeal, but by inducing bankrupts to act honestly, thus increasing bankruptcy law's debt-clearing potential. The reasons for this change of emphasis will be discussed shortly.

Secondly, when late 18th century merchants had a realistic hope of actually reforming the law to remove the certificate decision from creditors, and making bankruptcy a debt-clearing process by the certificate decision solely being based upon a bankrupt's behaviour during his bankruptcy, they shrunk from taking this opportunity. This chapter will include discussion of both the dimensions of this opportunity, and why merchants, despite their professed interest in it, refused to accept the opportunity when presented to them. It will be seen how bankruptcy law not only acted as a means of debt collection, but also served an important function in maintaining and recreating merchant homogeneity, and a system of trade based upon credit, by acting as a ritual degradation and reinstatement ceremony.

I Merchants' Attitudes towards the Certificate of Discharge in the Late Eighteenth and Early Nineteenth Centuries

a) The Depersonalisation of Trade

The background to the differences between the early and late 18th century mercantile attitude towards the role of bankruptcy law was the growing depersonalisation of English commerce. Before discussing the changed merchants' case for bankruptcy reform, let us consider the new and distinctive arena in which late, as opposed to early 18th century trade took place.

To a large extent, the American and English experience followed a similar path:

> As a more impersonal, corporate economy emerged in the early nineteenth century; debtor-creditor relationships, particularly

> among merchants and entrepreneurs,
> became more formal and rational.[2]

Coleman argues that the changes in the American merchants' attitudes towards their bankruptcy law in the later period is explained by the conflict between:

> the impersonal and barely perceived
> forces of system, order and rationality
> and the older forces of personal
> responsibility and respectability.[3]

In turn, this growing depersonalisation of commerce was said to lead to changes in American merchants' views of the reasons for offering discharge to honest bankrupts:

> Forgiveness of obligations, which had
> always been in the power of creditors to
> grant as a matter of personal convenience,
> advantage, and even charity, was now [in
> the early 19th century] to be institutionalised
> in public policy and to operate as a matter
> of right rather than grace.[4]

Broadly speaking this development also occurred in England.

Coleman sees four elements in the growth of the impersonal market that relate to merchants' changing attitudes towards debt and bankruptcy law. Firstly; in the United States 'business in general and credit in particular became increasingly depersonalised'[5] with the emergence of the corporation as the major form of business organization - the consequent main methods of raising capital being through the sale of stocks and bonds, and through the blossoming of a banking system.

With these changes, and, in particular, with the rise of the banks as a major source of credit, personal assessments of respectability between merchants were replaced with impersonal evaluation of a borrowers record:

> In short, in the orderly, systematic and depersonalised world that was emerging, the bookeeper became the judge of the last resort for lender and borrower alike.[6]

In England, the joint stock company did not exist as a legal form until the mid-19th century[7], and did not prove to be a popular form of business organisation until some decades later.[8] Nevertheless, credit did move towards being awarded by assessors of a borrower's record, as opposed to assessors of his personality, with the late 18th century emergence of wide-scale English banking as a vital source of mercantile credit.[9]

The second element in the increasingly impersonal American market that Coleman sees as being involved in changing merchant attitudes towards bankruptcy law was that of the growth in 'scale and geographical scope of business activity'.[10] Customers became 'names on pieces of paper rather than faces and personalities'[11] and credit became further depersonalised:

> the trend to bigness also paved the way for legal systems which accepted the discharge of debts as normal and routine.[12]

While the geographical scope of 18th century English trade had been extensive overseas; internally, it was only with the improving communications infrastructure in the later part of the century that

fairly localised and familiar itinerant salesmen were being replaced by, to customers at least, diverse and anonymous sales representatives of specialist firms who were involved in the supply of retail shops.[13] The scale of retailing, for instance, grew too: Alexander refers to the growth of 'monster' shops[14] in which customers would not be known personally, their bad debts being a nuisance as opposed to the breach of some special relationship.[15]

Thirdly, Coleman refers to 'a more formal, legalised perception of relationships'[16] in which people who defaulted on a debt or, indeed, any contract, were likely to be sued. He also refers to 'the full flowering of the bookeeper mentality'[17] as an explanation of merchants coming to accept bankrupts' discharge from past debts 'as an equitable, rational and systematic way of writing down bad debts'.[18] This tautologous, or at least teleological, explanation of merchants wanting discharge for the honest bankrupt as of right because they had a 'bookeeper metnality', does not coincide exactly with the English scene. Before any 'bookeeper mentality' took hold in England, a half-way house between personal trading communities and an entirely anonymous market existed. As seen in the earlier chapter on Swindling[19], and as will be seen later in the present chapter[20], reputation remained vital in late 18th century English trade. Even if merchants, perhaps even bankers, did not know fellow tradesmen personally, they did know whom they would trust - and recommendations as to a stranger's bona fides would have held great weight.[21]

Coleman's fourth factor in the growth of a new mercantile attitude towards debt comprises an impressionistic view of the late 18th century American entrepreneur, and how he was admired by his contemporaries. Discharge was acceptable, Coleman asserts, for:

> the plunging, speculative, promoter type who came to typify the driving high risk segment of American business after the Revolution.[22]

This may or may not be relevant to the English view of the 'self-helpers':

> He was a rich man: banker, merchant, manufacturer and what not. A big, loud man, with a stare, and a metallic laugh... A man with a pervading appearance on him of being inflated like a balloon and ready to start. A man who could never sufficiently vaunt himself a self-made man.[23]

Despite tautology and impressionism, Coleman convincingly posits a relationship between the depersonalisation of American trade during the 18th century and the changing mercantile attitude toward debt; discharge becoming seen to be a matter of right as opposed to grace. This depersonalisation of trade, and related changing merchants' views of debt, coincides largely with the English situation.

Before leaving Coleman's arguments, it is important to note the unproblematic way in which he sees the depersonalisation of trade as creating not just new merchants' attitudes towards debt, but also a new form of bankruptcy law. He fails to explain the mechanics by which judges or legislators proved sensitive to the expectations and requirements of the late 18th century merchants. Here and elsewhere we will argue that while, inter alia, the depersonalisation of English trade may have caused changes in merchants' attitudes towards debt and bankruptcy law, changes in bankruptcy law occurred only after a

praxis for reform on the part of the merchants, and then through Parliament despite, as opposed to alongside, the courts.[24]

Not only had the merchants' case for bankruptcy reform altered with the changing nature of English commerce, it had also gained new allies in the form of practising lawyers. Amongst other factors, this allegiance was to harden and to add an urgency to the merchants' case for bankruptcy reform.

b) The Reforming Lawyers and the Hardening of the Merchants' Case for Bankruptcy Reform

Throughout the 18th century, there had been the occasional voice amongst lawyers calling for reform of bankruptcy law. Thomas Davies, for example, in his text on banktuptcy law, argued that unfortunate bankruptcy could occur:

> the various dispositions of fortune... will ever be... in an uncertain fluctuation; sometimes attended with storms and tempests, and at other times, with a pleasing calm, and a cheerful sun-shine.[25]

It was not until the late 18th century, however, that a sizable number of lawyers began severely criticising bankruptcy law, and began to demand its reform.

There are several possible reasons for this new interest amongst lawyers, the first of which has its key in Montefiore's advice to fellow tradesmen:

> Creditors, who have it in their power to issue commissions, should consider seriously

> before they hazard a measure so irrevocable; as multiplied experience has fully proved, that no other advantages arise from such proceedings in general, but small dividends at remote periods of time, purchased at incalculable injury to the feelings and character of the unfortunate individual, and at considerable expense to the estate.[26]

In his trade dictionary Postlethwayt also advised merchants to 'avoid the violence of a legal prosecution'[27] against other merchants who became insolvent.

The first possible reason, then, for a new interest in the reform of bankruptcy law on the part of lawyers was to maintain and to encourage formal bankruptcy proceedings as against the increasingly popular informal debt-collection method known as 'composition'.[28] Only in the former proceedings was money to be made by lawyers as Commissioners, in initiating commissions of bankruptcy, in proving debts, in appeals on points of law, and so forth. This is not to suggest some conspiracy amongst the 'reforming lawyers' aimed at achieving 'new' areas for legal services and for profits. Unconsciously at least, however, self-interest may have motivated some lawyers to press for bankruptcy reform.

Edmund Townsend, a former bankrupt, <u>did</u> perceive a conspiracy by lawyers actively <u>against</u> tradesmen. He referred to various measures in the Bills leading up to the eventual 1824/25 bankruptcy legislation[29]:

> it is manifest on the face of them, [they] were more calculated to increase the emoluments of the lawyer, than to promote the interests of the trader.[30]

Townsend went so far as to call upon traders to organize themselves to face the 'legal interest' as an equal. Nor was the belief that lawyers were milking merchants in the bankruptcy process entirely Townsend's personal persecution complex. On 5th November 1790, The Times reported that:

> Yesterday the Chancellor condemned the practice of those attorneys who ran about and solicited people to take out commissions of bankruptcy. He said this was what no man of fair practice would do.[31]

It is, however, hard to believe that one of the leading 'reforming lawyers' of bankruptcy, Basil Montagu , was solely motivated by conscious self-interest. An editor of Bacon's work, a campaigner for the emancipation of the Jews, author of a temperance pamphlet signed 'A Water Drinker', and friend to Coleridge and Wordsworth, it is quite probable that his conscious reason for proposing bankruptcy reform was as he said:

> from my conviction that our professional duties consist, not merely in activity and in publication upon some practical point of professional knowledge, which repay themselves: but in availing ourselves of every opportunity to strengthen the root and foundation of the science itself.[32]

Montagu's concern with further rationalising the 'science' of law hints at a second possible reason for some late 18th and early 19th century lawyers gaining an interest in bankruptcy reform. These lawyers may have been influenced by Beccaria, Bentham and the new utilitarian

philosophy. Certainly in Montagu's writings, there are many explicit references to Filangieri, an Italian utilitarian whose work The Science of Legislation was translated into English in 1806. For these reforming lawyers, a rational bankruptcy law would refer not to the discretion and privileges that judges continued to see binding debtors to their creditors[33], but to the more 'scientific'[34] principles of rights and duties.

A third possible reason for the existence of so many professional lawyers interested in bankruptcy reform in the late 18th and 19th centuries refers to the involvement of these lawyers in the workings of their contemporary market. The reforming lawyers were especially involved on a day to day basis with commercial cases. The lawyers giving evidence and calling for reform before the 1817 and 1818 Select Committees on bankruptcy law were either commercial specialists (for example, Joshua Mayhew, Samuel Sweet, Joseph Vandercom), or Commissioners of Bankruptcy (for example, William Cooke, R.H.Eden, Basil Montagu). Of interest is not that these specialists were called to give evidence, but that so many of them had firm and reasoned views on how bankruptcy law should be reformed.

Barristers in commercial practice would not only have been persuaded of the merchants' new case for an economically rational, debt-clearing bankruptcy law[35] through their direct personal experience of the kind of cases brought by merchants. Atiyah argues that socially, barristers came from, mixed with, and acted for members of 'the new trading and mercantile class'.[36] Too much should not be made of this social dimension of the lawyers' 'new' interest in reforming bankruptcy law. While Duman writes of the 18th century bar that it was considered to be 'suitable for sons of the landed as well as the middle classes'[37], he also presents barristers as being very much a social clique with a

feeling of professional brotherhood and communal spirit'[38] who were generally reluctant to so much as meet with clients directly, in their desire to avoid situations which 'smacked of business'.[39]

These factors - a market for legal services as yet not fully exploited, the influence of utilitarian rationalism, and lawyers' experience of the effects of and, possibly, the arguments against the existing bankruptcy law - led certain practising lawyers, in an albeit unorganised fashion, to push alongside merchants for an economically rational bankruptcy law acting first and foremost as a debt-clearing device. It is important to note, however, that it was certain <u>barristers</u> whom these factors primarily influenced. Various legal historians have pointed to each of these three factors as being a major impetus for commercial law change as they affected <u>judges</u> in their common law decision-making. Horwitz refers to late 18th century judges framing 'general doctrines based on a self conscious consideration of social and economic policies'[40] in order to satisfy and to keep their mercantile customers. Fletcher explains late 18th century changes in larceny law with reference to the influence on judges of 'rationalist and utilitarian theories made popular by Bentham and the English translation of Beccaria'.[41] And Atiyah, more cautiously, writes that 'above all, [the] increased contact with the commercial community may have played a part in making the legal profession essentially sympathetic to the demands of economic freedom'.[42] Each of these factors, perhaps even through the medium of the arguments of counsel in their courts, would have influenced judges to some extent.[43] However, as has and will be argued[44], these factors cannot, either jointly or severally, explain the rather more complex mode of development of the commercial law in the 18th century. Judges always placed the internal consistency, the very legitimacy, of the common law[45],

before the interests of their customers, utilitarianist reform, or any shared interests with members of their social class.[46]

The merchants' case for bankruptcy reform, then, came to be on the political agenda as barristers mouthed their concern for reform in the Select Committees, in the courts[47], and in Parliament[48]. As will be seen - merchants did not entirely entrust their case to these lawyers.[49]

Underlying the merchants' case for bankruptcy reform becoming urgent in the late 18th century, was the growth of a depersonalised market that positively required a bankruptcy law that could successfully clear the bad debts of strangers, not merely allowing creditors the opportunity to show mercy or vengeance towards the transgressor of some personal bond. At a more surface level, the merchants' case for bankruptcy reform hardened partly because of merchants finding new allies amongst certain practising lawyers. Other factors also hardened the merchants' case for reform of bankruptcy.

There was considerable dissatisfaction with judicial developments of bankruptcy law. Eden argued that bankruptcy reform Bills arose 'above all' from 'the great mass of judicial decisions' which led to 'repetitions, inaccuracies, and redundancies.'[50] Judges had alienated merchants from existing bankruptcy law by further insisting upon the criminal nature of bankruptcy (in line with other crimes, incorporating mens rea as part of an act of bankruptcy), and by firmly underlining the position of there being no judicial control whatsoever over the creditors' certificate decision.[51]

Merchant dissatisfaction with bankruptcy law was probably also fired by the piecemeal and short-lived bankruptcy acts of 1772 and 1777[52] offering appeals to courts of law on the question of their certificates by imprisoned bankrupts. The fact that Parliament clearly could, but chose not to judicialise the certificate decision on any

long-term basis must have angered merchants.[53]

Eden indicated economic reasons for the necessity of bankruptcy reform in the early 19th century. Merchants pressed with some vigour for bankruptcy reform as a result of:

> the immense extension of commerce, the depreciation in the value of money, the alteration in commercial proceedings[54], [and] the invention of new frauds.[55]

Eden was referring to the factors that he perceived behind the accelerating number of bankruptcies per year in the late 18th and early 19th centuries.[56] The number of bankruptcies per year were also swollen through the destabilising effects of the Napoleonic Wars.[57] Eden's argument was that the sheer weight of numbers of bankruptcies per year during this period necessitated some reform of bankruptcy law to ensure that it efficiently recovered creditors' bad debts. A side effect of this growth in bankruptcy rate was to place bankruptcy within the experience of more merchants:

> It was an unusual tradesman in this period who did not, at some period in his career, either come very close to insolvency or actually experience it.[58]

Two further, vital factors in hardening and adding an urgency to mercantile calls for the reform of bankruptcy law were the merchants' belief in the preponderance of sham bankruptcy[59], and a general fear of the threat to trade posed by swindling[60]. It will be recalled that merchants saw bankruptcy law as the appropriate aspect of the law to prevent swindling, and that they saw it as failing to do so.

We will return to this point shortly.

With the underlying depersonalisation of trade, these, then, are some of the more important factors behind the late 18th and early 19th century merchants' firm demand for the reform of bankruptcy law. As indicated, it was also the advance of an impersonal market that acted as the major influence behind the emergence of a substantially novel mercantile case for the reform of bankruptcy law in the later part of the 18th century.

c) The Case is Altered

Levinthall argued that from the earliest times 'bankruptcy laws' have universally had two objects in view: firstly, an equitable division of the debtor's property amongst his creditors; and secondly, the prevention of insolvent traders from committing acts detrimental to their creditors' interests.[61] Discharge from a bankruptcy, Levinthal argued, was not a universal feature of bankruptcy law:

> bankruptcy law seeks to protect the creditors, first, from one another, and, secondly, from their debtor. A third object, the protection of the honest debtor from his creditors, by means of discharge, is sought to be obtained in some of the systems of bankruptcy, but this is by no means a fundamental feature of the law.[62]

In 1810, Evans, a commercial lawyer, epitomised the attitude of late 18th and early 19th century merchants and reforming lawyers towards the proper ends of bankruptcy law:

> First, the equal distribution of the property in proportion to the debts. Second, the liberation of the debtor, who has made a fair surrender of his property to the general satisfaction of his creditors.[63]

Evans and Levinthal's first objective of bankruptcy law, that creditors should be protected from one another, was held to be a vital aspect of bankruptcy law by merchants and judges throughout the 18th century.[64] Of interest at this point, however, is that Evan's second objective of bankruptcy law includes both Levinthal's 'universal' second object, and Levinthal's 'non-fundamental' third object. That is to say, Evans could not separate protecting creditors from debtors, from the opportunity for debtors to obtain a certificate of discharge. For Evans, these two objects were merely two sides of the same coin.

Reforming lawyers and merchants alike concurred with Evans' view. J. Henry, a lawyer, published a plan for an international bankruptcy code of which one of the ends was 'to establish points in bankruptcy which have no locality but essentially exist in each case'.[65] Amongst these 'essentials' was the 'release and discharge of the bankrupt on a bona fide conformity to the bankrupt laws of his domicile'.[66] Similarly, the former cider and spirits tradesman, Edmund Townsend, argued that the 'great purposes' of bankruptcy law consisted of:

> securing the creditor a more equal and full proportion of the effects of his unsuccessful debtor, and of alleviating the sorrow and distress of an honest but unfortunate trader.[67]

Townsend added: 'bringing to punishment the fraudulent practices of a base character,'[68] which could be achieved by denying certificates to these base characters. A single prime object of bankruptcy law, then, was seen by merchants and reforming lawyers to be the protection of creditors from their debtors by means of offering discharge to honest bankrupts.

Effectively, the argument went that bankruptcy law should set up a bargain between a bankrupt and his creditors: the bankrupt would receive his certificate in exchange for handing over his entire estate to his creditors. If a bankrupt fulfilled his side of the bargain, he should as of right, be discharged. This 'incentive' for the debtor would be to his, and to his creditors' 'mutual benefit'.[69] Everybody's utility would be maximised.

Throughout the 18th century merchants had pressed for a more judicial certificate decision. In the early part of the century, merchants had been concerned that if unfortunate bankrupts be denied certificates - this would have a detrimental effect on English trade in, especially, threatening entrepreneurial risk-taking, and losing former 'darling traders' to English commerce. A more judicial certificate decision, by denying creditors the chance to claim revenge against their unsuccessful debtors, was seen as being necessary to ensure that the unfortunate bankrupts received their just desert of discharge.

As a network of small, honour-based trading communities was replaced by a national and impersonal market, merchants ceased referring to 'just deserts' for honest bankrupts. They now argued that honesty could actively be created if certificates were awarded in exchange for fair behaviour. In the early period, merchants had claimed that entrepreneurial spirit and mercantile adventuring were threatened by

the arbitrary nature of the certificate decision. They now held the view that the market, that economic efficiency, required that certificates be awarded for fair behaviour. This would allow bankruptcy law to act not inter alia, but exclusively as a means of collecting the debts of people who were, in all likelihood, connected with their creditors solely by means of long lines of indorsements on various bills of exchange. Thus in 1783 Burges was of the opinion that:

> The object of the bankrupt law is to procure to the creditors the payment of their debts.[70]

And Philip George, in 1817, stated that:

> Creditors have generally but two objects, a fair disclosure from the bankrupt, and an early dividend.[71]

This view, not that unfortunate bankrupts should receive their just deserts, but that fair bankrupts could, in fact, be created by the guarantee of a certificate, is further evidenced in the late 18th century merchants' shunning of the notion that creditors should be humane towards their bankrupt debtors. With the depersonalisation of trade, and with the argument that bankruptcy law should merely clear bad debts, humanity was seen to create nothing more than inefficiency in the bankruptcy system.

Until the late 18th century, merchants perceived the humanitarian aspect of the certificate device to have been of some, albeit secondary importance. As late as 1760, Courteville, describing the Dutch equivalent of discharge for unfortunate bankrupts, stated that:

> There is not only humanity, but policy in this... the welfare of the State depends on every man's doing well.[72]

By the late 18th century, however, humanity came to be seen as standing in the way of bankruptcy law's debt-clearing potential by offering the fraudulent some hope of discharge. Only if certificates were guaranteed for the fair, and only for the fair, could bankruptcy law act efficiently to clear bad debts. George, a merchant, was clear that his humanity had stood in the way of this efficient functioning of the certificate device:

> Q: Have you ever signed a certificate which you thought a bankrupt <u>ought</u> not to have?
> A: I believe I have; I have been persuaded to do it from charity, where a man's family has been distressed.[73]

George knew that only a fair bankrupt 'ought' to be granted a certificate. If creditors could not divorce themselves from the burden of pity, if they could not operate certificates of discharge as an efficient means to produce fair bankrupts and a bankruptcy law that could, consequently, maximise returns from bad debts; they were held to be the wrong people to have the certificate decision:

> ... the creditors should have no voice in it, because it ought not to be put to their humanity, whether they will grant such a certificate or not.[74]

As will be seen, this view was in stark contrast to the judicial attitude which continued to be that the certificate was precisely a means of offering creditors the power of mercy over their bankrupt debtors.[75]

This view that a judicial certificate decision, unhampered by feelings of pity, could act as an inducement to honesty, coincides with late 18th century deterrence theory that influenced at least some of the reforming lawyers, and was certainly echoed in the writings of merchants. After Beccaria[76], and after Montesquieu before him[77], Romilly was clear that:

> The lot of evil which [a criminal] is to suffer for his misdeeds should be pronounced in a judicial sentence, the crime should be defined, the punishment should be certain, and it should be public, that his sufferings might operate by way of example and prevention, and might be made useful to the community.[78]

The bankrupt was seen to be a rational man who would choose to be fair or dishonest according to the likelihood of his obtaining the benefit of a certificate, or the punishment of his being refused one. Thus one merchant, in arguing for the surety of a certificate solely to fair bankrupts, referred to the 'prudent farmer' who will:

> punish and expose a few of the feathered delinquents, who devour his grain, as a terror to the rest.[79]

Bankruptcy law, then, was seen as potentially offering an efficient

means of debt-collection should the certificate of discharge be offered in exchange for honesty on the part of the bankrupt, and should certificates be denied, even on humanitarian grounds, to the fraudulent. Merchants and reforming lawyers saw bankruptcy law to be failing in this purpose.

d) Dissatisfaction with bankruptcy law

In The Bankrupt[80], the respectable Sir Robert Riscounter would not follow the advice of Pillage and Resource to escape the consequences of his financial ruination by fraudulent means. Bowing to his audience, and despite his own cavalier attitude towards debt, Sam Foote wished to reward his character Riscounter for his honesty. It is significant that Foote felt obliged to do so not with a certificate of discharge granted by understanding creditors, but by means of the deus ex machina of Sir Robert's bills on a Dutch house of business being unexpectedly honoured at the end of the play.

If Foote felt unable to display the certificate as the reward for honesty, Edmund Townsend, a cider and spirits tradesman of Covent Garden, came to be cynical of receiving discharge for his honesty during his own bankruptcy. Townsend had handed over his entire estate to his assignees in bankruptcy whose job it was to redistribute the money amongst the creditors. In 1810, even though three of his assignees had been dismissed for mal-administration, Townsend still desired to be honest, stating in a handbill to his creditors:

> I most earnestly solicit a place in your good opinion, and assure you, that, till your debt is paid, nothing shall divert me from being most assiduously,
>
> Your faithfull and obedient servant...[81]

A year later, he published another handbill, still hopeful, in which he wrote of having been bullying his assignees into some action by 'extraordinary exertion'[82]. However, by later in 1811, Townsend had become embittered at a system that had failed to recognise his honesty. His assignees' delays had angered his creditors into a 'spirit of revenge':

> which will generally prevent the bankrupt from experiencing their favour, which the law has meant to show a man who has delivered up his property, and conducted himself uprightly as an encouragement to do the like.[83]

Townsend, not a naïve man, would have known that fraud could have released him from his bankruptcy. He paid dearly for his integrity,[84] and, in 1822, wrote an angry pamphlet referring to the injurious effects on public morals of the present bankruptcy law.[85]

Foote's and Townsend's lack of trust in the certificate as a reward for honesty was typical of mercantile attitudes towards this aspect of bankruptcy law. Merchants, guided by the depersonalisation of trade, desired a bankruptcy law that would maximise returns from bad debts by creating honesty through the guarantee of a certificate for bankrupts who acted fairly in assisting in the redistribution of their estates. While in 1764, Beccaria had warned that 'it is important not to confuse fraudulent bankrupts with those of good faith'[86]; in 1818, the merchant R Waitham stated that:

> It has always appeared to me that the great defect in our bankrupt system has arisen from the want of discrimination

> between the honest and the dishonest debtor; at present they seem to be on precisely the same footing.[87]

This, according to Nowlan, a fellow merchant, had the effect that bankruptcy law 'does not encourage and protect the former, nor deter and punish the latter'.[88]

This lack of discrimination between honest and fraudulent bankrupts that frustrated bankruptcy law's debt-clearing potential, was blamed upon the unchecked power that creditors had over the prima facie granting or withholding of certificates. Not only did this enable traders to indulge in 'sham' bankruptcy, it also failed to help to create honesty through the offer of a guaranteed certificate in exchange for fair play.

Although he later referred to the humanity of granting certificates to traders (other than to those who had demeaned themselves with some impropriety)[89], Basil Montagu was of the view that the correct motive behind a creditor's granting of discharge was:

> a sense of right that the bankrupt has so conducted himself as to be entitled to his certificate.[90]

Montagu argued that certificates should be granted as of right to bankrupts who facilitated the prompt distribution of maximum dividends from their remaining estates to their debtors. However, Montagu enumerated various 'bad motives' that drove creditors to sign or to withhold certificates in such a way as to deny the opportunity of using bankruptcy law optimally to clear bad debts. Although his arguments against the unfettered power in creditors over the certificate are reminiscent of those of the early 18th century merchants,

his reasons for wishing the certificate decision to be judicialised were somewhat different. Montagu sought an efficient debt-clearing device; his predecessors had sought a means of protecting unfortunate bankrupts so that the risks involved in trade would not discourage entrepreneurial adventuring, and so that individual unfortunate traders would not be lost to English commerce.

According to Montagu, the first 'bad motive' that drove creditors improperly to withhold certificates was 'a wrong sense of their duty'.[91] Thus, elsewhere, Montagu referred to the case of ex parte Noel[92] in which creditors had refused a certificate to prevent the bankrupt from committing 'more depredations on the public', as opposed to considering whether the bankrupt's conduct during his bankruptcy entitled him to discharge.[93]

Other 'bad motives' included creditors' anger that, through no fault of the bankrupt's own, 'no dividend had been declared'.[94] Certificates might also be withheld because creditors wished to 'suppress evidence'[95]: only a certified bankrupt could appear as a witness in litigation against his creditors.[96] Some creditors incapacitated bankrupt debtors for 'fear of competition in trade'.[97] The 'love of power', power having a 'constant tendency to corrupt', could also deny worthy bankrupts their certificates from creditors.[98] Creditors could further hold back certificates in 'the hope of bribery' from any concealed funds that the bankrupt might have.[99]

Two other 'bad motives' of creditors, denying bankruptcy as an efficient debt-clearing device, were said to be 'to prevent the bankrupt from receiving any allowance'[100], and 'resentment'.[101] By section 57 of the 1732 Act, a bankrupt whose estate paid a dividend of 10/- in the pound, received an allowance of 5% of his estate, up to £200; 12/6d. brought an allowance of 7½% up to £250; while, if the

dividends were under 10/- in the pound, the assignees and commissioners could decide whether any allowance was appropriate. However, ex parte Grier (1744)[102] was authority that the allowance was not to be paid until the certificate was awarded - Lord Hardwicke L.C. explained that despite Grier's estate having yielded dividends of 10/- in the pound, Grier:

> was not entitled to the allowance given to bankrupts, unless he had his certificate; for if the creditors should consent to give it to him before, it would be of no service, as they might take it from him again the next moment.[103]

Furthermore, Kenyon C.J. found in Groome v. Potts (1796)[104] that:

> a bankrupt must put himself in a situation to demand this allowance by obtaining his certificate, before payment of the dividends by the assignees.[105]

The effect of Kenyon's judgment was to place creditors in a conflict of interests over the certificate decision. Despite the bankrupt's behaviour, it was in their interest to refuse a certificate until at least after the bankrupt's estate had been finally carved up. Thus, they could circumvent the statutory provisions concerning allowances to bankrupts.

The last 'bad motive' of creditors mentioned by Montagu was that of 'resentment' which, he argued, was 'anti-Christian'.[106] In Vanity Fair Mr Osborne was the creditor most anxious to prove his former friend, the now bankrupt Mr Sedley, a 'villain'.[107]

Osborne sought to disassociate himself from Sedley to make himself less of a 'wretch'. Townsend referred to resentful creditors, robbed of their dividends by lawyers, messengers, auctioneers and others involved in bankruptcy proceedings.[108] While one pamphleteer wrote of 'the hazard of being able to procure such a certificate from disappointed creditors'[109], Dr Johnson added that creditors were recalcitrant through 'the wantonness of pride, the malignity of revenge, or the acrimony of disappointed expectation.'[110]

Filangieri wrote generally of the irrationality of the certificate decision whilst in the hands of creditors. A bankrupt could be perpetually incapacitated if his creditors 'from private interest, caprice or pique... were determined to ruin him'.[111] This fear of capriciousness in the certificate decision, allied with the fear that humanitarianism would lead to the discharge of fraudulent tradesmen, and that a plethora of 'bad motives' drove creditors to withhold certificates from fair tradesmen, led to considerable mercantile dissatisfaction with bankruptcy law.

Further dissatisfaction over the certificate of discharge arose over the issues of natural justice and the number of creditors to a bankruptcy who de facto controlled the certificate decision. There are many references in merchants' writings[112] to the fact that creditors holding the certificate decision represented a denial of the rule of natural justice that no man should be a judge in his own cause.[113] Reforming lawyers like Romilly[114], and politicians such as Burke, also commented on the absence of procedural justice for bankrupts. The latter, talking about insolvency law generally in his famous speech to the electors of Bristol, stated that a great defect in English law was:

> that some punishment is not on the opinion of an equal and public judge, but is referred to the arbitrary discretion of a private, nay, interested individual.[115]

The absence of procedural justice for bankrupts was, to those pressing for an economically efficient, debt-clearing bankruptcy law, further evidence of the law's irrationality. Not only did it lead to creditors deciding upon certificates on the basis of 'bad motives', it also represented an injustice in that fair bankrupts were denied their 'entitlement' to a certificate that they had earned. If the certificate was to act as an inducement to honesty, like cases had to be treated alike; a bankrupt had to be certain of the consequences of being either honest of dishonest.

The certificate decision was seen to be even less rational - even less based upon a decision as to the bankrupt's culpability - in as much as a few, or even a single creditor often had enormous influence over the granting or withholding of certificates. Four-fifths in number and value of the creditors had, since the 1732 Act, control of the granting of certificates. Frequently one large creditor was in the position of deciding whether to sign the certificate to bring the signatures over the threshold of the necessary number and value for the certificate to be granted. This led Burges to comment that:

> The obstinacy or malevolence of a single creditor frequently renders it impossible for an honest man to obtain a certificate.[116]

Montagu too was 'certain' that:

> deserving bankrupts have very great difficulty sometimes in obtaining the signature of the last one or two creditors, from the consciousness of power which such creditors possess, so that the good intentions of the great body of the creditors are for a time delayed.[117]

The various problems attached to creditors having the prima facie certificate decision (humanity, improper motives, capriciousness and the absence of procedural justice) were intensified since a single creditor often had real control over the certificate decision. Indeed, Sir Samuel Romilly identified another area in which a single creditor had enormous power over a bankrupt's life, be the bankrupt fair or fraudulent:

> however honestly [the bankrupt]may have acted, and though everything in the world be given up to his creditors, yet if he does not obtain his certificate, he may be imprisoned for life by any one creditor.[118]

There was, then, considerable mercantile dissatisfaction with the certificate of discharge decision resting with creditors. Bankruptcy law could be, in the merchants' terms, economically efficient. It could, as merchants desired, maximise returns from bad debts by guaranteeing a certificate for honest bankrupts, thus encouraging bankrupts to assist in the collection and redistribution of their

estates. While the certificate decision lay with creditors, however, the certificate failed to fulfil its potential function of making honesty the more rational choice for bankrupts. Humanitarianism could offer the hope of discharge to the fraudulent; while improper motives on the part of creditors could deny certificates to honest bankrupts. Furthermore, whilst creditors had the certificate decision, the fraud of sham bankruptcy was made possible. Sham bankruptcy, which was thought by merchants to predominate bankruptcy proceedings, represented certificates as the very antithesis of what, it was argued, they should be: they were seen as being an instrument for fraud as opposed to an inducement for honesty.

Merchants, their case strengthened inter alia by the support of influential practising lawyers, argued that the certificate decision should be rationalised to ensure that a bankrupt's honesty guaranteed him discharge. Two paradoxes, however, now arise. Firstly, the most obvious way of rationalising the certificate decision was entirely to remove it from the creditors. Further, if the certificate decision was judicialised, the nemo judex principle (no-one should be a judge in his own cause) would be incorporated into bankruptcy law, and sham bankruptcy would be destroyed. Secondly, if the certificate decision was solely based upon frauds committed during a bankruptcy, it would be in the interests of even bankrupts who had been fraudulent in their pre-bankruptcy affairs to be fair during their actual bankruptcy. This would seem to satisfy the merchants professed desire for a bankruptcy law that operated solely as a debt-clearing device. The pre-bankruptcy frauds could be punished by the criminal law proper in separate actions. The paradoxes in the merchants' case were that merchants wished to maintain at least some power with creditors over the certificate decision, and that they insisted that the certificate decision should include consideration of the bankrupt's behaviour not

only during, but also prior to the bankruptcy. If merchants desired a bankruptcy law that efficiently cleared bad debts by guaranteeing a certificate in exchange for cooperation by the bankrupt, their wishes that creditors maintained some power over certificates and took into account pre-bankruptcy affairs, appeared to contradict their need for bankruptcy law as an efficient debt-clearing device. This contradiction is all the more remarkable firstly, because of the merchants' frequent and heated criticisms of creditors holding the certificate decision; and secondly, because eminent lawyers, including Sir Samuel Romilly whose name was linked with the 1809 Bankruptcy Act[119] (known as Romilly's Act[119A]), had publicly described the benefits of an entirely judicial certificate decision only taking into account the bankrupt's behaviour during his bankruptcy - his pre-bankruptcy swindles being subject to separate criminal actions.

After a brief discussion of some specific reform proposals for bankruptcy, it will be argued in the next section that bankruptcy law and, particularly, the certificate of discharge, meant something to late 18th and early 19th century merchants over and above their arguments that it should maximise returns from bad debts. It will be seen that the certificate bore important ritual overtones representing a degradation and status reinstatement ceremony. In the following chapter, it will be seen that in another area of bankruptcy law - entry into bankruptcy proceedings being based solely upon some fraudulent act of bankruptcy - merchants, unhindered by any ritual significances, argued and acted uncompromisingly to make bankruptcy an efficient means to clear bad debts.

II The Certificate of Discharge as Ritual Degradation and Ritual Reinstatement Ceremony.

a) The efficiency potential of the certificate in clearing bad debts.

Despite the debt-clearing potential of a judicial certificate decision that would grant discharge for, and thereby encourage honesty during a bankruptcy, merchants were generally in favour of creditors retaining at least some control over the certificate decision. Indeed, there some sho argued that creditors were, in fact, the correct people to hold an (unchecked) discretion over the granting or withholding of certificates. Perhaps the most remarkable voice to this effect was that of W.D.Evans who was also one of the firmest proponents of the exchange of a guaranteed certificate for honesty[120]. Evans thought it 'very fair and reasonable'[121] that those who suffered as a result of their debtor's bankruptcy should be the ones to decide upon discharge, without incurring the 'considerable expense'[122] of offering reasons which could be open to judicial scrutiny. However Evans did exhort creditors to be speedy and rational in their decision-making, considering:

> the fairness and integrity of the bankrupt, and not the accidental diligence or remissness of the assignees, or the casual proportion between the debts and the estate.[123]

Others had less confidence that creditors could be persuaded to base discharge solely upon their bankrupt debtor's culpability. Some argued that creditors should retain the certificate decision, but that some judicial review of their decision should, after some time, be available

for bankrupts. Thus Lockhart argued that after a 'reasonable time', and as an 'additional inducement' for bankrupts to act fairly, the Commissioners should be empowered to grant a certificate regardless of creditors' wishes, to 'protect honest bankrupts from any vindictive motives'.[124] Montagu proposed a similar scheme, but wanted creditors to have the opportunity 'to show cause why the certificate should not be allowed'.[125] He explained that creditors should retain some control over the certificate decision, for a certain time as an 'unlimited power', because each creditor was injured not only financially, but also 'by his feelings having been wounded by the improper conduct of the person in whom he confided'.[126] Furthermore, Montagu believed that 'there are some offences of such a subtle nature as to be inexplicable to a public tribunal, and so severe that they ought not to escape with impunity'.[127]

Other reform proposals were more subtle, but most included some residual power, at least, with the creditors. Thus, for example, W. Cooke suggested, specifically to end sham bankruptcy, that Commissioners and the Lord Chancellor alone should grant a certificate protecting the debtor's body from imprisonment if the bankrupt had acted fairly during (and before) his bankruptcy. Thereafter, if a dividend was forthcoming from his estate, the certificate should also cover the bankrupt's newly earned property. However, if no dividend came out of the bankruptcy, creditors would be empowered to decide whether or not the certificate protecting the bankrupt's body should be extended to cover his property.[128]

The actual report of the Select Committee proposed that the Commissioners, if they were satisfied that there had been no fraud before or during the bankruptcy, and once the estate had yielded a dividend, should be empowered to award a certificate protecting the

bankrupt's person from imprisonment. Four-fifths in number and value of the creditors should then be empowered to grant a certificate[129] with the Commissioners' and Lord Chancellor's approval, covering the bankrupt's future property. If within a year, no dividend was forthcoming, or if creditors would not sign the certificate, Commissioners should be enabled to grant a full certificate. This was again dependent upon the bankrupt's behaviour prior to and during the bankruptcy and was subject to a power in creditors to speak against the bankrupt's receiving discharge.[130]

In each of these reform proposals, creditors were to be left with at least some control over the certificate decision. There were a few merchants who wished to remove entirely the creditors' power over the certificate, taking the merchants' case that certificates should be held out as a guaranteed inducement for honesty to its natural conclusion. Townsend, for example, proposed that:

> Certificate to be granted or refused, by an open court of inquiry, after the expiration of three months. Bankrupt to be present.[131]

Only with Townsend's plan could bankrupts be assured of certificates for honesty, without fear of creditors' improper motives at least delaying discharge. The fact that Townsend was one of the few calling for an entirely judicial certificate decision requires explanation. However, firstly, we must discuss another area in which merchants, despite their support from influential lawyers, stopped short of demanding that bankruptcy law satisfy their professed end of bankruptcy as an economically efficient debt-clearing process.

When asked whether a bankrupt's certificate should depend upon 'his conduct during trading and before his bankruptcy as well as his conduct afterwards', William Cooke replied 'most undoubtedly'[132]. Cooke's view was typical of that of most reforming lawyers and merchants. As has been seen, it was also the opinion expressed in the report of the Select Committee[133]. It was generally argued that swindles (pre-bankruptcy frauds) should be included in the certificate decision, either through the extension of section twelve of the 1732 Act to include more forms of pre-bankruptcy fraud that would statutorily deny certificates to certain bankrupts[134], or through the empowering of Commissioners and the Lord Chancellor, as well as creditors, to inquire into 'the conduct of the bankrupt, in the mode of contracting his or her debts'.[135]

Now, as has been argued, for bankruptcy law to operate as an efficient means of clearing bad debts, the certificate decision should only have taken account of a bankrupt's behaviour during his actual bankruptcy. Only if a former swindler had hope of discharge, would it have been in his interest to be fair during his bankruptcy. Consequently, with swindlers being denied hope of discharge, the potential of the certificate as an inducement to all bankrupts to act honestly, and thus to help to maximise returns from their estates, was partially undermined.

The opportunity of discharge for even swindlers did not necessarily mean that pre-bankruptcy fraud would go unpunished. Romilly had argued that swindles should be punished by:

> the penalty that the law has appointed for them; or if there be such as no law has yet provided against, an act should

> be passed to declare them, criminal, and
> to fix the proper punishment for them.[136]

This scheme, that would have left bankruptcy law free to operate as as efficient debt-clearing device, was largely ignored, and was not seriously floated in print again until J.R.McCulloch's Principles of Political Economy in the late 1820s.[137]

The inclusion of swindling in the certificate decision, then, partially undermined the merchants' own case that bankruptcy law should merely act as a device for maximising returns from bad debts. Swindlers, undeterred by the nominal threat of capital punishment for frauds during bankruptcy[138], may as well have attempted to conceal funds, to bribe creditors, to secure 'sham' creditors and to have committed other frauds during their actual bankruptcy. Not only was this mode of punishing swindling inefficient vis-à-vis bankruptcy law's debt-clearing potential, it was also an inefficient means of deterring swindling itself. While creditors held the certificate decision, humanitarianism or bribery could have freed a swindler from punishment over a matter which a criminal law court proper would have attracted the certainty of punishment.

Merchants and reforming lawyers pressed for an efficient debt-clearing bankruptcy law. They displayed considerable dissatisfaction with creditors' powers over the certificate decision in that it endangered the debt-clearing potential of a guaranteed certificate in exchange for honesty on the part of the bankrupt. Despite the fervour with which they argued their case, when bankruptcy reform was on the political agenda, they nevertheless also argued for the retention of at least some power with creditors over discharge; and for pre-bankruptcy frauds to be relevant to the certificate decision. It will be argued that this is demonstrative of bankruptcy law having

a meaning for merchants over and above their professed concern that it clear bad debts. Bankruptcy law also represented an important ritual degradation and reinstatement ceremony for merchants.

b) Bankruptcy as Ritual Degradation

Individual swindles could have been punished by means of specific crimes: larceny by trick, embezzlement, obtaining property by false pretences, etc.[139] Not only was the punishment and deterrence of swindling solely by means of such individual crimes possible in the late 18th and early 19th centuries[140], it was actively advocated by Romilly, a man whose name was closely associated with the 1809 Bankruptcy Act.[141] The punishment of swindling was, however, held by most merchants also to be part of the responsibility of creditors in their decision over whether to grant discharge to their bankrupt debtors. For swindlers, according to the conventional wisdom, would eventually - and inevitably- become bankrupt.[142]

According to the arguments of contemporary merchants themselves, creditors taking cognizance of pre-bankruptcy fraud in the certificate decision was inefficient on two grounds. Firstly, this method of policing trade was inefficient in respect to merchants' professed desire that bankruptcy law act first and foremost as a debt-clearing process. As noted, honesty could, according to the merchants' own criteria of rationality, have been induced in all bankrupts if certificates were awarded solely upon the basis of the bankrupt's behaviour during his actual bankruptcy. Pre-bankruptcy fraud could then have been dealt with by specific anti-swindling crimes (larceny by trick, etc.). However, not only did this method of policing trade stand opposed to mercantile desires for bankruptcy as an efficient debt-

clearing process, it also represented an inefficient means of deterring swindling. By contemporary deterrence theory, the rational individual would only avoid disapproved social action if it was certain that this action would solicit punishment.[143] With swindling punishable by the creditors to a bankruptcy a swindler could always hope that he would avoid punishment with the assistance of either humane, gullible, or corruptible creditors.

Explanations offered by merchants for their wish that the creditors' certificate decision continue to include consideration of pre-bankruptcy frauds were slight and unconvincing. After a brief survey of these explanations, we will go on to argue that their specious nature signals a deeper, non-conscious reason for merchants wishing swindling to be taken into account in the certificate decision: bankruptcy also acted latently as a ritual degradation ceremony for the malefactors of trade.

One explanation given at the time for wanting creditors to control swindling in their certificate decision was that they alone would be sensitive to 'subtle and inexplicable fraud'.[144] Burges argued that individual laws against specific swindles must fail because of 'the new shapes in which fraud was perpetually springing up'.[145] Further, cases like Shuttleworth v. Bravo (1800)[146], in which it was held that a creditor could not be a competent witness to a contravention of section 12 of the 1732 Act (disqualifhing a bankrupt from any hope of discharge because of certain pre-bankruptcy behaviour)[147], may have been thought to represent so many technicalities in the law, that creditors were best left to control swindling. Certainly, the death penalty clauses in bankruptcy legislation, relating to frauds during a bankruptcy, were generally believed to fail as a result of too many technicalities[148], as well as their

being expensive, time-consuming, troublesome and uncertain in their application.[149] It may have been thought that if a separate action, instigated by the creditors, was necessary for the punishment of swindling, then swindling (like the capital crimes in bankruptcy) would have gone unpunished.

None of these reasons, however, are sufficient explanation for merchants denying themselves the opportunity of pressing for an efficient, debt-clearing bankruptcy law. Many similar problems were either overcome or ignored in the case of the criminal law proper. Philips argues that coexisting with a 'savage criminal code' were:

> very weak and disorganized forces for law enforcement, indictments depended on private prosecution by the victim, a liberal code of criminal procedure making many acquittals possible on technicalities, and a well-established machinery for obtaining pardons to commute death sentences.[150]

A more viable explanation is available if we recall that since the 1780s there had been a moral panic about swindling[151]. In part, there may have been a reluctance to remove the control of swindling from creditors because neither the press, nor the Guardians or Society for the Protection of Trade against Swindlers and Sharpers would have been much impressed by swindlers receiving the opportunity of discharge from the full extent of their debts. The swindling moral panic offers a more profound explanation of the desire that creditors police pre-bankruptcy affairs of the late 18th century merchants are established as having been an heterogeneous class.

Coleman's characterisation of the contemporary American trading community has been shown not to coincide exactly with the English scene.[152] Conceding the likelihood that the 'bookeeper mentality' had fully blossomed amongst American merchants, in England by contrast, personal ties remained of great importance. In the early 18th century, these personal ties were of supreme significance to the homogeneity of merchants within small and localised (but interconnected) communities.[153] By the late 18th century personal knowledge of potential debtors or creditors was less likely. Nevertheless, merchants knew of, or could find out about their potential debtors or creditors, creditworthiness itself being based upon a merchant's reputation:

> nothing but reputation gives man credit,
> his resource is in reputation only and he
> must preserve it or starve.[154]

Depersonalisation of trade had taken place in England, but not to the same extent as that of America.

If reputation was the major cohesive factor behind late 18th century merchant homogeneity, there were other forces binding merchants together. These ranged from membership of societies such as that against swindling[155], to the economic ties created by the credit mechanism of indorsable bills of exchange whereby if one merchant defaulted, many would suffer.[156] As noted, Hobsbawm, amongst others, has identified the rise of a self-conscious class of merchants during the 18th century from their having occupied a rank in a largely feudal order.[157]

Durkheim's comments on the existence of solidarity within occupational corporations[158] are of relevance to the, albeit looser-tied, late 18th century merchants. People were said to combine to

share a common morality because of:

> material neighbourhood, solidarity of interests, the need for uniting against a common danger, or simply to unite.[159]

The last of these reasons is based upon a belief in combination arising as a result of psychological requirement to escape anxiety: 'the individual... finds joy in [association], for anarchy is painful to him'.[160] This may or may not be true[161]; however taking the other propositions in turn, they are seen to be sufficient to explain late 18th century merchant homogeneity. The English merchants, particularly with the improved communications infrastructure, shared a closer geographical area than their more impersonal American counterparts. Although each merchant competed against his fellows, there was a solidarity of interest in maintaining the very system of competition. Common dangers were manifest from many quarters: from a Parliament still dominated by the landed interest[162]; from people who dealt not in merchandise, but in money and shares, and from the 'old corruption' ('Jews, load-jobbers, placemen, pensioners, sinecure people, and people of the <u>dead weight</u>')[163]; from those advocating a return to an agricultural economy[164]; from overseas trading rivals[165]; from wars, bad harvests and political and trade 'crises'[166]; and from judges who, as we will see, failed to comprehend the requirements of trade.[167]

If these were some of the 'common dangers' from without the trading community threatening its security; swindlers represented a 'common danger' from within that community. Coser described as 'not new' the insight that external enemies have a cohesive effect upon a group[168]. Nor is it a new insight to suggest that cohesion can also

emanate from the enemy within a group:

> [the] attitude of hostility toward the law-breaker has the unique advantage of uniting all members of the community in the emotional solidarity of aggression.[169]

We have argued that the swindling moral panic was functional in maintaining the use of bills of exchange: to attack those who break rules, is to <u>reinforce</u> the rules.[170] The moral panic was also functional in preserving and recreating the social solidarity of an increasing self-conscious merchant class. The folk-lore of swindling manifested itself in newspapers, literature, judicial statements, anecdotes, and in special societies established to combat swindling. However it was in bankruptcy law's continued concern with pre-bankruptcy fraud that the social function of the moral panic in maintaining and recreating mercantile homogeneity found its most concrete form.

Durkheim argued that 'where a group is formed, a moral discipline is formed too'.[171] Thus, when John Sedley in <u>Vanity Fair</u> became insolvent, he suffered the indignity of having his name 'proclaimed a defaulter on the Stock Exchange'[172]. This would have so damaged his reputation as to have acted as reparation for his contravention of a 'moral discipline'. Durkheim, however, also wrote of the 'warmth' of unity.[173] To break from the covenant of this warmth was to court an icy reception. Sedley was not offered an informal composition.[174] A witch was caught, and merchant solidarity would be enhanced as the witch was denounced: 'his bankruptcy and commercial extermination had followed'.[175] Ruination was insufficient, ritual ruination by means of a degradation ceremony was required.

Garfinkel has described 'status degradation ceremonies', a universal phenomenon[176], as :

> any communicative work between persons whereby the public identity of an actor is transformed into something looked on as lower in the local scheme of social types.[177]

He writes of the utter destruction of the total identity of the perpetrator - Bankowski and Mungham's term 'role-stripping' being most instructive in this context.[178] By the late 18th century, a merchant's 'total identity' was, in public, his very occupation:

> It was, of course, Mrs Sedley's opinion that her son would demean himself by a marriage with an artist's daughter. 'But lor', Ma'am,' ejaculated Mrs Blenkinsop, 'we was only grocers when we married Mr S, who was a stockbroker's clerk.[179]

A man who had been fraudulent in trade had his capacity to be a merchant removed from him by bankruptcy law, both by means of his inability to receive moneys without them going straight to his assignees in bankruptcy, and by the destruction of his reputation. His status suffered a complete transformation, from merchant to swindler/undischarged bankrupt. Thus, one pamphleteer wrote of:

> the injury done to the credit, trade, livelihood, and I may add, to the character of a tradesman, by his

> becoming bankrupt... his character will assuredly suffer in the eyes of the multitude.[180]

Townsend too referred to the 'odium which attaches to the name of a bankrupt'.[181]

Garfinkel enumerated eight prerequisites for achieving a successful denunciation. The merchant's desire for bankruptcy law to retain a concern with swindling is, in the light of these categories, clearly seen to be a desire that bankruptcy maintain its ritual portent.

Firstly, the perpetrator and the event for which he stands accused must be 'removed' from the realm of their everyday character'.[182] This was evident in the formalistic proceedings surrounding bankruptcy- from the docket, to the petition, to the three creditors' meetings. The bankrupt would suffer alienation as be became a case to be recorded in the London Gazette, as he underwent questioning in the tumultuous commissioners' rooms[183], and as his future was determined through the 'exotic jargon'[184] of bankruptcy law: 'this, with many other ill-starred occurrences, in a few years produced a Whereas'.[185]

Secondly, the perpetrator and the event must be classified as types contrary to those morally approved of. Adam Smith stated that:

> The greater part of men... are sufficiently careful to avoid [bankruptcy]. Some, indeed do not avoid it, as some do not avoid the gallows.[186]

The alleged swindler who wrote a column in The Times of 1786[187] has already been seen to satisfy another aspect of Garfinkel's second category: 'the confessions of the Red can be read to teach the meanings of patriotism'.[188]

Thirdly, the denluncer must act in the capacity of a public, not a private person. We have seen how merchants and reforming lawyers were clear that creditors should not base the certificate decision upon some personal motive, possibly of revenge, but should only consider the bankrupt's culpability.[189]

Fourthly, he must denlunce according to his group's, not his own values. George, an ex-creditor to a bankruptcy, was ashamed to admit that his personal feelings of charity had come in the way of justice when he awarded a certificate to a swindler.[190]

Fifthly, the denouncer must consider the wrong to the group, not to himself. Again, Montagu's list of the 'bad motives' of creditors suggests this as a norm in merchants' and reforming lawyers' views of the role of creditors to bankruptcies.[191]

Sixthly, witnesses must define the denouncer as a supporter of these values. Hence the horror felt about people who 'lived by proving debts and signing certificates'.[192]

Next, denouncer and witnesses must feel distanced from the perpetrator. This was often achieved in a bankruptcy through the physical imprisonment of a bankrupt. Mrs Heartfree's husband, in Fielding's Jonathan Wild[193], was such a prisoner:

> "Why doth he not procure bail?" said Wild.
> "Alas! Sir," said she, "We have applied to many of our acquaintance in vain; we have met with excuses where we could least expect them.'[194]

Further, the bankrupt was the object of Commissioners' and creditors' questioning, he was not a competent witness in any actions against his creditors.[195]

Finally, 'the denounced person must be ritually separated from a place in the legitimate order... he must be placed 'outside'.'[196] As we know, the swindler/undischarged bankrupt was outlawed from the merchant community both by his inability to receive or to earn money for himself, and by the immense stigma attached to his being an undischarged bankrupt:

> Till [the bankrupt] has gained [his certificate] he is separated from the community he has wronged.[197]

Merchants approved of this situation - it was said that the swindler/undischarged bankrupt should be 'branded with the mark in infamy'[198]; while Burges proposed that a judge should be able to force an undischarged bankrupt to wear a badge declaring his fradulent past.[199]

Arnold has argued, within the context of the criminal law, that:

> The ceremonial trial never is, or can be, an efficient method of settling disputes. Of course, efficiency is one of its ideals, but there are others equally important which must also be dramatised.[200]

As Merton has noted, the use of such words as 'ideals' creates a confusion between 'subjective dispositions' and 'observable objective consequences'.[201] It is in the latter sense that we will consider the 'other ideals' of the merchants' desire that swindling be taken account of in the certificate decision. Let us, then, replace the work 'ideals' in Arnold's statement with 'social functions'[202], and have regard to the social functions of bankruptcy law's ceremonial trial.

Merton defines social function as the interdependence between standardised social activities or cultural items, and the social or cultural system. The activities or items are not necessarily functional for the entire social/cultural system; nor do all such activities or items fulfil social functions; nor are they indispensible for the given society.[203] Social functions may be 'manifest' or 'latent'. The former are:

> those objective consequences contributing to the adjustments or adaptions of the system which are intended and recognised by participants in the system.[204]

Latent functions, alternatively, are 'those which are neither intended nor recognised'.[205] Further, unbeknown to the actors involved, a social activity or cultural item may have latent dysfunctions.[206]

An application of Merton's version of functionalist analysis to bankruptcy's ceremonial trial of swindlers will neatly summarise this section of the chapter. Firstly, the continued concern amongst merchants and reformers that creditors should have at least some control over the certificate decision, and that they should take into account pre-bankruptcy fraud, had latent dysfunctions for the merchants' own case that bankruptcy should act as an efficient debt-clearing process.

> When swindling was taken into account in the certificate decision, those who had been fradulent prior to their bankruptcy had no incentive to assist in the clearing of their debts; and when creditors held sway over the certificate decision, even unfortunate bankrupts could not be sure that honesty was the best policy since the criterion on which the certificate decision was made could quite possibly be other than that of the bankrupt's level of honesty.[207]

Secondly, the punishment of swindlers through bankruptcy law, rather than by means of individual criminal prosecutions, had, albeit weakly argued, manifest functions. The law could be sensitive to the most subtle of frauds, and a swindler, once caught, would not escape punishment as a result of the various problems attached to creditors taking out separate, criminal actions against their fraudulent debtors.

Thirdly, and the real explanation for merchants desiring creditors to have control over a certificate decision that took account of pre-bankruptcy fraud: this cultural item had a vital latent function. It was a degradation ceremony, and, as such, served to maintain and to recreate the social solidarity of late 18th century merchants, despite the growing depersonalisation of trade:

> moral indignation may reinforce group solidarity. In the market and in politics, a degradation ceremony must be counted as a secular form of communion.[208]

This, however, does not explain why unfortunate, honest bankrupts were subjected to a degradation ceremony.

c) <u>Bankruptcy as ritualised cleansing</u>

Late 18th century merchants and reforming lawyers were generally agreed that swindlers should be perpetually incapacitated from future trading. This, it was argued, should be done through bankruptcy law, and through creditors (perhaps supervised by judges) making a rational certificate decision on the basis of not only a bankrupt's behaviour during but also before his actual bankruptcy.[209] Merchants, however, were also clear that the unfortunate and honest insolvent tradesman

should undergo the same process that ritually degraded and incapacitated the swindler.

If one function of bankruptcy law was to degrade swindlers, another function was:

> to encourage and protect ingenious and enterprizing merchants and manufacturers, when their adventures proved unsuccessful from unseen losses... by granting them certificates and allowances from their effects, when no imputation lay against their fair dealing and moral conduct, to enable them to recommence their pursuits, by which the State did not lose the benefits arising to the community from their genius and trading.[210]

While the same process was used to degrade swindlers and to encourage unfortunate bankrupts, there were, in fact, two routes by which merchants, if they had so desired, could have created different processes for unfortunate bankrupts and for swindlers.

Firstly, bankruptcy law could have been used as a process for clearing bad debts however they arose if swindles were punished by separate criminal actions. As we have seen, this route was not popular in that it denied the ritual portent of bankruptcy as degradation ceremony.

Secondly, bankruptcy law could have been used only in cases where some <u>prima facie</u> suggestion of swindling arose. Where there was no suggestion of swindling, the unfortunate tradesman could, as Montefiore had argued[211], have been offered an inexpensive and speedy informal composition. This idea was not popular for several reasons.

Barristers in commercial practice were more interested in helping merchants to reform bankruptcy law than creating a more enforceable version of informal compositions.[212] Barristers may have preferred to reform a procedure of which they had more experience, or they may have feared losing business if debt-collection was less legalistic.[213] There was the fear amongst merchants that informal compositions could lead to novel forms of fraud, such as that described by Thackeray whereby the Crawleys refused to return to England from France, unless their creditors accepted 9d. in the pound.[214] Most significantly, however, merchants quite simply perceived bankruptcy law, despite its failings, as the appropriate procedure by which an unfortunate trader should clear his bad debts. Thus, Edmund Townsend's description of his response to the consequences of his having accommodated an Irish bank:

> at their failure, my name being on bills to the amount of many 1,000 pounds, which I had raised for them, there was no other mode of saving my own <u>bona fide</u> creditors a due share of my property, than by submitting to a bankruptcy.[215]

Bankruptcy proceedings, then, could have been used solely to clear bad debts however they were accrued; or bankruptcy proceedings could have been reserved for swindlers. Despite these possibilities, merchants desired bankruptcy law, with its degradation ceremony for swindlers, to be used as the mode of collecting debts both from swindlers, and from unfortunate bankrupts. The concern that bankruptcy law should recognise misfortune in pre-bankruptcy affairs is again only explicable in terms of its ritual power in reinforcing merchant homogeneity. Two separable rituals were encompassed in bankruptcy

proceedings: the status degradation of swindlers, and the status reinstatement of unfortunates.

Whereas degradation ceremonies have been identified by sociologists, the major works on status reinstatement are within the field of social anthropology and, specifically, in the interpretation of taboo. It is appreciated that employing the concepts and methodologies of a discipline concerned with 'non-literate' societies, to 'large complex and highly differentiated societies', is not to be taken lightly.[216] Nevertheless, late 18th and early 19th century mercantile attitudes towards bankruptcy law coincide directly with taboo theory. Indeed, Freud asserted that 'taboos still exist among us'[217], and Radcliffe-Brown offered contemporary examples.[218]

While there is a high level of consensus amongst social anthropologists as to the actual mechanisms of taboo-related rituals, there is, not surprisingly, less consensus as to an appropriate analytical framework within which such rituals should be interpreted. Let us place late 18th century bankruptcy law, as it pertained to unfortunate bankrupts, within the context of taboo rituals, and thereafter analyse the reasons for merchants wishing to perpetuate this situation.

Taboo encompasses 'a sense of something unapproachable, and it is principally expressed in prohibitions and restrictions'.[219] There is a 'holy dread'[220] against breaking a taboo. For late 18th century merchants, insolvency represented just such a taboo:

> Bankruptcy is perhaps the greatest and most humiliating calamity which can befall an innocent man.[221]

The unfortunate bankrupt, however innocently, broke a taboo by becoming bankrupt. The literature on taboo is clear that an innocent trans-

gression of a taboo, is nevertheless a relevant transgression:

> Even if the person concerned has committed the offence unconsciously, the guilt is still transferred to him.[222]

Thus, all that remained for the unfortunate bankrupt was 'the comfort only of his conscience, and the satisfaction of his innocence' which, however, did not save him from 'the censure of the world, the loss of character, and the rigour of the laws'.[223] So too, when the 1818 Select Committee reported that in bankruptcy there was 'a total absence of all discrimination between culpability and misfortune'[224], the point was not that either swindlers or unfortunates should be removed from the common procedure of bankruptcy, but that the certificate decision should be conducted rationally.

Three stages may be identified in taboo rituals. Firstly, a 'ritual status'[225] is undermined by the contravention of a taboo. Secondly, there is a period of separation when the taboo person undergoes special rituals. Thirdly, through these rituals, the transgressor regains his 'ritual status'.

The ritual status of a late 18th century merchant was dependent upon his creditworthiness - to be uncreditworthy was to lose the very status of being a 'merchant'; as Montagu put it, 'his state in society'.[226] In Radcliffe-Brown's terminology, creditworthiness had a 'ritual value' and its corollary, insolvency, was a 'ritual avoidance'. The 'calamity' of insolvency was two-fold: the trader had debts which he had to clear without the opportunity of borrowing elsewhere; and he was denied the very status of being a merchant.

'Separated from the community he has wronged'[227], an unfortunate bankrupt underwent 'a kind of commercial chrysalis'.[228] The stigma

attached to all bankrupts, fair or dishonest, has already been discussed.[229] There are great similarities between a stigmatised person, separated from his community, and one who has transgressed a taboo. The former is 'disqualified from full social acceptance'[230], while the latter 'does not belong socially to the community'.[231]

The similarity between a stigmatised, and a taboo person extends further. Freud wrote of taboos that:

> no external threat of punishment is required, there is an internal certainty, a moral conviction, that any violation will lead to intolerable disaster.[232]

King described his greatest fear: 'the stigma of bankruptcy has always terrified me',[233] and Montagu wrote of the term 'uncertified bankrupt': 'the misery which these words convey is but little known by us who feel not a want but we ourselves create'.[234]

The separation from the community of both a stigmatised and a taboo person is not only apparent from their lack of social acceptability and their subjective feelings of dread, it is also apparent in that each passed on their 'guilt' to those connected with them.[235] A bankruptcy was said not only to be calamitous for the bankrupt himself, but also to be 'to the ruin of creditors, friends and [the bankrupt's] own family'.[236]

The sole means by which a taboo person, once stripped of his status and separated from his community, can <u>regain</u> his ritual status is through some purification ceremony.[237] Radcliffe-Brown offers a contemporary illustration of a less serious infringement of a taboo:

> There are some people who think that one should avoid spilling salt. The person who spills salt will have bad luck. But he can avoid this by throwing salt over his shoulder. Putting this in my terminology, it can be said that spilling salt produces an undesirable change in the ritual status of the person who does so, and that he is restored to his normal or previous ritual status by the positive rite of throwing salt over his shoulder.[238]

In the context of late 18th century bankruptcy law, Townsend's description of the effects of the receipt of a certificate of discharge, combines the ideas of a bankrupt being creditworthy again, and his regaining the ritual status of 'merchant':

> [the certificate] does away with the criminal implication of the law, and restores a bankrupt... to credit and his former rank in society.[239]

Lockhart too was sensitive to the purificatory rite involved in the granting of a certificate of discharge which was proof:

> not only of [a bankrupt's] liberation from former obligations, but in a degree, of his character as a fair man, fit again to be trusted and dealt with.[240]

In accordance with the theory that bankruptcy, for the unfortunate bankrupt, represented a cleansing ceremony, there was a concern amongst merchants that the ritually reinstated tradesman should

receive public recognition of his rehabilitation: 'both his honesty and innocence should be stated to the public'.[241] In Sweet's view, the receipt of a certificate was insufficient recognition:

> I think it would be beneficial to the public, if the character of an honest bankrupt were publicly proclaimed in the Gazette after he had passed such an ordeal.[242]

Even a more publicised certificate of discharge was not, however, the culmination of bankruptcy's ritual reinstatement ceremony for unfortunate bankrupts. Ruud states generally about taboo purification rituals that 'once the ceremony is over, there is no "arrière pensée", but the matter is absolutely finished'.[243] Sweet, however, argued that ex-bankrupts should not be allowed to become trustees to another's bankruptcy because of the 'propriety of keeping the office of trustee respectable'.[244] Furthermore, King asserted that even after his certificate, an ex-bankrupt would suffer since 'feebleness, discredit and suspicion will ever accompany his name'.[245] Another author wrote that a bankrupt's name 'will always carry with it the idea of misconduct, indolence, or extravagance',[246] while Beawes claimed of the creditors that 'they cannot restore lost credit and reputation'.[247]

It is Beawes' (stressed) claim that creditors cannot reinstate an ex-bankrupt, which is the clue as to how complete reinstatement could occur. An American author wrote:

> Why is a man obliged to repay his debts? It is hoped that few persons will reply "Because the law compels him." Why then? Because the moral law compels it.[248]

Ritual status was not lost for ever. While bankruptcy law was the main part of purification, full purification rested upon the shoulders of the ex-bankrupt himself. In 1782, the Gentleman's Magazine carried an article on a man of 'integrity' who had nevertheless been a bankrupt.[249] Sir Stephen Theodore Janssen became bankrupt through misfortune in 1765. Since obtaining his certificate, he and his family had lived in comparative 'poverty' (£600 p.a.) while he slowly repaid, 'to the last penny', the debts from which he had been discharged. As Pitt-Rivers has noted:

> A man is... always the guardian and arbiter of his own honour, since it relates to his own consciousness and is too closely allied to his physical being, his will, and his judgement for anyone else to take responsibility for it.[250]

Bankruptcy law, then, may be identified as the first and major part of a ritualised cleansing process for tradesmen who inadvertently contravened the insolvency taboo. At a subliminal level, it was both for this reason, and also so that bankruptcy law could act as a degradation ceremony for swindlers, that merchants pressed for the continued inclusion of pre-bankruptcy affairs in a certificate decision over which creditors retained at least some control. This was contrary to a professed desire amongst merchants that bankruptcy law efficiently and solely concerned itself with the clearing of bad debts. As noted, and as some argued at the time, bankruptcy could have cleared bad debts efficiently if the certificate decision were judicialised, and only took account of behaviour during a bankruptcy: only

then would it have been in <u>every</u> bankrupt's interest to assist in the redistribution of his estate in exchange for a guaranteed certificate.

Merchants' concern that bankruptcy law take cognizance of pre-bankruptcy affairs (be they representative of honesty or fraud) is also contrary to claims about late 18th century legal development that 'ancient rules are reconsidered from a functional or purposive perspective'[251], or that 'Law making (and enforcing) processes are always instrumental'.[252] In the next chapter, merchants (as opposed to judges, as Horwitz and Mathias suggest) will be seen to have been pressing for a more 'instrumental', debt-clearing bankruptcy law, entry into which was not to depend upon some fraudulent act of bankruptcy. However in the present chapter, it has been seen that merchants were prepared partly to forego their purpose of bankruptcy as debt-clearing process, to satisfy certain non-rational ritual requirements.

We have already seen how bankruptcy's degradation ceremony of swindlers functioned to reinforce merchant homogeneity. Let us now consider the reasons why merchants also desired that the certificate decision take note of honesty in pre-bankruptcy affairs; <u>any</u> notice of pre-bankruptcy affairs being at the expense of an entirely instrumental, debt-clearing bankruptcy law that only involved itself with behaviour during a bankruptcy.

Freud's interpretation of taboo rituals grew from his experience of 'obsessional' patients who, Freud argued, could be said to be suffering from 'taboo sickness'[253]:

> the basis of taboo is a prohibited action for performing which a strong inclination exists in the unconscious.[254]

Thus is explained the 'energetic' vengeance of a group against a taboo-breaker to avert a danger to the whole group, and to rid a communal guilt.[255] There is always 'the risk of imitation, which would lead to the dissolution of the community'.[256]

Freud's analysis of taboo rituals is open to the criticism of an assumption of the universality of human cognitive processes.[257] However, applying Freud's analysis to our evidence of the 18th century bankruptcy law, we can argue that: late 18th century merchants consciously despised insolvents because of an unconscious desire to become insolvent. At first sight this is absurd. The conscious hatred of insolvents has been shown to have existed - but an unconscious desire to be insolvent appears to be less likely.

Freud's analysis makes more sense if merchants are seen not to have desired insolvency, but:

> a gambling trick in which all the advantage is on the side of the trickster: if the trick succeeds it makes his fortune, or preserves it; if it fails, he is at most reduced to poverty, which was perhaps already pending when he determined to run the chance.[258]

The unconscious desire, then, may have been to play the wheel of business fortune on another's money, uncaring of the consequences of failure. How outrageous for someone actually to do this! When an acquaintance of Sam Foote declared 'what a pleasure it is to repay our debts', Foote replied, 'with the air of ridicule and pompitude':

> credit... is the art of living without money. It saves the trouble and expense

> of keeping accounts; and makes other people work, in order to give ourselves repose.[259]

Foote's reply was a joke, but juxtaposed with the proposition of the pleasure of repaying debts, it clearly helps to substantiate Freud's idea of the ambivalence surrounding taboos.[260]

While the ambivalence felt by late 18th century merchants towards debt helps to explain bankruptcy as taboo purification ritual, this aspect of bankruptcy law may also be explained with reference to its social function. Radcliffe-Brown's form of social functionalist analysis of taboo ritual is not, in fact, that far removed from Freud's psychoanalytical approach. Both are concerned with the group cohesion arising out of these rituals. Freud sees cohesion arising in a negative manner in that the taboo acts as a protective mechanism preventing people from pursuing paths that they would like to pursue, but which would threaten the given social order. Radcliffe-Brown sees taboo rituals as creating cohesion in a more positive manner in that the taboo ritual represnets an integrative mechanism whose focal point is an object or occasion which is of itself, or is symbolic of 'important common interest'.[261] Neither Freud nor Radcliffe-Brown, however, really explain why particular objects or events are taboo for particular societies.[262]

Mary Douglas also concludes that taboo rituals have their major social function in recreating cohesion within a group; however she goes beyond Radcliffe-Brown in arguing that specific taboos are only comprehensible within the context of the unique cosmology in which they exist[263]. From Douglas' standpoint, insolvency rituals positively ordered merchant relationships by imposing system upon 'an inherently untidy experience'.[264] That some people were uncreditworthy implied

an order amongst merchants based upon creditworthiness,

According to Douglas, taboo rituals should not be explained too materially for just as Moses, in his strictures on profane behaviour, should not simply be identified as a 'public health inspector'[265], the certificate of discharge should not merely be seen as a device to encourage honesty in trade. The taboo should be studied in relation to its symbolic effect on the structure in which it exists. The insolvent trader in the late 18th century was beyond the order of a money and credit-based group. The symbolic significance of bankruptcy's ritualised cleansing process, was to restore the insolvent to an approved ritual status. As such, bankruptcy was not only therapeutic for the individual insolvent and for the creditors involved[266], it also had a major function in recreating the reality of a system of trade dependent upon credit[267].

d) Summary and Modern Parallels

Perhaps supporting Levinthal's suggestion that there are certain 'universal features' in bankruptcy laws[268], let us summarise the present chapter referring to some remarkable parallels between the late 18th and early 19th century situation, and the interim report of the Cork Committee on the review of insolvency law published in 1980.[269]

With the depersonalisation of trade, and the hardening of mercantile resolve for reform of bankruptcy law as a result of an alliance with certain lawyers, the 'sham' and 'swindling' panics, and the accelerating bankruptcy rate, a new case for bankruptcy reform emerged. Early 18th century merchants had sought to minimalise the risks attached to trading ventures by making discharge readily available to unfortunate bankrupts. Late 18th century merchants were

more concerned with creating an efficient debt-clearing process in order to maximise returns from bad debts.

It was argued that bad debts could be best cleared by a bankruptcy law that encouraged honesty by offering the guarantee of a certificate in exchange for fairness on the part of the bankrupt. The basic objectives of bankruptcy were held to be similar to those posited, over two centuries later, in the Cork Committee's interim report: firstly, repaying creditors 'speedily and fairly' with the estate in 'honest and competent hands'[270]; and secondly,

> to protect the debtor from pursuit by his creditors individually, and, having given him the relief from the burdens of his debt <u>in exchange for</u> the surrender of his assets, to provide for his <u>rehabilitation</u>[271] in due course if the circumstances of his case are appropriate.[272]

Despite late 18th century mercantile fears that the certificate decision, while in the hands of creditors, could be based upon reasons other than the bankrupt's culpability, and despite the debt-clearing potential of the certificate decision only taking account of the bankrupt's behaviour <u>during</u> his actual bankruptcy (thus making it in the interest of even a former swindler, who could be punished separately for his swindles, to assist in the redistribution of his estate), merchants wished to retain some power over discharge with creditors, and the certificate decision to take account of pre-bankruptcy affairs. Bankruptcy <u>meant</u> something to merchants, over and above its debt-clearing potential. In 1980, the debt-clearing potential of bankruptcy law was still partially undermined by a special meaning attached to

to the term 'bankrupt':

> underlying the present system there is ... a strong undercurrent of what can conveniently be described as retributive and punitive justice towards the debtor. At an early stage in the proceedings he is classified as a bankrupt, with all the disabilities and penalties as well as the stigma in the eyes of the community which is implied by that status. This is so irrespective of the merits of the case.[273]

Late 18th century merchants, at a non-conscious level, wished to retain some control with creditors over a certificate decision that took pre-bankruptcy affairs into consideration because of two separable rituals inherent in bankruptcy procedure. Firstly, and functioning to recreate merchant homogeneity, bankruptcy was a ritual degradation ceremony for swindlers. Similarly in 1980, the enemy from within the community had to be denounced for the sake of the community:

> There are debtors whose actions give rise to a deep sense of public outrage which can only be assuaged by a public questioning of the debtor carried out by a disinterested public servant. If high standards of common morality are to be maintained and public confidence in the integrity of our business life is not to be impaired, then those who have been described as 'the criminals of the credit world' must be treated vigorously.[274]

Secondly, and to recreate a system of trade dependent upon credit, bankruptcy was, for the unfortunate bankrupt, a status reinstatement ceremony. It is again interesting to note that the 1984 Government White Paper on Insolvency Law[275] rejected the Cork Committee's report's proposal that small consumer debtors, against whom there is no allegation of fraud, should not undergo bankruptcy procedure, but should be dealt with by a separate 'debt collecting arrangement'.[276]

Ostensibly for 'administrative convenience' the Government plans to leave small consumer debtors:

> no alternative but to file their own petitions and to be subject to what is still considered the stigma of bankruptcy.[277]

Late 18th and early 19th century merchants could have had, but did not press for, a judicial certificate decision only taking into account a bankrupt's behaviour during his bankruptcy. Ritual significances prevented them from pressing for a fully efficient, debt-clearing bankruptcy law, despite their professed desire for this end. In another area of bankruptcy law, however, unhindered by ritual significances, they pressed enthusiastically, both in words and in action, to make bankruptcy a more efficient debt-clearing process: merchants called for voluntary self-declaration of bankruptcy.

Chapter Eight

Bankruptcy as Process

As we have seen, despite the debt-clearing potential of a judicial certificate decision based upon a bankrupt's behaviour during his actual bankruptcy, ritual requirements forced late 18th century merchants to demand that creditors retain at least some control over a certificate decision that also took account of pre-bankruptcy affairs. For merchants, bankruptcy law should be, in part, a method of policing trade.

More importantly, however, merchants perceived the major end of bankruptcy law to be the efficient clearing of bad debts:

> Creditors have generally but two objects,
> a fair disclosure from the bankrupt and
> an early dividend.[1]

If the ritual significance of bankruptcy in recreating merchant homogeneity and a system of trade based upon credit had prevented merchants from pressing for a purely economically rational certificate decision that guaranteed discharge for honesty; in another vital area of bankruptcy law, unhindered by ritual overtones, merchants pushed unequivocally for bankruptcy law as an efficient debt-clearing process. In the light of mercantile calls for the availability of voluntary self-declaration of bankruptcy, merchants can be seen to have been desirous of bankruptcy as debt-clearing process first, and as crime a poor second.

In the present chapter, the debate around self-declaration of bankruptcy will be seen to have been representative of, and fundamental to, the two contemporary competing views of bankruptcy law:

a device to police trade, or a process to clear bad debts. Merchants will be seen to have pressed for the latter view of bankruptcy law in both their arguments and their action for establishing self-declaration of bankruptcy. As to their action - merchants will be seen to have circumvented the law, and to have de facto created a system of self-declaration of bankruptcy by debtors and creditors increasingly concerting apparently fraudulent acts of bankruptcy. It will be argued that in the judicial response to these concerted acts of bankruptcy, the divergent views of merchants and judges over bankruptcy law's proper function can be seen, judges still perceiving bankruptcy law as an aspect of the criminal law. Finally, and to explain why merchants so desperately required a debt-clearing process of bankruptcy law, the merchants' social order, as evidenced in their attitudes towards debt, will be examined. In another chapter[2], we will discuss why the legislature accommodated merchants by, in 1824, allowing self-declaration of bankruptcy, and why the judiciary proved unable, or unwilling to do so.

a) The mercantile demand for self-declaration of bankruptcy

In the late 18th and early 19th centuries, then, there were two views of bankruptcy law's primary prupose: policing trade, and clearing bad debts. The judiciary, as will be argued at more length in the following chapter, conceived bankruptcy mainly as a device to police trade - judges continued to see all bankrupts as criminals, all having committed an act of bankruptcy that was 'partaking of the nature of a crime'.[3] Merchants, alternatively, saw bankruptcy mainly as a debt-clearing process. As is displayed in Montefiore's disapproving definition of a bankrupt:

> a trader who from the state of his affairs is deemed insolvent, or, as defined by lawyers, a trader who secretes himself, or does certain other acts tending to delay or defraud his creditors,[4]

merchants were not concerned with any fraud that might be found in the act of bankruptcy, the sole entry into bankruptcy proceedings. If bankruptcy was to have a residual policing function, it was substantive fraud prior to, or during a bankruptcy that merchants wished to deter, not the isolated act of a desperate man. In calling for self-declaration of bankruptcy as a valid entry into bankruptcy proceedings, merchants displayed a desire that bankruptcy, for the creditors of an unfortunate insolvent tradesmen, should act primarily as a debt-clearing process. Self-declaration 'would alter the whole system'[5] in as much as no man would declare himself 'guilty of a crime and a tort'.[6] Once he had declared himself a bankrupt, the greater (if not total) judicialisation of the certificate decision would ensure an insolvent tradesman's continued assistance in the collection of his debts.

Merchants were aware of the debt-clearing potential of a rationalised bankruptcy law. For traders, bankruptcy was 'the only compulsory means of distribution of an insolvent's effects'[7]: an informal composition could fail on the objection of a single creditor.[8] The distribution offered by bankruptcy law ensured that creditors shared the bankrupt's remaining assets in proportion to their debts: 'thereby only can preference be avoided'.[9] The costs involved in an insolvent tradesman's frauds during the redistribution of his estate could be eliminated, and bankruptcy could be made attractive even for

the insolvent tradesman himself, if creditors, under at least some judicial supervision, could be persuaded to grant discharge in exchange for honesty. Self-declaration of bankruptcy could enable an unfortunate insolvent tradesman easily to enter bankruptcy proceedings 'which provide equally for his own protection, and for a just distribution of his effects among his creditors'.[10] Indeed, there were great hopes for bankruptcy's debt-clearing potential should self-declaration be incorporated into the law:

> a great number of persons would avail themselves of that opportunity and pay their creditors very nearly, if not quite, 20/- in the £, instead of the present plan which is now adopted.[11]

Further, it was argued that self-declaration of bankruptcy would be an ideal test of insolvency[12], that insolvency law and many foreign codes allowed for self-declaration[13], and that self-declaration was already generally desired by merchants:

> its introduction into our own [code] has been...so universally approved of, that it is unnecessary to urge any of the numerous arguments in its support.[14]

However merchants pressed for self-declaration of bankruptcy not only in words, but also in action.

It has been seen that most bankruptcies in the late 18th century were thought to be 'sham' bankruptcies between an insolvent tradesman and 'friendly' creditors.[15] Despite this belief, merchants and reforming lawyers argued that although most bankruptcy was 'concerted' to

'plunder' real creditors[16], some concerted acts of bankruptcy were designed to have quite the opposite effect:

> some of the fairest and most honourable commissions that have been issued for the last twenty years or since I have been in business, have, from necessity, been founded on what might be called concerted acts of bankruptcy.[17]

A 'concerted' act of bankruptcy was one in which a debtor and his creditors agreed that the debtor should deny his creditors, execute a 'fraudulent conveyance'[18], or commit one of the other statutory acts of bankruptcy. In so doing debtors and creditors de facto created a system of self-declaration of bankruptcy and a purely procedural use of bankruptcy law. This situation, however, was most unsatisfactory for the bankrupt who had to commit what, in the eyes of the judiciary, was a crime:

> Considering that by the present bankrupt laws, bankruptcy is treated as a crime, great inconvenience occurs when a fair debtor in insolvent circumstances, is told by his creditors that it is his duty to commit an act of bankruptcy.[19]

Furthermore, since the bankrupt had to pretend to have committed the act of bankruptcy with fraudulent intent[20], the insolvent tradesman had to enter bankruptcy proceedings with 'something very like subornation of perjury'.[21]

Nevertheless, concerted acts of bankruptcy for the benefit of

creditors were common in the late 18th century. Creditors were not interested in punishing acts of bankruptcy; they were more concerned, with the connivance of their debtors, to use bankruptcy as a debt-clearing device, with the laundering of fair but unfortunate bankrupts an integral part of the process. A survey of some of the reported cases on concerted acts, quite apart from acting as evidence of their frequency, will display the rift between mercantile and judicial attitudes towards the purpose of bankruptcy law. Later, this distance between the mercantile perception of bankruptcy as debt-clearing process, and the judicial perception of bankruptcy as crime, will be seen to have been the major influence behind <u>legislative</u> reform of bankruptcy law in 1824/25.[22]

b) <u>The judicial attitude towards self-declaration of bankruptcy</u>

The cases on concerted acts of bankruptcy mainly involved creditors seeking to quash bankruptcy proceedings on the ground that there was no intention to defraud on the part of the bankrupt. <u>Mens rea</u> was essential in 'doubtful' acts of bankruptcy[23] until the 1790s when, as will be seen, it became essential for every act of bankruptcy.[24]

In judicial attitudes towards the status of concerted acts of bankruptcy, at one extreme lay Lord Mansfield's refusal to allow them to stand:

> An act of bankruptcy in the eye of the law is considered as a crime; - but where is the crime of denying oneself to another, by previous consent and agreement?[25]

At the other extreme lay Lord Meadowbank's opinion as expressed in a Scottish case:

> Is there anything fraudulent here, anything collusive, anything but what must be admitted to be a fair and legitimate purpose towards the creditors.[26]

The conflicting perceptions of bankruptcy as a device to police trade, and bankruptcy as a debt-clearing process, are implicit in two of Lord Kenyon's judgements on concerted acts of bankruptcy. Two further points of interest arise from a study of these cases: firstly, they are examples of the constraints of legal formalism upon any judicial desire to satisfy the demands of their mercantile customers; and secondly, they are representative of a very real conflict in Lord Kenyon's own mind as to the meaning of bankruptcy law.

In Roberts v. Teasdale (1790)[27], Kilner agreed, after two informal meetings with his creditors, that he was insolvent. Kilner then sought advice from Crowder, his creditors' solicitor, as to what he should do. Crowder's initial evidence in Roberts v. Teasdale was that:

> He told Kilner that the most advisable thing he could do was to commit an act of bankruptcy by denying himself to a creditor, which he accordingly did. He added, that this advice [was] without the knowledge of the petitioning creditors, or any desire from them, though they had before desired him [i.e. Crowder] to take out a commission.[28]

Some time into the purported bankruptcy proceedings[29], Teasdale petitioned for the bankruptcy to be overturned on the ground that it had been concerted between the bankrupt and some of his creditors, including the now assignee in bankruptcy, Roberts. According to Teasdale, the absence of fraudulent intent on the part of Kilner in the act of bankruptcy was damning to its being the basis of bankruptcy proceedings. Teasdale hoped to reclaim cotton that he had lent to Kilner, not being satisfied with a mere share in Kilner's remaining assets, as would have been the case if the bankruptcy was to stand.

Lord Kenyon differentiated the present case from:

> those cases in which concerted acts of bankruptcy have been held to be fraudulent, and the commission grounded upon them void.[30]

Kenyon was thus careful not to make sham bankruptcy legal. In Roberts v. Teasdale, Kenyon could see fraudulent intention neither on the bankrupt's, nor the creditors' part:

> Here was a desire to make an equal distribution of the bankrupt's effects, and the advice was the most beneficial which could have been given for all parties.[31]

Despite this explicit acceptance of a procedural use of bankruptcy law when both creditors and debtor agreed that it was the most sensible method of clearing the latter's debts, as Holdsworth has noted of Kenyon:

> [he] always kept distinct the provinces of the judge and the legislator, and followed precedent, however much he might disagree with the rule established by it.[32]

Kenyon would have known of Mansfield's judgements in which concerted acts were held to be invalid[33], and would certainly have been aware of the famous case of Bamford v. Baron (1787)[34] in which Mansfield's decision had been followed: 'those who were privy to a concerted act of bankruptcy could not take advantage of it'.[35] Furthermore, Kenyon, who was shortly to establish the definite requirement of mens rea in acts of bankruptcy[36], would have understood Mansfield's objection to concerted acts of bankruptcy: namely, that since the alleged bankrupt had not intended to delay and to defraud creditors, he should not be held liable to the (criminal) law of bankruptcy[37]. Consequently, Kenyon admitted some doubt in his tentative decision that Kilner's concerted act of bankruptcy was valid, and ordered a re-examination of the solicitor, Crowder.

Crowder's new evidence that at the informal meetings between his clients and Kilner there had been talk of Kilner committing a 'fraudulent conveyance' as the basis for bankruptcy proceedings, led Kenyon to declare that the case had been 'materially altered'.[38] Nevertheless, Kenyon directed the jury to find that there had been a valid act of bankruptcy. Although it has been suggested of Kenyon that 'juries trusted him, and followed his directions'[39], in this instance, possibly suspecting a sham bankruptcy, the jury ignored Kenyon's direction, and refused to agree that there had been a valid act of bankruptcy.

Kenyon was determined that Teasdale would not receive an inflated

share of Kilner's remaining assets. He had hoped to establish a wide-ranging rule that bona fide concerted acts of bankruptcy were valid. In the event, he was obliged to settle on a far narrower decision that, on the facts of Robert v. Teasdale, no concerted act had occurred since the act of bankruptcy was committed on the independent advice of a friend (Crowder), who had had no direct communication with the creditors. Kenyon again stated his preference for the wider rule, and perhaps declared to the jury that he could see no attempted sham bankruptcy in the evidence, by saying that Crowder's advice was:

> not for the purpose of making a fraudulent bankruptcy. It was honest advice, and for the benefit of all parties.[40]

Despite the narrowness of this decision, it was radical in that Kenyon allowed an act of bankruptcy to stand where the bankrupt's intention was not to delay and to defraud creditors, but to benefit them. It displayed a clear preference for bankruptcy as debt-clearing process when possible, and it displayed a disinterest in seeking to prove all bankrupts guilty of committing a manifestly criminal act of bankruptcy.

Four years later, Kenyon felt obliged to follow Hooper v. Smith.[41] Had the jury in Robert v. Teasdale permitted him the wider rule, it may have been otherwise, however Kenyon reluctantly found in Stewart v. Richman (1794)[42] that:

> whatever idea of policy or propriety first suggested it, and though it might appear that a commission of bankruptcy is the most equitable mode of dividing

> the bankrupt's estate amongst his creditors, it is now settled that a trader could not legally concert an act of bankruptcy with his creditors.[43]

These two decisions of Lord Kenyon neatly highlight the quite different views of Lords Mansfield and Meadowbank as to bankruptcy law's proper purpose. In Kenyon's reluctance to follow Mansfield's belief in bankruptcy as an aspect of the criminal law, and in his frustrated preference to allow bankruptcy to be employed as a debt-clearing process, it is possible to see the contemporary divergent and conflicting views of bankruptcy's proper function. It is possible to see the debate surrounding self-declaration of bankruptcy.

Roberts v. Teasdale and Stewart v. Richman are also demonstrative of the extent to which late 18th century judges were prepared to develop the law to coincide with the expectations and requirements of their mercantile customers. As has been seen in legal developments around the question of a factor's bankruptcy[44], judges bowed to mercantile desires only in as much as the development would not threaten the internal consistency of the law. Thus, having been deprived of the opportunity of holding bona fide concerted acts of bankruptcy to be valid in Roberts v. Teasdale; despite his clear distaste for a rule that broke with mercantile wishes and, apparently, practice, Kenyon felt bound to follow precedent in Stewart v. Richman and to hold that concerted acts were invalid.

Shortly it will be seen how other judges, wishing to develop the law to satisfy mercantile demands, but unwilling to break with precedent, attempted to marginalise the damage caused by the formal legal rule that concerted acts were invalid. However firstly, a conflict in Kenyon's own mind as to the meaning of bankruptcy law should be

discussed. Kenyon's decision in Roberts v. Teasdale stood in stark contrast to his decision in Fowler v. Padget some eight years later.[45] In the earlier case, Kenyon sought to establish a rational entry into a debt-clearing process. A bona fide intent behind the committing of an act of bankruptcy was held to constitute a valid entry into bankruptcy proceedings, and Kenyon regretted not being able to extend the scope of his decision to acts concerted between debtors and creditors. However in Fowler v. Padget, Kenyon held that:

> Bankruptcy is considered as a crime, and the bankrupt in the old laws is called an offender: but it is a principle of natural law, and of our law, that actus non facit reum nisi mens sit rea. The intent and the act must both coincide to constitute the crime.[46]

Thus on the one hand, Kenyon allowed bona fide intent to establish a procedural, debt-clearing bankruptcy; while on the other hand, Kenyon required proof of fraudulent intent in acts of bankruptcy which were considered to be criminal in nature.

Kenyon's self-contradictory view of bankruptcy law as process and as crime cannot be explained in terms of any desire to maintain a residual policing function with bankruptcy law to reinforce merchant homogeneity and the credit system through bankruptcy's rituals. Unlike the merchants, seeing bankruptcy as crime first, and process a poor second, Kenyon may simply have been confused when faced with a bankrupt who had chosen bankruptcy for his creditors' benefit. He may have been unaware of the fact that by letting this bankruptcy stand he was contradicting his own belief in bankruptcy as crime. Alternatively, he may have intended this contradictory conception of

bankruptcy law: bankrupts could become such with criminal intent (the norm), or with the intention to benefit their creditors (an unusual situation[47] that, being 'for the benefit of all parties'[48], was morally acceptable). The only people whom Kenyon would not permit to use bankruptcy proceedings were those with friendly creditors ('a fraudulent bankruptcy'[49]), or those who had the intention neither to benefit, nor to defraud creditors:

> The legislature never could have meant to extend criminality [or to offer a debt clearing process?] to a person who leaves his house only for the purpose of transacting his legal concerns.[50]

Irrespective of whether Kenyon saw bankruptcy as both crime and process as a result of confusion, or as a rational strategy[51], it will later be argued that this was the kind of contradiction to be expected prior to a fundamental change in the law.[52]

Faced with the hostility of merchants who pressed for self-declaration of bankruptcy so that bankruptcy could act as a debt-clearing process, other judges attempted to quell mercantile dissatisfaction by tempering the strictness of the rule in Hooper v. Smith that concerted acts of bankruptcy were invalid. If their conviction that bankruptcy was a crime prevented judges from allowing creditors privy to a concerted act to benefit from it, they were prepared to allow non-privy creditors to rely on a concerted act to petition bankruptcy proceedings. Clearly, the objection that the bankrupt's motives were laudable, not fraudulent, had to be overcome. Bowing to the merchant interest as much as they could whilst still giving the appearance at least of a formal, legal rationale, judges

found two ways round this objection of a lack of fraudulent intent on the part of the bankrupt.

Fristly, it was claimed that those who were privy to a concerted act of bankruptcy could neither rely upon it, nor object to its being called an act of bankruptcy: their 'mouths were shut'.[53] This was a weak ground upon which to allow non-privy creditors to petition a bankruptcy on the basis of a concerted act. The court simply denied itself the opportunity to question the bankrupt as to his intention in committing the act of bankruptcy.

The second method of overcoming the problem of an absence of fraudulent intent in the act of bankruptcy, was for the court to hold that by concerting, for example, a 'fraudulent conveyance' with some of his creditors, the bankrupt was attempting a distribution of his estate other than that directed by the Bankruptcy Acts.[54] This, of course, was a fiction in that the 'fraudulent conveyance' was not intended to be the final method of distribution of the estate, but only as a means by which bankruptcy law proper could come into operation. Indeed, stating that he preferred the first justification for allowing non-privy creditors to petition a bankruptcy based upon a concerted act, Eldon L.C. referred to this second method as an 'extravagant length'.[55]

Thus, judges were not prepared to forego their long-held belief that bankruptcy was a crime. However, they were prepared to manufacture an implied male fides on the part of the bankrupt, to allow bankruptcy to be employed as a debt-clearing process when creditors not privy to a concerted act petitioned bankruptcy upon it. This was despite the obvious objection floated by Cullen as counsel in ex parte Bourne, that if a lack of real fraudulent intention on the part of the bankrupt meant that privy creditors could not petition on a concerted

act, it was absurd to say that the same act constituted fraudulent intention vis-à-vis non-privy creditors.[56]

In their words and in their action, then, merchants pressed for self-declaration of bankruptcy. In the face of the judicial perception of bankruptcy as crime, merchants demanded that bankruptcy should operate primarily as debt-clearing process. Later we will discuss why the judiciary,despite sympathetic tinkering with the law, would not accommodate merchants over concerted acts of bankruptcy whereas in 1824, the legislature allowed self-declaration of bankruptcy.[57] However let us conclude the present chapter with a discussion of the social order of late 18th and early 19th century merchants to explain how, on the one hand, merchants desired creditors to have some control over a certificate decision that took note of pre-bankruptcy affairs and thus helped to police trade, while on the other hand they pressed for self-declaration of bankruptcy, and for bankruptcy law mainly as a debt-clearing process.

c) The merchants' social order

The late 18th century merchants' praxis (theory and action) surrounding self-declaration of bankruptcy is clearly demonstrative of a desire amongst merchants that bankruptcy law should be employed as a process efficiently to dispose of bad debts. This view of bankruptcy appears to contradict the merchants' concomitant belief that bankruptcy law had a role in policing trade. As has been seen[58], the use of bankruptcy proceedings was not only less efficient than individual prosecutions would have been in deterring swindling (bribery or humanity might secure discharge from bankruptcy for a swindler), but the consideration of pre-bankruptcy affairs by creditors in the

certificate decision also detracted from bankruptcy's debt-clearing potential[59]: honesty could not be bought by the guarantee of a certificate while creditors' 'bad motives' could come in the way of a rational certificate decision; the expectation of discharge for a swindler would have induced even his honesty during his actual bankruptcy and would thus have maximised his creditors' returns; and the criminal trappings of bankruptcy would have been a disincentive to honest insolvent tradesmen to declare themselves bankrupt. Despite these arguments having been made at the time, and despite the preference for bankruptcy as process as demonstrated in their praxis around self-declaration, merchants wished to maintain a residual policing function for bankruptcy law.

In order to understand the merchants' social order of the late 18th and early 19th century and thus to understand why merchants desired a residual policing function for bankruptcy law, it is necessary firstly to compare the later merchant community with its early 18th century predecessor.

The great difference between early and late 18th century trade lay in a move from a personal trading community where entrepreneurial adventuring was all, to an impersonal community where economic efficiency was put at a premium.[60] In the early period, merchant homogeneity was realised in the economic ties between communities, but also in the honour-based relationships between members of localised and personal communities. In the later period, a more impersonal community relied for its solidarity not only upon economic interconnections via long strings of indorsements on bills of exchange, but also upon friction with other classes, and upon friction with enemies from within the trading community: swindlers who were ritually denounced by means of their bankruptcies.

Early 18th century merchants perceived the debt bond as a special relationship between traders, the breach of which was a personal wrong upon the creditor. In the later period, debt and credit came to be seen purely as a means to create profit: debt became entirely a business transaction[61]. Correlatively, in the early 18th century, the personal wrong suffered by the creditor to an unfortunate bankruptcy should not, it was argued, prevent him from granting discharge to an honourable bankrupt not only on grounds of compassion, but also to protect entrepreneurial risk-taking, and so as to protect England's resource of honest tradesmen. In the later period, however, bankruptcy law was seen not in terms of its being able to protect the honourable trader, but as a means of maximising returns from bad debts, by minimising the costs of debtors' frauds. Thus arguments were advanced for self-declaration and for a more rational certificate decision. The concern had moved from the protection of fellow trades-men who had broken through misfortune, to the protection of creditors in their search for maximum returns from any loan that they made.

Against the background of this shift in emphasis of the perceived purpose of bankruptcy law, it is possible to explain the distinctive nature of the late 18th and early 19th century merchants' social order, and to explain why merchants, who pressed vehemently for self-declaration of bankruptcy to allow bankruptcy to act as process, also wished to have creditors retain some discretion at least over a certi-ficate that took account of pre-bankruptcy affairs. The latter forced bankruptcy also to act as a means of policing trade despite, as has been noted, this being inefficient both towards the merchants' major end of bankruptcy as debt-clearing process, and, indeed, as Romilly argued, towards policing trade itself.[62]

The sanctity of the credit system, and the pursuit of economic efficiency, were common values for late 18th and early 19th century merchants. These common values differed in their mode of conservation over and above their reproduction through practice. The credit system was symbolically conserved through the theatre of ritual and its concomitant consensus. The pursuit of economic efficiency was conserved through the (successful) demand for 'instrumental' legal rules with their concomitant conflict.

The merchant class functioned successfully as a result of their sharing a consensus of common values. This was epitomised in bankruptcy's rituals of the status degradation of swindlers and the status reinstatement of unfortunate bankrupts which symbolically recreated the credit system and merchant homogeneity. The denunciation of pre-bankruptcy fraud, and the recognition of honesty in pre-bankruptcy affairs in the certificate decision were representative of consensus-type legal rules which are 'manifestations of the shared values of the group'.[63]

Within a framework of consensus amongst the merchant class reinforced by bankruptcy's rituals, inter-merchant relationships in the pursuit of economic efficiency were based upon private interest by which:

> men are governed by self-interest and guided by judgments about the most efficient means to achieve their privately chosen ends.[64]

The type of legal rules associated[65] with such a social order are 'instrumental rules' which:

> are treated by the individual as one more factor to be taken into account in his calculus of efficiencies.[66]

Self-declaration, and the move towards the guarantee of a certificate for honesty, are examples of precisely such rules whereby the minimisation of costs and the maximisation of returns from bad debts, if not necessarily profit, could be achieved through bankruptcy law. The insolvent tradesman would calculate his own best interests to lie with bankruptcy proceedings, and this would also be in the best interests of his creditors.

Merchants wanted bankruptcy law first and foremost to be a debt-clearing process. Their secondary concern that it should also police trade is explained by the merchants' social order by which the rituals involved in bankruptcy's policing function helped to recreate a homogeneity of meanings for merchants within which private interest and bankruptcy as process could operate.

The main thrust of the merchants' case for bankruptcy reform, then, was that bankruptcy should clear bad debts in an economically efficient manner. It was this argument that stood in such stark contrast to judicial developments of the criminal nature of bankruptcy that it led the judicial view into what will be described as a 'crisis'.[67] Out of this crisis was to emerge legislation of 1824/25 incorporating self-declaration into bankruptcy law, and entirely changing bankruptcy from being primarily a crime, to being primarily a debt-clearing process.

Chapter Nine

The Schism between Mercantile and Judicial Perceptions of Bankruptcy Law in the Late 18th and Early 19th Century

In a previous chapter it was argued that 18th century bankruptcy law was 'relatively autonomous' in three senses.[1] Firstly, it coincided nearly, but by no means exactly with the expectations and requirements of its early 18th century mercantile customers: these merchants may have disapproved of the judicial view of all bankrupts as criminals; however their satisfaction with the availability of discharge for unfortunate bankrupts made the law at least tolerable to most. Secondly, as was seen in a chapter on the bankruptcy of factors,[2] judges were prepared to develop bankruptcy law according to merchants' wishes, but never at the expense of the internal consistency of the law, nor so as to threaten its 'structural principles'. Thirdly, it was suggested that when the distance between what judges could offer, and what merchants required of bankruptcy law became too immense, the judicial view of bankruptcy entered a critical and confused phase, eventually prompting Parliament to resolve the conflict in favour of the merchants. Thus again was revealed the relative nature of bankruptcy law's autonomy from the social and economic system and, more specifically, from the requirements of the merchant class. While the crisis in the judicial perception of bankruptcy, and the resolution of that crisis will be part of the subject matter of the following chapter, the schism between the mercantile and judicial perceptions of bankruptcy will be discussed here.

We have already alluded to the immensity of the rift between late 18th and early 19th century mercantile and judicial views of bankruptcy law. With the depersonalisation of trade, merchants saw bankruptcy

primarily as a debt-clearing process to the extent that debtors and creditors were prepared actually to perjure themselves to activate bankruptcy proceedings, by concerting apparently fraudulent acts of bankruptcy. Meanwhile judges not only continued to see bankruptcy as crime, but they further exacerbated the situation of the merchants by developing bankruptcy law in line with general developments in the criminal law. As will be seen, by incorporating the necessity of mens rea into acts of bankruptcy, and by thus insisting upon clear evidence of fraudulent intent on the part of the perpetrator, judges both emphasised the criminal nature of bankruptcy, and made it more difficult for merchants to concert acts of bankruptcy with a view to clearing bad debts.

The distance between what judges could offer and what merchants required of bankruptcy law will also be seen to have been increased to lengths intolerable to the merchants by the judicial insistence upon three entirely independent decisions over the granting of discharge: by the creditors, by the Commissioners, and by the Lord Chancellor. This had the effect of making certificates of discharge, even for the completely blameless bankrupt, difficult to obtain.

a) The Growth of Mens Rea in Acts of Bankruptcy

As Fletcher has noted in respect to 18th century larceny law, there was a shift towards the end of the century from criminal liability resting upon some objectively observable 'manifestly criminal' action, to its resting upon the union of an act (the '*actus reus*') and an intention (the '*mens rea*') occurring at a single point of time.[3] In the context of bankruptcy law, judges shifted the responsibility of a perpetrator of an act of bankruptcy from responsibility for the

natural consequences of his action, to responsibility for the intended consequences of his action. While this coincided both with the rise of the Protestant ethic of individual responsibility[4], and with the mercantile view of the behaviour of rational individuals who chose honesty or dishonesty according to the likely consequences of their action[5], merchants, as will be seen, were greatly distressed by this judicial development of bankruptcy law in line with criminal law in general.

Several points of interest arise out of discussion of the means by which mens rea was introduced into acts of bankruptcy. Judges will be seen to have developed bankruptcy law according to the internal consistency of the law. This legal formalism, creating autonomous legal development quite out of phase with mercantile requirements, was to the extent of provoking a determined praxis for reform amongst merchants. The development will be seen further to have alienated merchants by the greater insistence on the criminal nature of bankruptcy, and by the continued judicial focusing upon fraud in the act of bankruptcy as opposed to focusing upon the more relevant frauds committed before or during bankruptcy, as the merchants would have preferred. Courts will be seen to have been insensitive to alternative conceptions of bankruptcy presented by counsel. And, important for the argument of the following chapter, judges will be seen to have reinterpreted past cases to coincide with their view of the contemporary state of the law.

The 1570 Bankruptcy Act had required a mental element to acts of bankruptcy. The perpetrator had to have committed the act 'to the intent or purpose to defraud or hinder any of his or her creditors'.[6] However, the 1604 Act stated that the act had to be committed:

> to the intent, or whereby his, her, or their creditors... shall or may be defeated or delayed for the recovery of their just and true debts.[7]

The mere perpetration of one of the acts of bankruptcy whether or not fraudulent intention was present, was a sufficient basis upon which to petition for bankruptcy. It was the latter statute to which reference was made throughout the 18th century[8]; the 'or' being taken literally until 1798 when Kenyon reinterpreted it as an 'and'.[9]

Thus, as noted[10], in Woodier's Case (c. 1730-34)[11], Woodier was held to have committed an act of bankruptcy by departing the realm, despite the fact that he probably did so to escape the consequences of murdering his wife. It was sufficient that his creditors were 'thereby in fact prevented from recovering their debts';[12] Woodier was held responsible for the natural consequences of his action. Before Woodier's Case was reluctantly followed by Buller J. in Raikes v. Poreau as late as 1786[13], there were several cases in which intention did feature. These cases only make sense in the light of the decision in Hopkins v. Ellis (1705).[14]

In Hopkins v. Ellis, Holt C.J. drew a distinction between 'plain' and 'doubtful' acts of bankruptcy. In the latter type of acts of bankruptcy, the 'animus furandi', the perpetrator's intention, was part of the proof of the existence of the act of bankruptcy. Thus in Woodier's Case - Woodier had clearly departed the realm, and his intention in doing so was irrelevant. In Gulston's Case (1743)[15], however, the act was in doubt, and Gulston's intention was relevant in establishing whether an act of bankruptcy had in fact occurred. In that case, Gulston had travelled to Barbados to manage two sugar crops on his estate there. Gulston remained there beyond his intended two

years, and despite having sent moneys to England as part payment of his English debts, Dale, a former colleague, petitioned Gulston's bankruptcy on the basis of Gulston having 'departed the realm'. A special jury of merchants found that Gulston had obtained the permission of his English creditors before going abroad. The act of banrkuptcy was in doubt in that the natural consequence of his having left England could only be identified as being manifestly criminal if despite his creditors' permission, Gulston had intended at the time to defraud or to delay them. Regardless of evidence as to Gulston's furtive behaviour prior to leaving, it was held that no act of bankruptcy had occurred. Similarly in ex parte Hall (1753)[16], Hall's refusal to see his creditors late at night was held not to be an act of bankruptcy. Hall had not intended to 'deny' his creditors, let alone defraud or delay them.

Explaining the point anachronistically: mens rea only became a constituent of acts of bankruptcy in the late 18th century. There was, throughout the 18th century, the requirement that the actus reus (the objectively fraudulent act) be proved. In 'doubtful' cases, the very proof of the actus reus could involve evidence of the defendant's intention in committing the apparent act of bankruptcy.

The development of mens rea as an essential element of acts of bankruptcy occurred over a short period of time in the late 18th century.[17] Buller J. sat on many of the relevant cases, and it is interesting to note how he felt bound to follow Woodier's Case, despite serious reservations, and then, quite suddenly, broke with precedent and instituted mens rea in acts of bankruptcy. The reasons for this change of heart will be discussed shortly.

Raikes v. Poreau (1786)[18] concerned a man who left England with his sixteen year old mistress who would accept him on no other terms.

Buller reluctantly bowed to legal formalism in following Woodier's Case as the relevant precedent, and found that since his creditors were in fact delayed, Poreau's intention was irrelevant in this clear act of bankruptcy of departing the realm. However Buller did state that:

> If I were now to lay down the law for the first time, I do not know that I should do it in this manner. But I am bound to conform to decided authority.[19]

Torn between following precedent, and instituting mens rea and responsibility for the intended as opposed to the natural consequences of one's action, Buller chose to follow precedent.

A year later Buller sat on Vernon v. Hankey (1787)[20] which involved Mrs Tyler departing the realm and in fact delaying her creditors in the recovery of their debts. Again Buller applied Woodier's Case, its always having been 'good law'.[21] Buller, however, applied Woodier apologetically, implying that even if intention was a constituent part of acts of bankruptcy, Mrs Tyler would still have committed such an act. Woodier, he stated, was not 'as strong a case as this, for he had more ground for his apprehension, having killed his wife'.[22] Again, Buller displayed dissatisfaction with the absence of mens rea in acts of bankruptcy, but felt bound to follow precedent:

> ... at this time, without examining into the expediency of [Woodier's Case], I should be extremely averse to overrule it.[23]

It is unfortunate that there remains no full report of Aldridge v. Ireland (1792)[24] in which Buller finally did examine the 'expediency'

of Woodier's Case, and overruled it. Aldridge v. Ireland involved Mrs Wall, a linen-draper from Bath, who 'departed her dwelling house' to journey to London to prevail upon her brother to withdraw an execution order on her house. Her brother insisted upon execution, and left Mrs Wall insolvent. She remained in London. It was a fact that by departing her house, she had delayed her creditors; however the court found that she had committed no act of bankruptcy. According to Fowler's counsel in Fowler v. Padget (1798)[25]:

> the court... said that it depended upon the intention of Mrs Wall, when she left her house at Bath, whether or not she had committed an act of bankruptcy whether she went with the intention of delaying or defeating her creditors.[26]

This was not an instance of intention being considered to ascertain the validity of a 'doubtful' act of bankruptcy: the act was 'plain', and Mrs Wall's lack of fraudulent intent saved her from bankruptcy. Whereas Poreau had absconded with a child mistress, and Mrs Tyler would have been guilty of an act of bankruptcy whether or not mens rea was relevant, Mrs Wall was morally blameless. Buller, then, clearly took his opportunity in Aldridge v. Ireland finally to ignore precedent, and to incorporate mens rea into acts of bankruptcy, holding Wall liable for the intended, as opposed to the natural consequences of her action.

In Fowler v. Padget itself, mens rea unequivocally found its way into acts of bankruptcy. Fowler departed his Manchester dwelling house to travel to London to recover a large debt from Mr Smith, whom Fowler had heard was in a failing condition. Fowler returned to Manchester ten days later having obtained from Smith a bill of exchange for £129

and goods of considerable value. While Fowler had been absent, several of his creditors had visited his house to demand repayment of debts, some of which had become due the day that Fowler de facto denied himself to his creditors by departing his house. Fowler had left no agent to deal with these creditors, one of whom, Padget, had broken into the house, taken, and sold some of Fowler's belongings. On his return, Fowler compounded with some of his creditors, but sued Padget for trespass, breaking and entering his house, and taking and converting his, Fowler's, goods. Padget sought to justify his action by claiming that Fowler had committed the act of bankruptcy of denying himself to his creditors.

The major issue before the Court of King's Bench, then, was whether or not Fowler, the plaintiff, had committed an act of bankruptcy. This had to be determined in the light of a finding of fact by the jury in the court of first instance in response to a shrewd question posed to them by Rooke J.:

> they thought that the intent of the plaintiff in going to London was laudable; that he had no intention to defraud or delay his creditors; but that delay did actually happen to some creditors.[27]

Padget's counsel mixed precedent with policy in their submissions. They referred to the precedents of Woodier's Case and Raikes v. Poreau, but also argued that there should be strict liability for acts of bankruptcy since:

> the primary object of the bankrupt laws is to make as just and speedy

> a division as possible, of the insolvent trader's effects amongst his creditors.[28]

Padget's counsel argued that the debtor's intention in committing an act of bankruptcy was, consequently, irrelevant: the inconvenience to the creditors was as great whether or not the debtor had intended to delay or to defraud them. Further:

> the creditor can scarcely ever know with what intent a man goes away from his house; but the fact of his being delayed payment thereby is notorious and easily substantiated.[29]

The defence counsel may have been looking backwards to the perception of fraud enshrined in the early 18th century precedents that fraud was a manifestly visible event in the world. Alternatively, the defence counsel may have been of the view that whenever strange events occurred, namely any action clearly falling into the statutory acts of bankruptcy, bankruptcy procedure should come into operation not so much to punish fraud, as to ensure a speedy redistribution of a debtor's estate before it began to diminish. The latter interpretation of the defence counsels' submission, and their view that bankruptcy was primarily a means of clearing bad debts, were not considered by Kenyon who simply brought bankruptcy into line with developments in criminal law in general.

Kenyon, in Fowler v. Padget, had no illusions that bankruptcy was other than as aspect of the criminal law:

> Bankruptcy is considered as a crime, and the bankrupt in the old laws is

> called an offender: but it is a principle of natural law, that actus non facit reum nisi mens sit rea. The intent and the act must both concur to constitute the crime.[30]

As seen, in Roberts v. Teasdale eight years earlier, Kenyon had been largely unsuccessful in creating the possible use of bankruptcy as debt-clearing process, entry into which could be based upon bona fide intention behind an act of bankruptcy.[31] In Fowler v. Padget, Kenyon insisted upon there being fraudulent intention behind an act of bankruptcy, bankruptcy itself being part of the criminal law. As suggested, Kenyon may simply have been confused over the meaning of bankruptcy law, or he may have been able to conceive of bankruptcy as both crime and process, but not as an aspect of the law that should come into operation by accident (even 'the richest man in the country'[32] would then have to beware leaving his house for a few hours when his creditors might call).[33] As will be argued in the following chapter, however, not only Kenyon's confusion, but also the strengthening of the view of bankruptcy as crime was not surprising in the context of the merchants' praxis for self-declaration of bankruptcy which threatened the very foundations of this judicial view of bankruptcy.

In finding Fowler innocent of an act of bankruptcy through lack of intent to delay or to defraud his creditors, Kenyon appears to have ignored legal formalism and the directly relevant precedents flowing from Woodier's Case. However Kenyon was concerned about the internal consistency of the law. Seeing bankruptcy as crime, Kenyon felt obliged to develop the law relating to acts of bankruptcy in line with general developments in the criminal law by which, as noted, the union of an actus reus and a mens rea replaced manifest criminality as the determinant of criminal liability.[34] Kenyon displayed a concern with

the internal consistency of the law not only by developing bankruptcy in line with other crimes, but also, alongside his fellow judges in Fowler v. Padget, by searching for and by reinterpreting past precedents to justify the inclusion of mens rea in acts of bankruptcy.

Kenyon referred to an article written some thirty years earlier by Lord Gilbert[35] as authority that the 1604 Bankruptcy Act was merely a faulty transcription of the 1570 Act in which mental elements in acts of bankruptcy did feature.[36] The article was, in fact, merely a brief resumé of some important aspects of bankruptcy law. The comment upon which Kenyon relied was a passing reference that the later statute 'is the same as the foregoing statute'.[37] With this authority, Kenyon felt able to read the 'or' in the 1604 statute (an act of bankruptcy being committed 'to the intent or whereby his, her or their creditors... shall or may be defeated or delayed'[38]) as an 'and'. He supported this position by noting that in the report of Maylin v. Eyloe (1729)[39] the 'or' in the 1604 Act was quoted as being an 'and'. However that case involved a man being found guilty of an act of bankruptcy without any imputation of fraudulent intent: he had left his house precisely to find his creditor to offer him terms. The 'and' in the report is clearly nothing more than a mis-quotation.

Kenyon also relied upon Lingood v. Eade (1747)[40] to establish a mental element in acts of bankruptcy. Kenyon claimed that no act of bankruptcy had been committed in that case because of a lack of fraudulent intent on the part of the alleged bankrupt. That case involved a man departing his house not to avoid a 'just and true debt', but to avoid 'a duty only' of delivering goods.[41] The 1604 Act was held not to apply because neither the intention behind, nor the fact of the alleged bankrupt leaving his house involved a delay or defeat of a creditor. It was again weak authority for the existence of a

mental element in acts of bankruptcy.

Kenyon's fellow judges in Fowler v. Padget also sought precedents for mens rea in acts of bankruptcy. Grose J. claimed that mens rea had, in fact, featured in Woodier's Case and Raikes v. Poreau, sub silentio:

> the parties must have know that their creditors would necessarily be delayed, by the steps they took.[42]

Ashurst J.'s claim that Hawkes v. Saunders (1784)[43] involved a mental element in the act of bankruptcy was an equally tenuous reinterpretation of past cases. That case concerned the definition of the actus reus in respect to acts of bankruptcy and established that delay to the creditors was as essential as the fact of the clear committing of one of the acts of bankruptcy:

> a trader who kept house with intent to delay creditors, which was manifest in that case was not deemed an act of bankruptcy, unless a creditor were in fact delayed.[44]

The obiter comment about the trader's intention (which, in any case, was not considered but held to be 'manifest') is poor authority for Ashurst to have claimed that Hawkes v. Saunders demonstrated that 'the intent and the act must concur in order to constitute an act of bankruptcy'.[45]

Perhaps Kenyon, Grose and Ashurst were aware of the extraordinary lengths to which they had gone by introducing the concept of mens rea

into acts of bankruptcy. Or perhaps they genuinely saw past cases through their contemporary spectacles of criminal liability requiring criminal intent. However, by bringing bankruptcy law into line with other aspects of the criminal law, they further alienated merchants who, in the main, saw bankruptcy not as crime at all, but as a debt-clearing process.. Indeed, the developing criminalisation of bankruptcy law continued after Fowler v. Padget.

In Ramsbottom v. Lewis (1808)[46], Ellenborough established an 'objective' test for mens rea in acts of bankruptcy, thus potentially capturing more traders as criminal perpetrators of acts of bankruptcy than would have been the case had a 'subjective' test of the individual merchant's actual intention been applied. More traders could also be held liable to the criminal law of bankruptcy because of the development of the actus reus of acts of bankruptcy. In Garret v. Moule (1794)[47], Kenyon reluctantly followed Hawkes v. Saunders[48] in finding that firstly, action coinciding with the statutory acts of bankruptcy had to occur, and secondly, that creditors had in fact to have been defeated or delayed:

> I will not presume to say, whether or not this construction should have been put on the statute at first; but that construction having been obtained, I am afraid now to disturb it.[49]

However in Robertson v. Liddell (1809)[50], Ellenborough again widened the scope of acts of bankruptcy by holding that so long as an act was committed with fraudulent intent, no creditor need in fact be delayed:

> we are of the opinion that Walmsley [the alleged bankrupt], in leaving home with intent to delay his creditors, committed an act of bankruptcy, although no creditors were thereby in fact delayed.[51]

This decision may have been unprecedented amongst bankruptcy cases; however it coincided with general developments in the criminal law: the first case of criminal attempt, R. v. Higgins[52], pre-dated Robertson v. Liddell by only seven years. In bankruptcy law, and in the criminal law generally, great weight was being placed on the perpetrator's intent to establish his culpability; and individuals were being held responsible for the intended consequences of their action, whether or not these consequences actually occurred.

This development of bankruptcy law in line with general developments in criminal law was, as will be argued in the following chapter, partly a response to the threat posed to the judicial view of bankruptcy as crime by merchants who pressed for self-declaration of bankruptcy. For, since no-one would declare himself a criminal, the judges had feared the undermining of their view of bankruptcy as crime.

If this was the cause, the effect of the further criminalisation of bankruptcy was to make the gap between what merchants wanted of bankruptcy, and what judges could offer of bankruptcy intolerable to the former. Concerted acts became harder to sustain, and honest bankrupts were treated as trade criminals. The judicial focusing upon fraud in the act of bankruptcy appeared to be absurd to merchants who were concerned with preventing frauds both prior to bankruptcy, during bankruptcy and in friendly commissions of bankruptcy. The effect of judges focusing on fraud in the act of bankruptcy was to

punish insolvency per se, whether it resulted from fraudulent dealings, mismanagement, or pure misfortune. The judicial view became uncompromising in its rejection of the merchants' case that bankruptcy should act as debt-clearing process first, and crime a poor second.

The gap between what merchants required of bankruptcy law, and what judges could offer of bankruptcy law became wider still as judges insisted upon three entirely independent decisions over discharge. This made the obtaining of certificates difficult for even fair bankrupts, and by no means guaranteed a certificate in exchange for honesty during bankruptcy.

b) Judicial Obstacles to Discharge

Judges continued to see bankruptcy as crime throughout the 18th century, developing the law relating to acts of bankruptcy in line with developments in the criminal law generally. They also retained their view of the certificate of discharge as a means by which creditors, despite the harm that they had suffered, could display humanitarianism[53]:

> there can be no stronger proof of the good-nature and humanity of the British character than the readiness, with which creditors sign [certificates of discharge], without any thought; even previously to the third [and final] examination [of the bankrupt].[54]

While merchants pressed for a more rational certificate decision based upon a bankrupt's culpability in his affairs before and (some merchants arguing solely) during his bankruptcy, judges read what they saw as

the penal bankruptcy statutes strictly, and exercised no control over the creditors' decision:

> the law has left it entirely to the caprice of his creditors to sign [their bankrupt debtor's] certificate or not; under a high moral obligation perhaps, but under no legal obligation, however great his atonement.[55]

Nor need creditors so much as explain their decision:

> [a creditor] may, without reason and without control, without appeal to any tribunal on earth, withhold his consent from the bankrupt's certificate.[56]

As indicated[57], post 1706 there were three hurdles that had to be overcome before a certificate was granted. Firstly four-fifths in number and value of the creditors (three-fifths by the 1809 Act[58]) had an unchecked power to sign or to withhold certificates; secondly, the Commissioners in Bankruptcy had to confirm the certificate; and thirdly, the Lord Chancellor had to allow the certificate. Only the creditors could consider 'the moral life of the bankrupt, and the nature and quality of his acts before be became a bankrupt'.[59] Perhaps distancing himself and the Commissioners from blame for the perceived continuance of widespread swindling, Eldon 'frequently observed' that the Lord Chancellor and the Commissioners could only consider the bankrupt's behaviour during his actual bankruptcy.[60]

Despite the fact that the Commissioners and the Lord Chancellor apparently had the same decision to make about discharge on the basis

of the same evidence (although Lord Chancellors, mysteriously, disputed this[61]), the Lord Chancellor would not allow mandamus to lie against the Commissioners. That is to say, just as the creditors' discretion over discharge was held to be uncontrollable, Lord Chancellors would exercise no control over the decision of Commissioners. Having developed from a means of restoring people to offices or liberties[62], in the 18th century mandamus 'enjoyed vast popularity as a means of prodding inert and inept officials, magistrates and borough corporations into fulfilment of their public obligations'.[63] While Mansfield had stated that mandamus 'ought to be used upon all occasions where the law established no specific remedy, and where in justice and good government there ought to be one'[64], as will be seen, judges would not allow mandamus to be ordered against Commissioners in Bankruptcy.[65] By thus insisting upon three entirely independent decisions over the certificate, judges ensured that what they saw as a humanitarian gesture, as opposed to any right of discharge, was not granted easily. The fear of recalcitrance at any of these three stages further frustrated mercantile hopes that bankruptcy could act as a debt-clearing process agreed upon by both creditors and debtor, with the latter being induced to act fairly with the guarantee of discharge in exchange for his honesty.

As early as 1750, Hardwicke L.C. had delivered some weighty obiter dicta to the effect that Lord Chancellors could not, and should not force Commissioners to sign certificates by a writ of mandamus.[66] His grounds for denying this writ to bankrupts appears to have been based upon a strict reading of the statutes, and confidence in the Commissioners:

> Certificates are matters of judgment, and I do not know that a mandamus would lie to compel an allowance; for it is discretionary in Commissioners first, and afterwards in the Lord Chancellor, and yet ought not to be arbitrary, either in the Commissioners or the Chancellor to say, we will, or will not, allow a certificate; but they ought to be governed entirely by fairness or fraudulent behaviour in the bankrupt.[67]

The leading cases on mandamus not lying against Commissioners arose out of litigation surrounding John King's bankruptcy in 1802. As in ex parte Williamson, there was every likelihood of there having been a sham bankruptcy orchestrated by the bankrupt himself to defraud his real creditors. Although the rule against mandamus being available against the Commissioners may have represented judicial attempts to make certificates hard to obtain for sham bankrupts, judges did not flinch from the fact that this made certificates hard to obtain for all bankrupts, thus again displaying the judicial belief that all bankrupts were to some extent culpable (if only by having committed an act of bankruptcy), and thus again distancing themselves from the mercantile belief that many bankrupts were fair and deserving of discharge.

John King was notorious in the late 18th century as a swindler with Jacobin tendencies.[68] He was well known to the law courts where he sued several times for libel[69] and to recover debts[70], insulting judges in the process.[71] In a complex, probably sham bankruptcy involving his trying to disassociate himself from a bankrupt banking partner by claiming to be the latter's creditor[72], involving his

flight to France[73], and involving threats to his Commissioners in bankruptcy that he would supersede the commission[74], King made various attempts at persuading courts to issue mandamus to force Commissioners to confirm certificates signed by requisite numbers of, in all likelihood friendly creditors.

At first, Eldon L.C. dismissively informed King that he, King, should petition the Commissioners himself if he disagreed with their decision to withhold discharge[75]. No mandamus was necessary because 'they will not scruple' to reconsider the case on the basis of any new evidence.[76] Obiter, Eldon argued that mandamus could not lie against the Commissioners to force them to confirm discharge since 'a refusal is to be taken as if they swore they could not grant the certificate'[77] and:

> I feel considerable doubt as to the control over them; and, whether, if there is a controlling power it is in them to do that, which they cannot in their consciences do.[78]

Further, Eldon referred to the authority of ex parte Williamson[79]; to the 'language of the statute' concerning separate decisions[80]; and to a debate in the House of Lords in which Lords Clare and Thurlow spoke against controls over the Commissioners' decision.[81]

In his judgment, Eldon insisted that:

> A discretion unlimited, is unknown to the law and constitution of England. It is the duty of the Commissioners to communicate without reserve the reasons, upon which their judgment is formed.[82]

It is interesting to note Eldon's concern that the Commissioners, but not the creditors need explain their reasons for withholding discharge[83], despite the fact that he refused to act upon Commissioners having bad reasons. Before King's attempts at obtaining discharge were over, Lord Erskine L.C, in refusing to grant <u>mandamus</u> against the Commissioners, had stated:

> why is a copy of [the Commissioners'] reasons to be granted... I can make no order upon them to certify; whatever reasons they may give.[84]

The Commissioners' decision, then, was completely uncontrollable and could be based upon any or no reasons.

If Lord Chancellors had insisted upon the creditors and the Commissioners' decisions being entirely independent hurdles to discharge, they also insisted that the Lord Chancellor's decision was unique. Eldon asserted, inexplicably in terms of the relevant section of the 1732 Act[85], that:

> The Lord Chancellor granting or withholding the certificate is influenced by a vast number of considerations to which the commissioners are not to attend.[86]

Certainly Lord Chancellors had delayed the granting of certificates on the basis of a belief that their decision was quite separate from that of the Commissioners. This had occurred in <u>ex parte Williamson</u> in which Hardwicke 'stayed' a certificate to give any Irish creditors time to hear of and to come in under an English commission of

bankruptcy. Hardwicke was, however, unsure of the extent of his power:

> I cannot lock up certificates for ever, and deprive a man of his liberty, which the law has given him.[87]

Despite this uncertainty, he stayed another certificate three years later.[88] Again there was the suspicion of a sham bankruptcy (the assignees being near relations of the bankrupt), but again discharge was made harder to obtain for <u>all</u> bankrupts, Hardwicke recommending that discharge should not occur for at least eighteen months after the actual bankruptcy.[89]

Eldon did, in fact, once follow the Commissioner's decision to grant discharge in a case where he found it 'impossible... to believe... a full discovery has been made'.[90] He admitted on that single occasion that the Commissioners were in a better position to decide upon discharge than the Lord Chancellor, the former being able to examine the bankrupt <u>viva voce</u> and having more evidence before them. In that case Eldon was concerned about the state of the bankrupt's books, but may have been persuaded to allow discharge by the arguments of the bankrupt's eminent counsel:

> Sir Samuel Romilly and Mr Wilson for the bankrupt, observed upon the effect of too strictly requiring the production of regular books... considering the number illiterate persons, engaged in trade.[91]

In other cases, however, Eldon was clear that the Lord Chancellor's decision over whether to allow certificates need not be influenced by

the creditors' or the Commissioners' decision to grant discharge. In ex parte Brown (1811)[92], Eldon followed his own obiter in ex parte King (1805) and his own General Order of 1809[93] in postponing a certificate until after the bankrupt's third examination. In ex parte Bessaro (1812)[94], Eldon followed Hardwicke's decision in ex parte Williamson in staying a certificate to give Sicilian creditors the opportunity to come in under a commission. While by Nowers v. Colman in 1816[95], Eldon took it as unproblematic that the Lord Chancellor could stay certificates, in a case of the same year Eldon had admitted that:

> The power of the Chancellor in staying certificates, is perhaps not very distinctly settled. The enactment upon the subject in 5 Geo. II is very short[96], and Lord Hardwicke (I do not say improperly) considered that the power of allowance enabled him to postpone the certificate, where the creditors were abroad.[97]

In making discharge difficult to obtain, Eldon was actually prepared to impose double jeopardy upon ex-bankrupts, and to revoke certificates that had already been duly granted. Thus in ex parte Crawthorne (1814)[98], Eldon revoked a certificate awarded two years earlier because it had been discovered that:

> the commission has been issued fraudulently by the bankrupt; that with his connivance debts had been fabricated and proved under his commission; and that by the preponderance of those fictitious creditors his certificate had been obtained.[99]

Eldon placed a single restriction upon this power in ex parte Tallis[100]:

> The Lord Chancellor entertained not the least doubt of his authority to revoke the certificate... if... it was found... it could be done without injury to persons who may have been engaged with the bankrupt in subsequent transactions.[101]

Only this restriction saved a former bankrupt from having his certificate of six years standing recalled in ex parte Reed (1819)[102].

Judges, in particular Lord Chancellors, then, clearly perceived discharge as a matter of grace rather than right. They made certificates difficult to obtain by insisting upon three entirely independent decisions over discharge, with the creditors and the Commissioners not so much as required to give reasons should they withhold the certificate. Chancellors would recall certificates already granted; and were prepared, before allowing a certificate, to be petitioned against its allowance by creditors for less than £20 who, formally, had no say in the certificate decision[103]; by creditors who had already signed the certificate[104]; by creditors who had not yet come in under the commission[105]; and by creditors who had come in under the commission late.[106]

Many of the decisions producing various obstacles to discharge arose in cases involving suspected sham bankruptcies. Nevertheless, if the legislation made certificates difficult to obtain for any bankrupt , the judiciary had made them even harder to obtain. Judges had widened the gap between what they could offer of bankruptcy law and what merchants required of bankruptcy law by making concerted acts of bankruptcy and a procedural use of bankruptcy law near impossible:

judges had underlined the criminal nature of bankruptcy by requiring mens rea in acts of bankruptcy. By making discharge difficult to obtain, judges again denied the merchants the opportunity to use bankruptcy as a debt-clearing process agreed to by both creditors and debtor with a guaranteed certificate of discharge an inducement to the latter both to agree to become bankrupt, and to be fair during his bankruptcy. The effects of this schism between the (frustrated) late 18th century mercantile preference for bankruptcy as primarily process, and the continued and strengthened judicial perception of bankruptcy as crime, will be discussed in the following chapter.

Chapter Ten

The Structure of a Legal Revolution

By the 1824/1825 bankruptcy legislation, in line with the expectations and requirements of the contemporary depersonalised mercantile community, bankruptcy law was reconstituted as being primarily a debt-clearing process with only a residual policing function. In the present chapter the mechanisms will be discussed by which this fundamental shift in the meaning of bankruptcy law occurred. It will be seen that the development of this aspect of the law relating to commerce coincided with Thomas Kuhn's characterisation of the mode of development of scientific knowledge.[1] It will further be seen why it was Parliament, as opposed to the judges who recreated the social function of the legal norm[2] of bankruptcy law coincident with the interests of the merchants. The chapter will summarise some of the central themes of the thesis, draw some conclusions from these themes, and make explicit the underlying theoretical concerns of the thesis.

Kuhn perceives the growth of scientific knowledge not in terms of continuous accumulation, but in terms of rupture and discontinuity. Cumulative developmental periods do exist, but they are interspersed with epistemological metamorphoses which destory the foundations of these periods and reconstitute them on completely new grounds. The development of 18th century bankruptcy law can and will be scrutinised according to the mechanisms described by Kuhn which, in analogous scientific development, lead to and from these epistemological metamorphoses.

While traditional histories of science see only continuity in scientific development, Kuhn is aware that:

> scientists are not, of course, the only group that tends to see its discipline's past developing linearly towards its present vantage. The temptation to write history backward is both omnipresent and perennial.[3]

Lawyers have been just such a group.[4] Assertions like: 'many joint stock companies were originally formed as partnerships by agreement under seal'[5], reveal more about present legal concerns (here, the joint stock company), than about the genesis of the distinctive joint stock form of business organization. If writing the history of science 'backwards' glosses over 'human idiosyncrasy, error, and confusion'[6], writing legal history 'backwards' has other functions. In brief, it encourages an uncritical attitude towards existing law (and society), rendering the unprecedented possibility of radical change unthinkable.[7]

An alternative, Kuhnian approach to legal development offers two sets of insights into legal history over and above saving the historical material from the violence of a mono-linear interpretative framework. Firstly, there is the possibility of a synchronic study of the relationship between an aspect of the law and its unique socio-economic context. The mono-linear approach, devoted to searching for the seeds of present law in past law fails to place past law into any historical context.[8] Secondly, there is the possibility of a diachronic study of the shift of one law to another law related at least by name, but quite different in social function. The cumulative mono-linear approach fails to recognise what may be vast differences in meanings between two laws bearing the same name.[9]

We have already seen the relationship between bankruptcy law and

typifications of the early and the late 18th century mercantile communities. In the early period, the fit between what judges could offer of bankruptcy law and what merchants required of bankruptcy law was poor, but tolerable to the merchants. Judges had perceived all bankrupts as criminals, and the certificate of discharge as a means by which creditors could display humanity despite the harm that they had suffered. Merchants saw fraudulent and unfortunate bankrupts, and perceived the certificate as a means of offering bankrupts their just deserts. Despite mercantile dissatisfaction with the possibility of arbitrary certificate decisions by creditors, the very existence of the certificate device insulated the law from too vehement a call for reform by the merchants.[10]

By the later period, the distance between what judges could offer and what merchants required of bankruptcy law had become intolerable to the merchants. Judges developed their view of bankruptcy as crime in line with general developments in the criminal law by insisting upon mens rea in acts of bankruptcy. This development would have had little effect in making acts of bankruptcy less common, nor would it have ensured that bankruptcy proceedings were reserved solely for those who merchants would have agreed were fraudulent tradesmen. As has been noted, whether a trader became insolvent through dishonesty or pure misfortune, it would have been difficult for him to avoid committing an act of bankruptcy with the necessary intention[11]: for example, it would have been quite natural for an insolvent trader, with his creditors bearing down upon him, intentionally to evade them on at least one occasion. More importantly, however, the continued and strengthened judicial view of bankruptcy as crime stood in stark contrast to the requirements of the depersonalised late 18th century trading community. Merchants no longer pressed for bankrupts to

receive their just deserts, they now argued that bankruptcy should act as a debt-clearing process agreed upon between the debtor and his creditors. This end was frustrated not only by the judicial insistence that bankrupts were per se criminals, but also by the fact that judges made discharge, still perceived as a matter of grace as opposed to right, more difficult to obtain. For bankruptcy law to act to clear bad debts, merchants argued, a certificate had to be guaranteed for bankrupts in exchange for their fair behaviour during the actual bankruptcy. Judicial obstacles to discharge made the receipt of a certificate less than certain for even the fairest bankrupt.[12]

The strained relationship between what judges could offer and what merchants required in the later period led to the merchants' praxis for reform, in particular, around the question of self-declaration of bankruptcy: they not only argued for self-declaration, but increasingly concerted acts of bankruptcy. Shortly, a diachronic study will be undertaken of the means by which bankruptcy law entirely changed its social function in response to the merchants' agitation. As indicated, the method of explaining this shift in meaning of the legal norm of 'bankruptcy' will be derivative from Kuhn's analysis of the structure of scientific revolutions.

Before commencing this study, it is important to note that although similar mechanisms will be held to operate in the development of both science and the 18th century law relating to commerce, the practice of law is not being posited as a science. Feyerabend argues that Kuhn has demarcated science by the existence of precisely these mechanisms of change. Consequently Feyerabend argues that on Kuhn's criteria, safebreaking is a science:

> Every statement which Kuhn makes about normal science remains true when we replace 'normal science' by 'organised crime'; and every statement he has written about the individual scientist applies with equal force to, say, the individual safebreaker.[13]

Kuhn replies that his demarcation criteria between a science and a 'pseudo-science' do not even come into play until attention is first confined 'to fields which aim to explain in detail some range of natural phenomena'[14]. Safebreaking (and the practice of law) do not even cross this preliminary hurdle. Nevertheless, it is clear that Kuhn can see no <u>prima facie</u> objection to the application of his methodology to non-scientific fields:

> If, as my critics point out, my... description fits theology[15] and bank-robbery as well, no problems are thereby created.[16]

It is now possible to analyse the metamorphosis of bankruptcy law during the 18th century not in terms of 'tradition, of tracing a line', but in terms of 'division, of limits'; not in terms of 'lasting foundations', but in terms of 'transformations that serve as new foundations, the rebuilding of foundations'.[17]

At this point a skeletal outline of Kuhn's position will be offered, employing Kuhn's own terminology. Thereafter, each of his terms will be discussed <u>seriatim</u>, they will be explained; some major criticisms of each will be considered; and their relevance to changes in 18th century bankruptcy law will be made explicit. In particular,

the first and arguably the most important of Kuhn's terms, that of 'paradigms', will receive full and careful treatment.

Science is said to be based upon 'paradigms' which, in brief, are both puzzles and suggest future puzzles for a scientific community to solve. The resolution of puzzles is accomplished in 'normal science'. In solving puzzles in 'normal science', scientists inevitably encounter 'anomalies'. In certain circumstances, these 'anomalies' give rise to 'crises'. A period of 'revolutionary science' occurs, during which time alternative 'paradigms' vie for acceptance. Eventually, like a one-way gestalt-switch, new and 'incommensurable' 'paradigms' replace the old 'paradigms'. The process begins again.

a) Paradigms

Before demonstrating the aptness of the concept of 'paradigms' to the history of 18th century bankruptcy law, let us explain why this concept is preferred to that of either 'discursive formation'[18] or 'ideal type'.[19]

Discussing an earlier concept of Foucault's than that of 'discursive formations', namely 'epistemes' (or 'historical a priories' that exist only in relation to finite historical periods[20]), Piaget commented that:

> Foucault's epistemes are strikingly reminiscent of Dr T Kuhn's "paradigms", and at first sight Foucault's analysis, because of its structuralist ambitions, even seems more profound than Kuhn's. Foucault's program, were he able to carry it through, would lead to the discovery of strictly epistemological structures

> that would show how the fundamental principles of the science of a given period are connected with one another, whereas Kuhn merely describes them and analyses the intellectual crises which resulted in "mutations".[21]

Piaget has two major criticisms of Foucault's The Order of Things, over and above considering his specific study of the 'human sciences' to be misconceived. Firstly, Piaget argues that Foucault failed to give any meaning to the term episteme: It is a 'mere diagram'.[22] Secondly, Piaget claims that Foucault has offered no explanation for the demise of one episteme, and the birth of a new one.

As to the first objection: Foucault's The Archaeology of Knowledge, published a year after Piaget's comments, attempts to concretise the meaning of an episteme. Perhaps still vaguely though, Foucault defined an episteme as the total set of relations which, for a specific historical period, unite 'discursive formations'.[23] The concept of 'discursive formation', however, is well defined: it is the unity of objects, statements, concepts and strategies of an intellectual pursuit. In destroying mono-linear cumulative histories, in reconstructing unities based upon testable as opposed to traditional (and possibly politically biased) categories, Foucault's approach is most attractive.[24]

However the second of Piaget's objections remains entirely valid, and denies the usefulness of the concept of 'discursive formations' in diachronic studies. Piaget wrote of Foucault's earlier concept of 'epistemes':

> His epistemes follow upon, but not

> from, one another, whether formally or dialectically. One episteme is not affiliated with another, either genetically or historically... reason's transformations have no reason and... its structures appear and disappear by fortuitous mutations and as a result of momentary upsurges.[25]

Foucault's later work offers no solution to this problem. The 'sole purpose'[26] of The Archaeology of Knowledge was said to be to establish the concept of 'discursive formations'. This archaeology:

> does not seek to discover the continuous, insensible transition that relates discourses, on a gentle slope, to what precedes them, surrounds them, or follows them.[27]

And any meagre attempts to explain historical development in The Archaeology of Knowledge (without allowing 'the living, fragile, pulsating 'history' to slip through [his] fingers'[28]) is revealed as being an uninspired causal explanation despite the structuralist terminology:

> what, for example, were the variations in the rate of unemployment and labour needs, what were the political decisions concerning the guilds and the universities, what were the new needs and new possibilities of public assistance at the end of the eighteenth century - all these were elements in the formation of clinical medicine.[29]

Kuhn, alternatively, not only establishes distinct epistemological periods, but also offers an analysis of the development of one such period into another.[30] As will be seen, if Kuhn's original formulation of the paradigm concept was, as Piaget claimed, 'mere' description and analysis[31], Kuhn's 'second thoughts' about paradigms offers a meaning to the concept that raises its potential from description ('this is how it is') to explanation ('this is why it is').[32]

It is the use of 'paradigms' to explain change that also makes paradigms a preferred concept to that of the 'ideal type'. As noted, the ideal type is an invaluable means of establishing the distinctive nature of an aspect of social reality with a view to achieving explanatory objectives.[33] Indeed, ideal types have already been employed explicitly to establish a model of the early 18th century trading community, and implicitly to establish the novel elements of the late 18th/early 19th century community as each related to their contemporary bankruptcy law. The problems of explaining movements from one ideal type to another remain entirely open - answers range from idealist to materialist constructions.[34]

The specificity of Kuhn's concepts to forms of <u>theoretical</u> knowledge deny the possibility of their use in explaining social development in general. However, in explaining law-change, the 'questionable metaphor' of the 'base' and the 'superstructure'[35] is rendered unnecessary by the 'paradigm shift' approach. Furthermore, this approach denies neither subject nor process in history, as do some structuralist approaches[36] - the merchants' <u>praxis</u> at the end of the 18th century will be seen to have influenced bankruptcy law reform. Finally, contrary to the conclusions of modern 'instrumentalist' legal historians, 18th century commercial law change did not occur unproblematically with judges simply satisfying the demands of their

mercantile customers as they arose.[37] The Kuhnian approach reveals a 'relative autonomy' for law[38], change only occurring after struggle on the part of the merchants.

Having promised so much of the 'paradigm shift' approach, let us now concretise the concept of a 'paradigm'. Kuhn's initial formulation of the concept was both obscure and ambiguous.[39] He attempted to give the term meaning by using it in context[40], and by partial definitions throughout his seminal book. Shapere noted that 'in short, anything that allows science to accomplish anything can be part of (or somehow involved in) a paradigm'.[41] Indeed, Masterman claimed to have found twenty-one different 'senses' in which 'paradigm' was used.[42] Her separation of the original idea of a paradigm into three categories is of use in explaining Fletcher's original attraction to the term.

Firstly, such definitions as 'an organizing principle governing perception itself'[43] were held to be aspects of a 'metaphysical' paradigm. This aspect explains why Fletcher, with his belief in 'structural principles' in the law[44], was drawn to the term 'paradigm':

> In my analysis of tort law, I used Kuhn's terminology to capture the combination of normative and stylistic elements in the contemporary "paradigms" of reciprocity and of reasonableness.[45]

Secondly, such definitions as 'a universally recognised scientific achievement'[46] were held to be 'sociological' paradigms in that they located paradigms in communities of scientists. Again, the term proved attractive to Fletcher:

> Kuhn himself, suggests the analogy between legal and scientific processes; in explaining his concept of paradigm, he likens it to "an accepted judicial decision in the common law".[47]

That is, both a scientific achievement and a leading legal precedent are authorities for future work done by scientific or judicial communities respectively.

Thirdly, more 'concrete' definitions of paradigms such as their being actual textbooks[48] or suppliers of tools[49], were held to be part of 'construct' paradigms. Under this category, legal 'construct' paradigms could be seen to include texts, commentaries, statutes, and legal reports.

Kuhn took note of Masterman's comments when he reformulated the paradigm concept.[50] However, his refined notion of a paradigm is substantially different from, and more sophisticated than Masterman's three categories. While the previous concept of a paradigm had been so vague as to have been employed by non-scientists to mean little more than 'world view' or even 'typical situation'[51], the refined concept has a far more specific and unambiguous meaning.[52]

Kuhn found that his concept of 'paradigm' had two distinct aspects. Firstly there is the ('sociological') notion of an identifiable scientific community with an 'entire constellation of beliefs, values, techniques, and so on'.[53] This he calls a 'disciplinary matrix':

> 'disciplinary' because it refers to the common possession of the practitioners of a particular discipline; 'matrix' because it is composed of ordered elements of

> various sorts, each requiring further specification.[54]

Secondly, there is the (more 'philosophical') notion of:

> concrete puzzle - solutions which, employed as models or examples, can replace explicit rules as a basis for the solution of the remaining puzzles of normal science.[55]

These Kuhn calls 'exemplars'.[56]

The 18th and early 19th century judiciary may be identified as being a 'disciplinary matrix'. Kuhn suggests several questions with which to establish the existence of a prima facie community of practitioners.[57] Bearing in mind Weber's characterisation of the English bar and bench as a 'guild monopoly'[58], the 18th and early 19th century judiciary may be seen to have satisfied Kuhn's criteria.

First, Kuhn asks, are there common elements in the education and apprenticeship of the members? All judges had served their 'apprenticeships' at the bar; and barristers, in turn, had all undergone similar legal training, always involving the sponsorship of senior colleagues.[59] Second, do they perceive themselves and are they perceived by others to have a set of shared goals? Clearly, the shared goal of the judiciary was to administer the law. Even as barristers, according to Duman, future judges would have enjoyed an 'esprit de corps' and a 'recognised code of professional conduct'[60] that must have enhanced their image of having shared goals. Third, is one shared goal the training of successors? Whilst one shared goal of judges was the choice of their successors[61], senior barristers took

an active role in training new recruits to the bar. Thus Duman states, in a passage covering all three of Kuhn's criteria so far, that:

> In chambers and commons the novice assimilated the values and norms of the bar that each professional generation transmitted to the next. The period of studentship ensured that all barristers underwent identical rites of passage that created as far as possible a standard professional outlook and fostered occupational solidarity.[62]

Fourth, is there full communication between members? Some legal jargon could be understood only by members: 'professional jargon and forms render the law imcomprehensible even to the best educated of laymen'.[63] And as will be seen, while disagreement was possible, the same 'language' was spoken by judges. Citing Larson, Duman referred to the 18th and 19th century bar generally as having achieved 'cognitive commonality'[64]. Fifth, do they share a judgment on professional matters? Commitment to professional etiquette was high[65], and we shall shortly discuss judicial commitment to legal methodology. Sixth, do they learn the same lessons from the same literature? Again, this would seem to have been the case with judges: 'legal knowledge was acquired from reading legal classics [and from a period of apprenticeship...]'[66]. Seventh[67], are the foundations of the field accepted? This would clearly have been true of judges. Eighth, are there formal and informal communication networks? Precedent fulfilled the former role, while their active social life with one another[68], and a comment about Lord King that he 'confidentially' conversed with practitioners in his court[69], suggest informal communication networks.

Furthermore, unlike scientists, judges could not (at least publicly) split into sub-groups. 'Professional commitment'[70] was high, this being a criterion by which a barrister was chosen for the bench.[71] And judges had to satisfy not only an 'audience' comprising each other[72], but also a far wider 'audience', thus all the more committing to them to their group structure and values.

Having established the 18th and early 19th century judiciary as, on Kuhn's terms, a 'professional community', it will now be argued that they had the 'components' of a 'disciplinary matrix'. Kuhn lists four main components: 'symbolic generalisations'; 'shared models'; 'shared values'; and 'shared exemplars'.[73] As noted, the last of these is what Kuhn would like to have called 'paradigms'.[74]

'Symbolic generalisations' are formal aspects of a disciplinary matrix which are deployed 'without question or dissent by group members'. Examples would be ' f = ma'[75], or (for some are usually expressed in words) 'action equals reaction'. Since law does not simply involve the application of logical or mathematical processes to variables that can be expressed in symbolic notation, the judicial community appeared, at first sight, to be without this component of a disciplinary matrix. However,rational legal discourse did rely upon generalisations similar to Kuhn's <u>verbal</u> symbolic generalisation of 'action equals reaction'. Thus, precedent involved an unspoken communal acceptance amongst judges of the difference between <u>ratio decidendi</u> and <u>obiter dictum</u>[76].

Similarly, statutory interpretation was based upon accepted canons such as: <u>expressio unius exclusio alterius</u> . These canons allowed discourse between Eldon and the considerably earlier opinion of Hardwicke:

> The enactment on the subject in 5GII is very short, and Lord Hardwicke (I do not say improperly) considered that...[77]

Kuhn's example of the second component, shared belief in certain models, is: 'heat is the kinetic energy of the constituent parts of bodies'. For late 18th century bankruptcy law, and late 18th century criminal law generally, judges shared a belief in the possibility of separating an actus reus from a mens rea. As has been argued, this particular model was novel in the late 18th century.[78]

Kuhn's third element is the existence of shared values, his example being: 'science should (or need not be) socially useful'. Again, the judicial disciplinary matrix had corresponding components. Willes C.J.'s appeal to 'reason and justice'[79] would have had meaning to his judicial brethren.

Kuhn's fourth main component of a disciplinary matrix is a 'cognitive commitment'[80] to 'exemplars'. The notion of exemplars clearly derives from Wittgenstein's philosophy, and in particular from Wittgenstein's own concept of a 'paradigm'[81]. According to Wittgenstein, our way of knowing the world through language is not by means of 'ostensive definition' or 'ostensive teaching of words'.[82] Thus, for example, to explain what a 'game' is, we do not state logical prerequisites, nor a systematic set of rules which identify the 'essence'[83] of any game. The hopelessness of defining a concept with logically exact boundaries ('no single ideal of exactness has been laid down'[84]) led Wittgenstein to the notion of characterization through 'family resemblances'[85]:

> How should we explain to someone what a game is? I imagine that we should describe games to him, and we might add: "This and similar things are called 'games'."[86]

Kuhn accepts Wittgenstein's explanation of the language-socialisation process.[87] Where Kuhn goes beyond Wittgenstein is in his attempt to establish, sociologically (Kuhn, modestly claims 'intuitively'[88]), a concrete 'language-community'[89] ('language', in this context, being a network of shared terms with accepted meanings[90]). Kuhn goes on to explain how scientific language-communities come to share not only a common set of puzzles requiring solution, but also the means by which these puzzles can be tackled, and the criteria by which a puzzle can be said to have been solved. Thus, entry into a disciplinary matrix occurs through exposure to concrete puzzles solved by others in the community, and by the actual practice of solving puzzles in this way (hence the 'exercises' at the end of chapters in scientific text-books[91]). In solving puzzles, the student learns how to approach future puzzles not through explicit rules, but through seeing similarities with past puzzles. Socialisation, then, takes place not through ostensive definition, but through exposure to exemplars.

Clearly, the Anglo-American common law tradition of judicial decisions based upon precedent may be placed within a Kuhnian framework of socialisation (of barristers, and judges themselves) through exemplars.[92] Thus, commitment to preceding judicial decisions which established the paradigm of all bankrupts as criminals (and, its corollary, the impossibility of <u>bona fide</u> bankrupts) led Kenyon C.J. to bow to this paradigm even though he doubted its rationale:

> whatever idea of policy or propriety first suggested it, and though it might appear that a commission of bankruptcy is the most equitable mode of dividing the bankrupt's estate amongst his creditors, it is now settled, that a trader could not legally concert an act of bankruptcy with his creditors.[93]

Kenyon complied with the bankruptcy as crime paradigm not because of any explicit rule stating 'bankrupts are criminals'[94], but because of his 'professional commitment' to the exemplars of his disciplinary matrix. The reasons why he should have doubted the expediency of this paradigm will be discussed below.[95]

It will be noted that in the preceding paragraph I have referred to the 'paradigm' of bankruptcy as crime. In this respect, I take 'paradigm' to mean (despite Kuhn[96]) the network of exemplars that both <u>helps</u> to define, and that is shared by a (here, judicial) disciplinary matrix.[97] Now, a question arises as to the relationship between this concept of a 'paradigm' and the concept of a 'structural principle' as employed in previous chapters.[98]

Kuhn is aware of the dangers of identifying a scientific community with reference to its subject matter.[99] However once the existence of a community has been established, there is no objection to labelling the community with its subject or with the name of its founding father; thus: 'old quantum theory'[100], Aristotelian physics'[101], or 'Copernicanism'[102]. The network of shared exemplars, the 'paradigm' of a specific community, is implicit in the label.

For at least two reasons no such shorthand labels are readily available to describe legal paradigms. Firstly, judges are less self-

conscious than scientists - they operate within a network of exemplars without abstracting a label for their particular practice: 'lawyers in the common law tradition prefer a low level of philosophical consciousness'[103] Secondly, such periodizing labels would, as has been argued[104], detract from the legitimating effect of gradual legal development:

> Judges and lawyers seldom propound new theories as a way of bringing change to the legal system.[105] Rather, they frequently attempt to reinterpret history and conflicting precedents as a way of suppressing the significance of a change in practice. Scientists take pride in harvesting new ideas; lawyers and judges see their role as nurturing the tradition.[106]

Fletcher claims that these two objections are sufficient to undermine the usefulness of the concept of paradigms in understanding law-change. However all that he has established is that paradigms are not manifestly visible to lawyers and judges. This does not deny the possibility of discovering latent, invisible paradigms by non-doctrinal analysis. This is precisely what Fletcher himself has done in discovering 'structural principles' in the law ('manifest criminality', 'possessorial immunity', etc.). He has distilled the exemplars of a particular legal period into a (silent) epistemological lable, into a 'paradigm'.

As noted, Fletcher prefers the notion of 'ideal type' to that of 'paradigm'.[107] A major ground for his preference is undermined by the possibility of 'latent' paradigms: 'the ideal type need not be

fully realized in the cultural material that one seeks to understand'.[108]

So far it has been established that the 18th and early 19th century judiciary may be identified as a disciplinary matrix with its own networks of exemplars. It has also been seen that, synchronically the judicial paradigm of Bankruptcy as crime was relatively autonomous from mercantile expectations and requirements of bankruptcy law.[109] Whereas, in the early 18th century the fit was bad but tolerable to the merchants, in the early 19th century, as evidenced in the merchants' praxis for reform, the distance between what judges could offer and what merchants wanted of bankruptcy law became intolerable to the merchants. As has and will be seen, the relative autonomy of 18th and early 19th century bankruptcy law is also apparent in its mode of development. Judges did bow to mercantile pressure in altering the law, but never at the expense of the 'internal consistency' of the law:

> I will not presume to say, whether or not this construction should have been put on the statute at first; but that construction having been obtained, I am afraid now to disturb it.[110]

However, in the long term, bankruptcy law was entirely altered to coincide with the needs of the early 19th century merchants. It is precisely to explain this relatively autonomous mode of development that judicial 'paradigms', as opposed to 'ideal types' or 'discursive formations', have been chosen as a conceptual model.

b) Normal Science/Normal Law Change

For Kuhn, normal science is the 'enterprise which accounts for the overwhelming majority of the work done in basic science'.[111] It is the 'puzzle-solving tradition'[112] arising from the shared paradigm of a disciplinary matrix. The paradigm suggests puzzles to be solved, and through its exemplars shows both how these puzzles may be solved, and the criteria for claiming a solution. As such, normal science is a 'highly cumulative'[113] exercise which, by adding exemplars to the paradigm, refines the paradigm.[114]

In normal science, the paradigm acts as a 'framework'[115]. The paradigm itself is not put to the test: a failure at puzzle-solving reflects upon the individual scientist, it does not falsify the paradigm.[116]

The normal mode of judicial decision-making corresponds fairly neatly with scientists' 'normal science'. There are, however, at least three apparent differences that must be mentioned.

Firstly, judges do not appear to choose the 'puzzles' that they will solve. Puzzles are brought to them by litigants, not merely suggested to them by their paradigm. However litigants come to court on the judges' terms: unless a puzzle coincides with a pre-existing legal paradigm, it will not be grounds for a legal action. We will return to consider judicial reaction to non-paradigmatic puzzles below when 'anomalies' are discussed.[117]

Secondly, although precedent is a method for decision-making, there are no clear-cut criteria for a claim to a 'correct' legal solution. Certainly precedent-based decisions are unlikely to be arbitrary; however,'split' courts (several different opinions expressed by judges sitting on the same case), the appeal procedure,

and judicial comments about the 'incorrect' reasoning of their predecessors, suggest that an ultimate criterion of 'correctness' is absent.[118] This is not damning to a claim for a legal version of 'normal science': it is quite conceivable that scientists sharing a paradigm could find two or more solutions to a puzzle.[119]

Thirdly, the very idea of a 'correct' legal solution may have two distinguishable meanings. On the one hand it may mean that the internal consistency of the law has been maintained: most judges would agree that on the precedents, a solution has been found. On the other hand it may mean that the fit between the law and (for our purposes) the expectations and requirements of merchants has been made closer: the effects of the law's relative autonomy have been marginalised.[120]

In an earlier chapter on the bankruptcy of factors, a typical example of normal legal development was discussed.[121] Merchants wanted the principal of a bankrupt factor to recover his goods before the factor's remaining estate was distributed amongst the general trade creditors. This would contradict a structural principle of bankruptcy law that:

> an equal proportion of the effects of
> the bankrupt amongst his creditors
> should be attained as far as possible.[122]

From the case of L'Apostre v. Le Plaistrier[123] onwards, judges derogated from this structural principle in the special case of factors. One of the exemplars in the 'parity amongst creditors' paradigm demanded that in cases involving factors, a separate but intersecting paradigm should come into operation. The reason was

that this separate paradigm (which held factors only to possess what their principals owned) could be allowed to govern this special case in line with merchants' wishes, but without cost to the internal consistency of the law: the two paradigms were of equal weight in their respective subject domains of bankruptcy and factorage. The principal's lien over his goods in his factor's hands, however, only extended to the principal's clearly identifiable property. Judges argued that this would prevent fraudulent claims of principal/factor relationships.[124]

The courts, then, considered as a relevant 'puzzle', a principal's claim that he could identify his own property amongst the remaining assets of his bankrupt factor. Each 'puzzle' was 'solved' with reference to similarities between it and preceding cases (or 'exemplars'). This enterprise was 'highly cumulative' in that an increasing number of goods were held to be 'clearly identifiable'.[125] The paradigm was refined, if only in scope, by the inclusion of more and more exemplars. However, it was a framework that was never broken during the 18th century: at no point was non-earmarked money (the least identifiable form of property) allowed to be followed by principals into their factors' hands.

Furthermore, this normal legal development did not only maintain the internal consistency of the law (there was no reason in the paradigm why there should not have been an extension of the ambit of 'clearly identifiable' property), but it also satisfied mercantile expectations and requirements. When the former criterion of the 'correctness' of a legal decision had been satisfied, judges could take note of the second criterion:

> we ought always as much as possible and as far as is consistent with the rules of law to do every thing to promote the trade and commerce of the nation.[126]

Bearing in mind that there is no reason to suppose that merchants would have desired the line to be drawn at non-earmarked money,[127] it is clear that the law's internal consistency was the judges' primary concern. Thereafter, in commercial matters, the judges concerned themselves with marginalising the effects of the law's relative autonomy (i.e. by narrowing the gap between what the merchants wanted, and what the law could offer.)

c) Anomaly

In the course of normal science unprecedented facts and theories arise which cannot comfortably be explained by a community's paradigm.[128] Although observation or deduction may be the primary source of an anomaly, novelties of fact or theory are not 'categorically separable'.[129] Kuhn explains this paradox: observation requires tentative theory to raise it from the level of a casual noting, to that of a possible discovery; tentative theory requires verification/falsification by experiment to raise it from the level of speculation, to that of a possible invention.[130]

In normal legal development, the primary source of anomaly is novelty of facts.[131] In the present section, the 'factual' anomalies of bankruptcy law that faced the late 18th and early 19th century judges will be discussed. Later, we will discuss the judicial theoretical responses to these anomalies.

The normal development of bankruptcy law produced two sets of

anomalies. The first of these was external to the actual court room situation, the second, internal to it.[132]

As we know, the judicial paradigm of bankruptcy law was focused upon the policing of trade. This paradigm was faced with three major 'external' anomalies in the late 18th and early 19th centuries. Firstly, there was the post 1780 swindling moral panic. The judiciary was seen as failing in its professed aim of deterring trade fraud by means of bankruptcy law: 'all the legal penalties are insufficient to impede the progress of successful swindling'.[133] Secondly, not only was bankruptcy law seen as failing to stem swindling, it was actually generally considered to be a vehicle for fraud. Sham bankruptcies were thought to be the norm:

> most bankrupts are previously provided with number and value of fictitious creditors, to counteract the malice of the real ones.[134]

Thirdly, the late 18th century judges were faced with the extraordinary anomaly of the merchants, the very people whose trade they sought to protect, arguing for bankruptcy as debt-clearing process first, and as crime a poor second:

> creditors have generally but two objects, a fair disclosure from the bankrupt, and an early dividend.[135]

The most blatant anomaly 'internal' to the court room was that of the bona fide bankrupts who had concerted acts of bankruptcy with their creditors to employ bankruptcy law as a procedure for their mutual benefit. Since judges perceived all bankrupts as criminals, the

novelty of a fair 'bankrupt' who had not so much as committed a ('fraudulent') act of bankruptcy, and who had chosen to become a bankrupt, must have appeared as being most strange.[136]

d) Initial Response to Anomalies

Kuhn argues that the initial response to anomalies is either suppression[137], or ad hoc modifications of the paradigm.[138] The judicial response to the anomalous facts of late 18th and early 19th century bankruptcy law coincides with this pattern.

The swindling panic did not go unnoticed by the judiciary:

> [Macdonald C. B.] considered both Miss Robertson and her companion Miss Sharpe, as two of the most bare-faced swindlers that ever existed.[139]

The judicial response to this anomaly of bankruptcy law failing in deterring trade fraud was not to follow the counsel of Romilly et al to remove 'swindling' from the ambit of bankruptcy law by encouraging the use of individual anti-swindling crimes. Judges maintained the idea that bankruptcy should deter trade fraud in their attempts to make it more successful towards this end by making certificates of discharge harder to obtain.[140] This modification of the existing paradigm also represented the judicial response to the perceived growth of sham bankruptcy: judges ensured that there were three separate hurdles to the granting of discharge (the decisions of the creditors, the Commissioners, and that of the Lord Chancellor). Also to deter sham bankruptcy, Eldon L. C. permitted Lord Chancellors the power of recalling certificates that had already been granted. This

ad hoc adjustment of the bankruptcy law paradigm was virtually unprecedented.[141]

The judicial response to merchants' frequently articulated claim that there could be fair bankrupts clearly demonstrates how the adherents to a paradigm can only interpret facts according to that paradigm. For the judiciary, all bankrupts proved themselves fraudulent by committing an act of bankruptcy. The anomalous claim of the merchants that some insolvent traders intended to be honest with their creditors, was assimilated by the judges into their 'bankruptcy as crime' paradigm in a way that entirely missed the merchants' point. Judges reasoned that acts of bankruptcy should include proof of both an actus reus and a mens rea to ensure that no fair insolvent traders were involved in bankruptcy procedure. Acts of bankruptcy would then only capture those with proven fraudulent intent. However, firstly, it was nearly impossible for any insolvent trader, be he unfortunate, negligent or fraudulent in his trading, to avoid eventually committing one or other of the acts of bankruptcy with the necessary intention.[142] And secondly, the merchants were not pressing for bankruptcy law to be concerned solely with those having fraudulent intent; they argued that bankruptcy should be able to be used as a civil process for clearing the bad debts of insolvent traders, induced to assist in the redistribution of their estate with the promise of discharge.

Finally, the judicial response to the anomaly of bona fide 'bankrupts', who had concerted an act of bankruptcy with their creditors to their mutual advantage also represented suppression and ad hoc modifications of their paradigm. Suppression occurred in two ways: firstly, there was the approach of Lord Mansfield who refused to see bona fide bankruptcies as a puzzle relevant for legal solution:

> An act of bankruptcy in the eye of the law is considered as a crime;- but where is the crime of denying oneself to another, by previous consent and agreement?[143]

In other words, when faced with a concerted act of bankruptcy, Mansfield simply refused to recognise it as having any legal effect at all. The second mode of suppression, was for the judge to perceive a bona fide concerted bankruptcy as an attempted sham bankruptcy. This is suggested by Kenyon's great care, in his attempt at a radical decision in Roberts v. Teasdale[144], to differentiate these bona fide concerted bankruptcies from fraudulent bankruptcies. Ad hoc adjustments also arose around this anomaly. In order that non-privy creditors could sue upon an act of bankruptcy concerted between their debtor and his other creditors, judges manufactured a fictional male fides on the part of the bankrupt. This they did either by 'shutting' the bankrupt's mouth (they closed their ears to the anomaly), or by claiming that the bankrupt had attempted to frustrate the distribution insisted upon by bankruptcy law by means of a 'fraudulent' conveyance (of course, the conveyance was precisely to bring bankruptcy proceedings into operation: it was 'fraudulent' only to the extent that judges could see it in no other way).[145]

e) Crisis

Stam suggests that some historians have used the word 'crisis' as a 'comfortable metaphor':[146]

> many historians have a rather vague and certainly varied sense of what "crisis" really means, for, on examination, the simple impact of the word begins to dissolve in ambiguity.[147]

However Starn does believe that 'notions of crisis can be serious conceptual tools'.[148] While not necessarily accepting Kuhn's 'crisis theory', Starn does state that:

> Kuhn transforms ['crisis'] into an interpretative construct, reaching to the edges of its implications.[149]

Kuhn argues that in normal science there are always anomalies; however, 'the scientist who pauses to examine every anomaly he notes will seldom get significant work done'.[150] Kuhn suggests two circumstances in which omnipresent anomalies give rise to a crisis for a community. Firstly, when the anomalies 'clearly call into question explicit and fundamental generalizations of the paradigm'.[151] Secondly, when 'external factors'[152] give a greater significance to the anomalies: for example, to explain the crisis leading to the Copernican revolution in astronomy, one would have to consider 'the social pressure for calendar reform', as well as 'medieval criticism of Aristotle, the rise of Renaissance Neoplatonism, and other significant historical elements besides'.[153]

Both these 'internal' and 'external' circumstances were present in late 18th century bankruptcy law. It should, however, be noted that the distinction between internal and external circumstances is harder to make in the case of law change than scientific development. In

late 18th century bankruptcy law it was 'external' factors that initially gave rise to anomalies (that is, the belief that bankruptcy law was failing to deter swindling, the belief that it was a vehicle for fraudulent sham bankruptcies, and the merchants' praxis for bankruptcy as debt-clearing process.) It was also these external factors that gave such great significance to the anomalies that they had produced: swindling and sham bankruptcy were moral panics, increasing numbers of bona fide bankrupts appeared in court, and (guided by the depersonalisation of trade, as reflected in the increased use of indorseable forms of paper credit), merchants (and 'reforming lawyers') pressed their case for bankruptcy as process with intensity.[154] Furthermore, the anomalies of bankruptcy law gave rise to crisis because of another highly significant external factor: the actual number of bankruptcies per year accelerated substantially from the last decades of the 18th century.[155] Bankruptcy law's failure to deter acts of bankruptcy must have become more apparent to the judges. And, during the depressions of 1810, and post the Napoleonic Wars, judges must have seen the plausibility of the merchants' case that some bankruptcies, at least, were faultless, despite their being based upon an (often unavoidable) act of bankruptcy.[156] Not only did external factors give greater significance to the very anomalies that they had occasioned, but, as will be seen, these external factors themselves called into question 'explicit and fundamental generalizations' of the bankruptcy as crime paradigm.

Kuhn describes some of the features of a crisis situation for a disciplinary matrix: 'there is a persistent failure of the puzzles of normal science to come out as they should',[157] there is 'pronounced professional insecurity'[158], the anomalies become 'the subject matter of the discipline'[159], and there is a 'technical breakdown'[160]

(objectives cease to be achieved). An analogous situation was experienced by the late 18th century judiciary over bankruptcy law.

It has been argued that a 'correct' legal solution had to satisfy both the internal consistency of the law, and, for our present purposes, the expectations and requirements of the merchants. Puzzles 'came out' incorrectly on the one hand, because judges had to make ad hoc adjustments to maintain the law's internal consistency (for example, by instituting, then claiming that acts of bankruptcy had always required proof of mens rea); and on the other hand, because the merchants' praxis palpably demonstrated the law's failure to satisfy their expectations and requirements.

Professional insecurity in the domain of bankruptcy law is clear from such judicial comments as: 'if I were now to lay down the law for the first time, I do not know that I would do it in this manner';[161] 'I will not presume to say whether this construction should have been put on the statute at first';[162] and, 'the power of the Chancellor in staying certificates, is perhaps not very distinctly settled'.[163]

The central position that the anomalies assumed in bankruptcy law is apparent from the kind of cases that judges increasingly had to consider: about sham bankruptcy, concerted acts of bankruptcy, 'fictitious payee' bills of exchange and the respective powers of creditors, Commissioners and the Lord Chancellor over the certificate decision.

A 'technical breakdown' occurred in bankruptcy from the points of view of both the judges and the merchants. For the judges, bankruptcy law was a device to police trade. Not only was there a general perception that it was failing in this end, but since annual bankruptcy figures increased, bankruptcy law was in fact failing to deter acts of bankruptcy. For the merchants, bankruptcy law should operate

as a debt-clearing process. Its failure to achieve this end led to their reforming praxis, and to their occasional calls for informal debt-clearing arrangements.

f) Revolutionary Science/Revolutionary Law Change

Crises lead to periods of 'revolutionary science' during which time ad hoc articulations of the traditional paradigm occur[164], and new paradigms are suggested and vie for acceptance.[165] Certainly, in the late 18th and early 19th centuries, judges made ad hoc articulations of their paradigm of bankruptcy law - bankruptcy was a crime: 'an act of bankruptcy in the eye of the law is considered as a crime'[166]; the certificate of discharge was a device available for creditors' benevolence:

> there can be no stronger proof of the good-nature and humanity of the British character than the readiness with which creditors sign, even previously to the third examination.[167]

However the new paradigms for bankruptcy that were suggested, and which vied for acceptance, did not originate from the judicial community itself. If a judge did raise a possible new paradigm, his commitment to precedent appeared to prevent his opting for the new paradigm:

> though it might appear that a commission of bankruptcy is the most equitable mode of dividing the bankrupt's estate amongst his creditors, it is now settled that a

> trader could not legally concert an act of bankruptcy with his creditors.[168]

This is not to say that late 18th and early 19th century judges were incapable of creating a paradigm-shift. On Fletcher's account, this appears to have been precisely the situation when the union of an actus reus and a mens rea replaced, over a short period of time, manifest criminality as the determinant of criminal liability.[169] Indeed, when in Fowler v. Padget[170] mens rea was unequivocally incorporated into acts of bankruptcy, although the 'bankruptcy as crime' paradigm was retained and reinforced, the exemplars relating specifically to acts of bankruptcy underwent a revolutionary change in line with this paradigm-shift in the more general criminal law. When this transmutation in bankruptcy law occurred, it happened with little debate, with Lord Kenyon, either unconsciously or sensing the mood of his brother judges, reinterpreting past cases as if nothing had in fact changed, and setting a new, authoritative precedent that destroyed manifest criminality in acts of bankruptcy at a stroke, leaving no room for future discussion on the subject.[171]

The reasons why alternative bankruptcy law paradigms did not present themselves and vie for acceptance in the courts but, as has and will be seen, through the political process, may partly relate to the fact that bankruptcy reform had become a live political issue in which any judicial interference would appear quite clearly, not least to any judges who were aware of possible alternative bankruptcy paradigms, as a policy-orientated intervention in contravention of the internal consistency of the law. More importantly, however, as has repeatedly been demonstrated, the late 18th and early 19th century judiciary generally simply did not understand the problems that merchants had

with the existing bankruptcy as crime paradigm. This was clear from the judges' hopeless attempt to protect 'fair' traders from bankruptcy by the inclusion of mens rea in acts of bankruptcy: not only were such acts inevitable for all insolvent traders, but merchants positively wanted fair traders to be able to employ bankruptcy law to clear their outstanding debts. In other areas of the law where judges did create paradigm shifts, they did so in response to changing social values which they themselves probably shared, not in response to pressure from a class whose needs and values they did not fully comprehend.[172] Thus, in the case of criminal liability, judges revealed themselves to have been somehow influenced (Fletcher's failing was not to show exactly how[173]) by the new values of responsibility for the intended, as opposed to the natural consequences of one's action.

Competition between paradigms for a new version of bankruptcy law, then, did not take place in the courts: law was not allowed to be provisional to the interests of the merchants. As has been argued, part of the very legitimacy of the law turned upon its appearing not to undergo revolutionary change.

In this respect, changes in bankruptcy law differed from the mode of scientific development. Whereas a scientific community produces and debates alternative paradigms once the existing paradigm is in crisis, in the case of late 18th and early 19th century bankruptcy law, competition between paradigms took place in Select Committees and in Parliament. Hence, in the evidence before the Select Committees on bankruptcy, there were debates about, for instance, self-declaration of bankruptcy: Mayhew, keen to prevent trade frauds, argued that self-declaration would 'open such a field of fraud, it would not be possible for any person to detect it'[174], whereas Wilkinson, concerned with maximising returns from bad debts, claimed that 'a great number

of persons would avail themselves of that opportunity [self-declaration] and pay their creditors very nearly if not quite, 20/- in the £, instead of the present plan which is now adopted'.[175] An example of a Parliamentary debate in which alternative paradigms were fought over, is one in which some members argued for the certificate as a matter of desert, whilst others argued for discharge as a matter for creditors' humanity: Romilly pressed for the Lord Chancellor to have the power to grant discharge 'if the certificate should appear to have been withheld by the creditors from improper motives'[176], while the Solicitor-General saw the certificate in terms of humanitarianism and lamented that 'humanity appeared to be confined to the bankrupts, and... the sufferings of the creditors had not been sufficiently attended to.'[177]

g) <u>The New Paradigm</u>

The moral panics about swindling and sham bankruptcy, the merchants' <u>praxis</u> around self-declaration of bankruptcy, the accelerating bankruptcy rate, and barristers[178] taking up the merchants' case, all contributed as factors occasioning a crisis in late 18th century bankruptcy law. The judiciary had failed to contain this crisis by strengthening and modifying their traditional bankruptcy as crime paradigm. Indeed, this judicial response had only fired the crisis by making the merchants' resolve firmer, Eden referring to 'the great mass of judicial decisions' which lead to 'repetitions, inaccuracies, and redundancies'.[179]

It was left to the political process to resolve the crisis by establishing a new bankruptcy law paradigm by which bankruptcy was process first, and crime a poor second. It is noteworthy that Parliament had long proved responsive to mercantile agitation for

bankruptcy reform by creating the 1759 Select Committee on the Bankrupt Laws[180], and by passing piecemeal legislation in 1772[181], 1777[182] and 1809[183]. However, it was not until the first decades of the 19th century that the merchants' reforming praxis was such as to throw the judicial paradigm into crisis, and to instigate frequent Parliamentary debates on the subject and a real commitment for reform - J. Smith commenting that the necessity of some change was 'so generally acknowledged, that it would be unnecessary for him to dwell upon it'.[184]

With self-declaration of bankruptcy in the 1824/1825 Bankruptcy Acts[185], bankruptcy could finally be employed by debtors and creditors as a debt- clearing process without the insolvent trader having to feign criminality in a concerted act of bankruptcy. The certificate of discharge was put on a more rational basis (it has been seen why merchants did not press for a purely rational certificate decision made by a judicial body[186]). In 1809, the number and value of creditors who could grant discharge was lowered from four-fifths to three-fifths, thus making the withholding of certificates through improper motives less likely. In 1825, sham bankruptcies were discouraged by the number and value being re-set at four-fifths until six months had elapsed. Thereafter, the near guarantee of a certificate for fair behaviour was reinstated by three-fifths in number and value, or nine-tenths in number alone of the creditors being able to sign a certificate.[187]

This new paradigm for bankruptcy law resolved the problems that led the old paradigm into crisis.[188] It satisfied the merchants' and reforming lawyers' case that bankruptcy should be able to be used as a debt-clearing process:

> the present statute... provides for the voluntary declaration of a trader's insolvency, made bona fide, for the purpose of surrendering himself and his property to the regulations of the bankruptcy laws, which provide equally for his own protection and for the just distribution of his effects among his creditors.[189]

It held out the certificate as an inducement for fair dealings, whilst it discouraged sham bankruptcy by the six month period before the new, more easily obtained certificate was available. It ceased to place formal moral blameworthiness on traders who broke as a result of the Wars. And bankruptcy's now secondary policing role deflected criticism from the judiciary for failing to prevent swindling by means of bankruptcy law. If the stigma of being bankrupt remained, it was the stigma of being an unsuccessful businessman rather than the stigma of being a trade criminal.[190] Bankruptcy had entered 'a different world'[191], a 'different universe of discourse'.[192]

The new paradigm of banakruptcy law, chosen not by the judges, but via the political process, maintained the law's apparent and real relative autonomy from the aspirations of the merchant class. There remained something called 'Bankruptcy Law'; a tradition had, seemingly, not been broken. As Kuhn notes, it is:

> excessively easy to ignore functional changes that would be apparent if they had been accompanied by a change of sign.[193]

Further, until time legitimated the new paradigm of bankruptcy, it was clear to all that it was not the judges, but the legislature that had changed the law. The autonomy (and mystique) of the law, so valuable to bankruptcy's ritual degradation and reinstatement ceremonies[194], remained intact.

The relative autonomy of the law also remained factually intact. A new set of exemplars could be established around the new paradigm. Old precedents could be reinterpreted. We have seen how judges were concerned firstly with the internal consistency of the law, and only secondly with satisfying the merchants' expectations and requirements. When the effects of this relative autonomy became too extreme, when, for the merchants, there was an intolerable distance between what they needed, and what the law could offer, the merchants became involved in a praxis for reform. Early 19th century bankruptcy law may have been changed to accommodate the 'new ruling class', the merchants; however it did not change without their active participation in demanding such a change.

Footnotes

Chapter One

1. Viz., e.g., D. Alexander Retailing in England during the Industrial Revolution (1970), Chapter 6.

2. Cf. P.H. Haagan 'Eighteenth Century English Society and the Debt Law' in eds S. Cohen and A. Scull Social Control and the State (1983), p.222. For the late 19th century history of debt law, cf. G.R. Rubin 'Law, Poverty and Imprisonment for Debt, 1869-1914' and 'The County Courts and the Tally Trade, 1846-1914' in eds G.R. Rubin and D. Sugarman Law, Economy and Society: Essays in the History of English Law, 1750-1914 (1984), at p.241, p.321 respectively.

3. On Ashton's figures, the average number of bankruptcies per year between 1732 and 1799 was 378 (T.S. Ashton An Economic History of England in the 18th Century (1955)(1972),p.254). For other bankruptcy statistics, viz. the tables and references at B.R. Mitchell Abstract of British Historical Statistics (1962), pp.245-246; and viz. S. Marriner 'English Bankruptcy Records and Statistics before 1850' 33 Economic History Review (1980),p.351.

4. Viz. infra, Chapter 7, pp.185-6. In brief, the problem with the legal enforceability of compositions lay in the fact that they could be overturned at the insistence of a single creditor.

5. Infra, Chapter 7. Sugarman and Rubin argue for the importance of an awareness of the symbolic dimension of law in legal historical work: D. Sugarman and G.R. Rubin 'Towards a New History of Law and Material Society in England' in eds G.R. Rubin and D. Sugarman, op. cit., p.1, at pp.67-68. Cf. A.G. Roeber's discussion of the recreation of 18th century Virginian 'social rank, mutual obligation, and shared values' in the rituals of the local courts: A.G. Roeber

'Authority, Law and Custom: the Rituals of Court Day in Tidewater Virginia, 1720 to 1750' 47 William and Mary Quarterly (1980),p.29. Roeber specifically alludes to the Tidewater court as offering, in drama of the debt cases before it, 'face-to-face definitions of mutual obligation in a public forum', ibid, p.43 (viz. esp. pp.41-43). Cf. another symbolic function attributed to 18th century debt law by Haagan : 'the debt law was a dramatic statement of the limits of law and of the state... mercy and discretion were the prerogative of individuals', op.cit., p.229; and viz. infra, Chapter 2.

6. J. Brewer 'Commercialization and Politics' in eds N.McKendrick, J. Brewer and J.H. Plumb The Birth of a Consumer Society: the Commercialization of Eighteenth Century England (1982), p.197, at p.210.

7. Infra, Chapter 3, pp.52-3 we define an 'ideal type' as a construct, established by a process of distortion, with a view to achieving some definite object. For the problems in the use of ideal types to explain social change, viz. infra, Chapter 10, p.291. For 'structural principles', viz. G.P. Fletcher Rethinking Criminal Law (1978); and viz. infra, Chapter 2, pp.25-9.

8. The judicial paradigms will be seen to have been similar to paradigms held by scientific communities of practioners as described by T. Kuhn in his most recent revisions of his thesis in The Structure of Scientific Revolutions (1962), viz. infra, Chapter 10.

9. Cf. the importance placed upon the abstract notion of the 'depersonalization' of trade in P.J. Coleman Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy 1607-1900 (1974). In the present work, by means of ideal typification, we strive to achieve a balance between abstraction and empirical detail.

10. This concept receives fuller theoretical treatment infra, Chapter 3, pp.90-3.

11. Viz. infra, Chapter 8. Debtors and creditors concerted acts of bankruptcy (the formal entry into bankruptcy proceedings). Judges saw acts of bankruptcy as criminal acts.

12. D. Sugarman 'Theory and Practice in Law and History' in eds R. Fryer et al Law, State and Society (1981), p.70, at p.97.

13. But viz. W.J. Jones 'Foundations of English Bankruptcy: Statutes and Commissions in the Early Modern Period' 63(3) Transactions of the American Philosophical Society (1979) for especially pre-18th century bankruptcy law; F.J.J. Cadwallader 'In Pursuit of the Merchant Debtor and Bankrupt (1066-1732)' unpublished University of London PhD thesis, 1965, pp.399-839 for a less than contextually-sensitive study; P.J. Coleman Debtors and Creditors..., op.cit., for the American scene; and I.P.H. Duffy 'Bankruptcy and Insolvency in London in the Late 18th and Early 19th Century' unpublished Oxford D.Phil. thesis, 1973, for an economic history of bankruptcy. Cf. D. Sugarman and G.R. Rubin 'Towards a New History...', op.cit., p.43: 'A specific, though perhaps neglected, feature of the relationship between law and economy is that between credit and the structure of the law and legal institutions; and cf. J. Brewer's comment from the point of view of a social historian: 'private indebtedness... has received much less attention [than public indebtedness] from historians despite the fact that it was a persistent and indeed ubiquitous source of anxiety in Hanovarian England', 'Commercialization and Politics', op.cit., p.203.

14. D. Sugarman and G.R. Rubin identify T.F.T. Plucknett's A Concise History of the Common Law 5th edition (1956) as a prime example of this mode of legal history: 'Towards a New History...', op.cit., p.1; viz. also ibid, pp.104-111, 119-120.

15. And also failing to recognize paradigm shifts - viz. infra, Chapter 10.

16. W. Prest 'Why the History of the Professions is not Written' in eds G.R. Rubin and D. Sugarman, op. cit., p.300, at p.302.

17. This approach is criticised infra, Chapter 10, p.284.

18. Cf. D. Sugarman and G.R. Rubin 'Towards a New History...', op.cit., pp.64-77.

19. Ibid, pp.47-52. In keeping with this approach, H.W. Arthurs problematises the meaning of that which constitutes 'judicial work', 'Special Courts, Special Law: Legal Pluralism in Nineteenth Century England' in eds G.R. Rubin and D. Sugarman, op.cit., p.380, at pp.382 ff..

20. For a highly suggestive essay on the present and the possible future of critical legal history, viz. generally D. Sugarman and G.R. Rubin 'Towards a New History...', op.cit..

21. Ibid, note 4 contains an invaluable bibliography of, inter alia, these histories of the criminal law. Drawing their theoretical impetus particularly from the work of A. Gramsci, the most influential of these histories include eds. D. Hay et al Albion's Fatal Tree (1975), E.P. Thompson Whigs and Hunters (1977), and eds J. Brewer and J. Styles An Ungovernable People (1980). An important antecedent of such contectually sensitive histories of the criminal law is J. Hall Theft, Law and Society (1952).

22. M.J. Horwitz The Transformation of American Law, 1780-1860 (1977). Cf. G.R. Rubin 'The County Courts...', op.cit., p.321: 'until very recently, the surge of interest in the modern social history of law was confined largely to the history of the criminal law. Comparable advances in the social history of civil law and the civil courts were noticeably absent'.

23. Viz., e.g., D. Sugarman 'Theory and Practice...', op.cit., pp. 80-1 and viz. D. Kennedy 'The Structure of Blackstone's Commentaries' 28 Buffalo Law Review (1979), p.205, esp. at p.220.

24. Viz. A.W.B. Simpson 'The Horwitz Thesis and the History of Contracts' 46 University of Chicago Law Review (1979), p.533.

25. P.Atiyah The Rise and Fall of Freedom of Contract (1979).

26. Eds G.R. Rubin and D. Sugarman, op.cit..

27. D. Sugarman and G.R. Rubin 'Towards a New History...', op.cit., pp.47-52.

28. Ibid, p.51.

29. Although continuities in the history of bankruptcy law will be considered infra, Chapter 7, pp.236-9.

30. M.R. Chesterman 'Family Settlements on Trust: Landowners and the Rising Bourgeoisie' in eds G.R. Rubin and D. Sugarman, op.cit., p.124, at p.157.

31. Ibid, p.165.

32. Viz., e.g., J.H. Langbein 'Albion's Fatal Flaws' 98 Past and Present (1983), p.96, esp. at pp.114-115.

33. D. Hay 'Property, Authority and the Criminal Law' in eds D.Hay et al, op.cit., p.17.

34. M.J. Horwitz 'The Doctrine of Objective Causation' in ed. D. Kairys The Politics of Law: a Progressive Critique (1982),p.201. This essay represents an epistemological break with Horwitz's earlier work The Transformation..., op.cit..

35. For plebeian awareness of laws which directly affected them, cf. J. Waller 'Grain Riots and Popular Attitudes to the Law' in eds. J. Brewer and J. Styles, op.cit., p.47, at pp.51-2, 62-4, 81-3. In the early 20th century it was suggested that 'at present bankruptcy, like divorce, is rightly regarded as a luxury for the well-to-do... a poor man never does, or can, become a bankrupt...

bankruptcy is a legal status jealously guarded by the caste to which it belongs', E.A. Parry (Judge) The Law and the Poor (1914), pp.113-114 (viz., generally, G.R. Rubin 'Law, Poverty...', op.cit., and 'The County Courts...', op.cit.).

36. Infra, Chapter 7, pp.213-236.

37. Cf. D.Sugarman 'Theory and Practice...', op.cit., esp. pp. 72 ff.

38. 5 Geo.IV, c.98 (1824) and 6 Geo.IV, c.16 (1825).

39. Viz. E.B.Pashukanis 'The General Theory of Law and Marxism' in eds P.Beirne and R. Sharlet Pashukanis: Selected Writings on Marxism and Law (1980), p.37, esp. at pp.74-90.

40. Viz. F.A. Hayek The Constitution of Liberty (1960)(1976), esp.at pp.220-233; F.A. Hayek Law, Legislation and Liberty (1976), Vol.2, p.109: 'a catallaxy is thus the special kind of spontaneous order produced by the market through people acting within the rules of the law of property, tort and contract'.

41. Cf. E. Kamenka and A. Tay 'Beyond Bourgeois Individualism: the Contemporary Crisis in Law and Legal Ideology' in eds E. Kamenka and R.S. Neale Feudalism, Capitalism and Beyond (1975), p.126; and E. Kamenka and A. Tay 'Social Traditions, Legal Traditions' and ' 'Transforming' the Law, 'Steering' Society' in eds E. Kamenka and A. Tay Law and Social Control (1980), p.3, p.105 respectively.

42. Even if such rules are not systematically employed by businessmen (viz. S. Macaulay 'Non-Contractual Relations in Business' 28 American Sociological Review (1963) 45; H. Beale and T. Dugdale 'Contracts between Businessmen: Planning and the Use of Contractual Remedies' 2 British Journal of Law and Society (1975) 18; R. Lewis 'Contracts between Businessmen: Reform of the Law of Firm Offers...' 9 Journal of Law and Society (1982) 153; R.B. Ferguson 'Commercial Expectations and the Guarantee of Law: Sales

Transactions in Mid-Nineteenth Century England' in eds G.R. Rubin and D. Sugarman, op.cit., p.192), they nevertheless can be used in the last instance, and therefore give shape to the mode of business transactions: the legal framework of contract law rules 'provide a starting point for negotiation' (R. Bowles Law and the Economy (1982), p.129, viz. Chapter 8 generally; viz. also Goetz and Scott's claim that whereas contract law theory has focused upon the 'complete contingent contract', the research by Macaulay et al (supra) suggests that ongoing contracts should be re-conceptualised as 'relational contracts': C.J. Goetz and R.E. Scott 'Principles of Relational Contracts' 67 Virginia Law Review (1981), p.1089).

43. Merchants perceived this as representing 'economic efficiency' in bankruptcy law. Perhaps indicating their distance from the everyday operation of trade, political economists made few references to bankruptcy law in their writings. A. Smith, for example, makes mention of bankruptcy but twice in The Wealth of Nations (1776) O.U.P. edition (1979). Firstly (Vol. 1, p.128), Smith refers to the frequency of bankruptcies in 'hazardous trades'; and secondly (Vol.1, p.342), he notes the humiliation suffered by a trader who becomes bankrupt. In A. Smith's Lectures on Jurisprudence (c.1762-66) O.U.P. edition (1978), there at two short passages on the death penalty in bankruptcy (at pp.131-132, p.483). Viz. I.P.H. Duffy 'Bankruptcy and Insolvency...', op.cit., Chapter 4 for other (scant) references in the writings of political economists to debt laws.

44. Cf. E.P. Thompson 'The Moral Economy of the English Crowd in the 18th Century' 50 Past and Present (1971), p.76, where Thompson describes a development from a 'moral economy' 'grounded upon a consistent traditional view of social norms and obligations, of

the proper economic function of several parties within the community' (p.79), to a new political economy in which the price mechanism impersonally distributed produce.

45. E. Kamenka and A. Tay 'Beyond Bourgeois Individualism...', op.cit., p.137.

46. This terminology is borrowed from K. Renner The Institutions of Private Law and their Social Functions (1949)(1976).

47. Cf. M.W. Flinn Origins of the Industrial Revolution (1966), p.56: 'though no single factor can, in isolation, explain so dramatic a transformation in the means and scale of production as the Industrial Revolution of the eighteenth century, an increased demand could, of itself, be a powerful means of inducing significant changes in the methods of production'.

48. Cf. D. Sugarman and G.R. Rubin 'Towards a New History...', op.cit., pp.23-42.

49. Cf. P. Atiyah The Rise and Fall..., op.cit., esp.pp.61 ff.

50. R.L. Abel 'Torts' in ed. D.Kairys, op.cit., p.185, at p.188.

51. Viz. M.J. Horwitz 'The Doctrine...', op.cit., esp. pp.201-2; and cf. G.E.White Tort Law in America (1980).

52. Viz., e.g., M.R. Chesterman 'Family Settlements...', op.cit.

53. On the criminalisation of the previously civil wrong of embezzlement, for instance, viz. J.H. Hall Theft, Law and Society, op.cit., esp. pp.35-40, 65-66, and G.P. Fletcher 'The Metamorphosis of Larceny' 89 Harvard Law Review (1976), p.469.

54. Viz. P. Linebaugh 'Eighteenth Century Crime, Popular Movements and Social Control' 25 Bulletin of Society for the Study of Labour History (1972), at p.13; J. Styles 'Controlling the Outworker: the Embezzlement Laws and Industrial Outwork in Eighteenth Century England' unpublished paper delivered at the Conference on the History of Law, Labour and Crime, the University of Warwick, 1983.

55. D. Sugarman, J.N.J. Palmer and G.R. Rubin 'Crime, Law and Authority in Nineteenth Century Britain' 2 Middlesex Polytechnic History Journal(1982) p.28, at p.48. As will be argued throughout the present work; in the interests of trade, bankruptcy law was decriminalised during the 18th and early 19th centuries.

56. D. Hay 'Property, Authority...', op.cit., p.62.

57. M.J. Horwitz The Transformation..., op.cit.

58. P.Atiyah The Rise and Fall... , op.cit. Other explanations of legal change which fail to take the actual processes of change into account include, for example, Landes and Posner's view that 'the common law is best explained as if judges who create the law through decisions operating as precedents in subsequent cases were trying to promote efficient resource allocation': W.M. Landes and R.A. Posner 'The Positive Theory of Tort Law' 15 Georgia Law Review (1981) 851, at p.851; cf. the criticism of earlier expressions of this view at 'Synopsium of Change in the Common Law: Legal and Economic Perspectives' 9 Journal of Legal Studies (1980) 189. Renner sought to explain legal change in terms of the fully-conscious policy of legislatures: 'The occasional loan transaction, as it took place in the period of simple commodity production, usually accompanied by guarantees and pledges, has been developed into the completely organised legal institution of the credit system. This progress was achieved by powerful legislation in all countries', op.cit.,p.147. A similar positivist explanation of legal change is to be found in M.Hartwell The Industrial Revolution and Economic Growth (1971) on which Duffy relies heavily in 'Bankruptcy and Insolvency...', op.cit. For the present work's sympathy with, but distance from the recent American 'structural' explanations of legal change, viz. infra, Chapter 2, pp.25-9 on G.P. Fletcher's work, and infra Chapter 10, note 32, on K. Vandevelde's work.

59. For the post-structuralist Marxist belief in human struggle as a basis for radical legal change - viz. P. Hirst On Law and Ideology (1979), esp. Chapter 1. The early 19th century merchants' struggle for bankruptcy reform was most successful in creating a radical legal change.

60. Viz. infra, Chapter 6, pp.168-73; Chapter 7, pp.189-90.

61. D. Sugarman 'Theory and Practice...', op.cit., p.74.

62. Cf. the sources cited supra, note 21.

63. Supra, pp.8-10.

64. J. Brewer 'Commercialization and Politics', op.cit.

65. A prime example is E.P. Thompson 'Patrician Society, Plebeian Culture' 7 Journal of Social History (1974), p.382.

66. J. Brewer 'Commercialization and Politics', op.cit., p.197.

67. Brewer argues that the 'free market' emerged once new bourgeois markets for consumer items literally freed merchants from aristocratic 'control or command through their purchasing power and patronage', ibid, p.198. In Chapter 3, we argue that merchants were concerned that bankruptcy law should not be so draconian as to discourage entrepreneurial risk-taking (although I.P.H. Duffy doubts that bankruptcy law, in fact, discouraged economic growth: 'Bankruptcy and Insolvency...', op.cit., Chapter 4). Wilson argues that the merchants (who 'came to make the things they had previously only sold') were one amongst several sources of the future industrialist entrepreneurs: C. Wilson 'The Entrepreneur in the Industrial Revolution in Britain' in C. Wilson Economic History and the Historian: Collected Essays (1969), p.156, at p.170; viz. also P. Mathias The First Industrial Nation (1969)(1978), pp.151-165.

68. Just such a 'sudden high liquidity preference' after the crash of the South Sea Bubble Company in 1720 foreshadowed 18th century mercantile insecurity and antipathy towards the 'monied interest',

J. Brewer 'Commercialization and Politics', op.cit., pp.209-10. For mercantile distrust of the 'monied interest', viz. infra, Chapter 3, n.33.

69. J. Brewer 'Commercialization and Politics', op.cit., p.200.

70. Ibid.

71. Cf., e.g., C.Wilson 'The Entrepreneur...', op.cit.,p.157: 'you lent and borrowed within your known community'; and viz. B.A. Holderness 'Credit in a Rural Community, 1660-1800' 3 Midland History (1975), esp. at pp.100-102, 111-112.

72. J. Brewer 'Commercialization and Politics', op.cit., pp.215-217.

73. Ibid, p.228.

74. Ibid, p.211.

75. Ibid, p.205. Viz. generally, J.M. Holden History of Negotiable Instruments in English Law (1955) for a similar explanation of legal change in this area.

76. E.P. Thompson 'Patrician Society...', op.cit., p.395; viz. also E.P. Thompson 'Eighteenth Century English Society - Class Struggle without Class?' 3 Social History (1978), p.133, at pp.142-3.

77. J. Brewer 'Commercialization and Politics', op.cit., pp.213-4.

78. Viz., e.g., D. Defoe Remarks on the Bill to Prevent Frauds Committed by Bankrupts (1706). Audley argued that a stable system of trade also depended upon traders keeping good books: 'they cannot thrive who have not an exact account of their expenses and incomes', The Way to be Rich (1662), p.23. Cf. the importance placed upon a rational system of bookkeeping in Weber's explanation of the rise of Capitalism: M. Weber The Protestant Ethic and the Spirit of Capitalism (1930)(1978), esp. pp.21-22.

79. Supra, p.3 and n.11.

80 Infra, Chapter 7.

81. Infra, Chapter 2, p.25.

82. Duffy places enormous significance upon just this last factor as an explanation of bankruptcy law reform. In particular, he focuses upon the 'crisis' year of 1810: 'Bankruptcy and Insolvency...', part 2.

83. E. Jenks A Short History of English Law (1934), p.382. Jenks focused (in Chapter 19) upon bankruptcy procedure. For a discussion of early 19th century bankruptcy procedure which, far from being 'uninteresting', is highly suggestive, viz. P.W.J. Bartrip 'County Court and Superior Court Registrars, 1820-1875: the Making of a Judicial Official' in eds. G.R. Rubin and D. Sugarman, op.cit., p.349, at pp.351-353. In brief, the 1831 Bankruptcy Act (1 and 2 Will.IV,c.56) replaced a system of ill-accommodated and independent Commissioners in Bankruptcy (infra, Chapter 6, n.8) with a Bankruptcy Court from which appeals could be made to the Court of Review. Placing the reforms in their context of 19th century administrative growth, Bartrip concludes that 'an attempt to modernise bankruptcy proceedings, thereby making them more suitable for a rapidly industrialising economy in which efficient commercial laws and institutions were vital for continued growth and prosperity', p.352. Concentrating upon the substance, as opposed to the procedures, attached to early 19th century bankruptcy law, the present study reaches a similar conclusion.

84. E. Jenks A Short History... , op.cit., p.384.

Chapter Two

1. The extent of the separation between civil and criminal Law in the 18th century is discussed infra, pp.35-7.
2. G.P. Fletcher Rethinking Criminal Law, op.cit.; cf. G.P. Fletcher 'The Metamorphosis of Larceny', op.cit.; cf. Fletcher's defence of his position in 'Manifest Criminality, Criminal Intent and the Metamorphosis of Lloyd Weinreb' 90 Yale Law Journal (1980), p.319.
3. I.e. after only a preliminary hearing by a judge.
4. 34, 35 Hen.VIII,c.4. This was the earliest Act to be repealed by the consolidating and amending Acts of 1824/5 (5 Geo.IV,c.98,s.1/ 6 Geo.IV,c.16,s.1). However cf. R.H. Helmholtz 'Bankruptcy and Probate Jurisdiction before 1571' 48 Missouri Law Review (1983), p.415 where it is argued that medieval ecclesiastical court practice concerning the estate of people who died insolvent represented an antecedent for many of the important features of secular bankruptcy law post 1542.
5. Op.cit., s.1.
6. 13 Eliz.I,c.7.
7. Cf. T. Cooper The Bankrupt Law of America Compared with the Bankrupt Law of England Philadelphia (1801): '[It] will have been seen that the older Acts of the English Parliament considered bankruptcy as a crime', p.118. For the early history of (secular) bankruptcy law viz. W.J. Jones 'The Foundations of English Bankruptcy...', op.cit.
8. 5 Geo.II,c.30. This was to remain the central bankruptcy statute throughout the 18th century.
9. This agitation is discussed at length, infra, Chapter 3. In brief, merchants argued that bankruptcies could arise from fraud or from misfortune in pre-bankruptcy affairs, and that unfortunate bankrupts should be assured of discharge from their past debts once

their remaining estates were re-distributed amongst their creditors. Only those who had been fraudulent prior to their bankruptcies should be treated as 'criminals'.

10. Op.cit., s.1.

11. This dismissive mention of unfortunate bankruptcy indicates that the legislature was sensitive to, but unimpressed by the merchants' case that some bankrupts were simply unlucky. Merchants, in turn, were unimpressed by this legislative response: viz. infra, Chapter 3, p.87.

12. Op.cit., ss.7, 10. The 'certificate of discharge' was first introduced into English Law by the 4 Ann.,c.17(1705),s.19, and the certificate decision was first placed in the creditors' hands by the 5 Ann.,c.22(1706),s.2.

13. Ex parte Capot (1739) 1 Atk.219, 26 E.R. 141, at p.220, p.141 (E.R.).

14. Bromley v. Goodere (1743) 1 Atk. 75, 26 E.R. 49, at p.77, p.50 (E.R.).

15. Ex parte Bennet (1743) 2 Atk. 527, 26 E.R. 716, at p.528, p.717 (E.R.).

16. Ex parte Lingood (1742) 1 Atk. 240, 26 E.R. 154, at p.242, p.155 (E.R.). This case concerned Lingood's frauds during his bankruptcy; cf. Lingood v. Eade (1747) 1 Atk. 196, 26 E.R. 127 in which Lingood failed to supersede his bankruptcy: 'the jury found him bankrupt without going from the bar', per Lord Hardwicke at p.196, p.127 (E.R.).

17. Cooper v. Chitty (1756) 1 Burr. 20, 97 E.R. 166, at pp.31-2, p.172 (E.R.).

18. This is discussed infra, Chapter 3, pp.55-61.

19. P. Price Gravamina Mercatoris: or the Tradesman's Complaint of the Abuses in the Execution of the Statutes against Bankrupts (1694),p.1.

20. Observations on the State of Bankrupts under the Present Laws Nomius Antinomos (ps.)(1760), pp.4-5.

21. Ibid, p.3

22. Pamphleteers stressed the relationship between the frequency of

bankruptcies, and wars and storms - viz., e.g., Remarks on the Late Act of Parliament to Prevent Frauds Committed by Bankrupts..., Anon. (1707), p.8.

23. This provision has recently attracted some attention: viz., e.g., I.P.H. Duffy 'English Bankrupts, 1571-1861' 24 American Journal of Legal History (1980), p.283; and viz. infra, Chapter 3, pp.56-9.

24. Observations on the State of Bankrupts..., op.cit., p.5.

25. Hooper v. Smith (1763) 1 Black Rep. 441, 96 E.R. 252, at p.442, p.253 (E.R.) per Lord Mansfield.

26. G.P. Fletcher Rethinking... , op.cit., pp.59 ff.; 'The Metamorphosis...', op.cit., pp.472 ff.

27. G.P. Fletcher 'The Metamorphosis...', op.cit., p.476. Later, with reference to T. Kuhn's notion of a 'disciplinary matrix' (T.S. Kuhn The Structure of Scientific Revolutions (1962) 2nd. edition (1970), p.182), we argue that judges shared a sufficient homogeneity of meanings to be able to characterise them as Fletcher does in this passage: viz. infra, Chapter 10, pp.294 ff.

28. G.P. Fletcher 'The Metamorphosis...', op.cit., p.472.

29. G.P. Fletcher Rethinking..., op.cit., p.62. Nb. although this explanation is vague, it does narrowly escape from also being tautologous: a legal perception is being relating to a 'shared Western' perception.

30. (1779) 2 East P.C. 685, 168 E.R. 208.

31. G.P. Fletcher Rethinking..., op.cit., p.100.

32. Infra, Chapter 10.

33. Infra, Chapter 10.

34. Cited as Mr William Gulston's Case (1742) in T. Davies The Law Relating to Bankrupts (1744), p.30. Viz. also Gulston v. Dale (1742) 1 Atk. 193, 26 E.R. 125; and ex parte Gulston (1753) 1 Atk. 139, 26 E.R. 91. For the difference between 'plain' and

'doubtful' acts of bankruptcy, viz. infra, p.31 and infra, Chapter 9, pp.262-3.

35. Viz. T. Davies, op.cit., p.30.

36. G.P. Fletcher 'The Metamorphosis...', op.cit., p.475. Cf. the 7 Ann.,C.12 (1708) enacted after an embarrassing episode where the Czar of Russia's Ambassador to Britain was arrested for debt (viz., s.1). Ambassadors were to be immune from such arrests (s.3), and people who attempted to prosecute ambassadors were to be 'deemed violators of the laws of nations, and disturbers of the public repose', s.4 (my italics).

37. Woodier's Case is reported at Bull N.P. 39 from a citation of it in the 1734 case of De Gols v. Ward (1734) Forr. 243, 25 E.R. 748. That it was a case of the 1730s and not earlier suggested by Buller J.'s misdating of it as having been heard in 1739: Vernon v. Hankey (1787) Co. B.L. 95, at p.95.

38. This was a reference to the ratio decidendi of Woodier's Case by Buller J. in Raikes v. Poreau (1786) Co. B.L. 95, at p.95.

39. (1753) 1 Atk. 201, 26 E.R. 130.

40. 11 p.m. was very late at night in the 18th century. In 1822, Cobbett's day began at daylight and ended at 8 p.m. - W. Cobbett Rural Rides (1830)(1981), pp.43, 60, 66, et passim.

41. P. Haagan 'Eighteenth Century English Society...', op.cit., p.231. Cf. G.R. Rubin's reference to a 19th century view of consumer credit 'which harked back to the late Middle Ages belief that insolvency was a mortal sin', 'The County Courts...', op.cit., pp.344-5.

42. D. Defoe Remarks on the Bill..., op.cit., p.27. Viz.infra, Chapter 3.

43. Op.cit., ss.1, 18.

44. I.e. without the possibility of the sentence being changed to that of transportation. This provision was, in fact, little used: by the 1820s there had been only 10 prosecutions and 3 executions. Partly, this may be accounted for by the fact of the already considerable civil rights creditors had over their bankrupt debtor. Moreover, creditors were reluctant to press for the death of their debtors; and private prosecutions were costly, time-consuming, and uncertain: viz. F.J.J. Cadwallader 'In Pursuit of the Merchant Debtor...', op.cit., pp.687-694, and viz. infra, Chapter 3, text accompanying n.129.

45. Observations on the State of Bankrupts..., op.cit., p.6.

46. Viz. infra, Chapter 3, pp.85-90.

47. R.H. Eden A Practical Treatise of the Bankrupt Law 2nd edition (1826), p.339 (describing the situation post 1706).

48. E. Durkheim The Division of Labor in Society (1893)(1964), pp.68 ff.

49. E. Durkheim The Division..., op.cit., p.68.

50. Ibid, p.68

51. Durkheim's own separation of law into those aspects involving 'restitutive', and those involving 'repressive' sanctions was exploded by Hart who, for example, questioned where the sanction lay in a failure to follow the procedures of s.9 of the Wills Act 1837? H.L.A. Hart The Concept of Law (1961), p.28.

52. D. Sugarman 'Law, Economy and the State in England, 1750-1915: Some Major Issues' in ed. D. Sugarman Legality, Ideology and the State (1983), p.213, at p.216.

53. Ibid, p.217. Cf. D. Sugarman and G.R. Rubin 'Towards a New History...', op.cit., pp.9-11.

54. By Sugarman's thesis, this 'privatisation' of business corporations 'from the regulatory public law premises that had dominated the prior law of corporations, whether municiple or trading corporations

both of which were regarded as arms of the state' (M.J. Horwitz, referring to the pre-19th century American situation: 'The History of the Public/Private Distinction' 130 University of Pennsylvania Law Review (1982) 1423, at p.1425), did not substantially alter the state-like regulatory capacity of such organisations over the lives of those involved in them. Horwitz describes a similar insight by those involved in the American Legal Realist Movement of the 1920s and 1930s: 'All law was coercive and had distributive consequences, they argued. It must therefore be understood as a delegation of coercive powers to individuals...', ibid, p.1426 (and cf. W. Twining Karl Llewelyn and the Realist Movement (1973), pp.46 ff.). More recently, the Informal Justice Movement has also sought to demonstrate how the public/private law divide is a jurisprudential fiction serving only to hide the coercive and regulatory nature of all law: viz., e.g., J.S. Auerbach Unequal Justice (1976), pp.280-81.

55. M.J. Horwitz 'The History...', op.cit., p.1424.

56. Cf., e.g., Sir M.Hale Pleas of the Crown (1678)(1972), author's preface dated 1713: 'I shall... divide the laws of this Kingdom, in relation to their matter, into two kinds. 1. The Civil Part, which concerns Civil Rights, and their Remedies. 2. The Criminal Part, which concerns Crimes and Misdemeanors', p.X; and cf. E.H. East A Treatise of the Pleas of the Crown (1803)(1972) which is concerned specifically with criminal law.

57. Viz. supra, Chapter 1, n.54.

58. Or, at least, property rights became qualified in different ways, more relevant to an impersonal market-economy: cf. D. Sugarman 'Law, Economy and the State...', op.cit., pp.223-230; D. Sugarman and G.R. Rubin 'Towards a New History...', op.cit., pp.23-42, where the prevailing orthodoxy that the market either brought

with it, or grew as a result of the emergence of, absolute property rights is questioned. For the criminalisation of previously civil, or legally irrelevant, action during the 18th century, viz. D. Sugarman, J.N.J. Palmer and G.R. Rubin 'Crime, Law and Authority...', op.cit. For an example of the use of the criminal/civil law divide as an aid in explaining 19th century legal development, viz. G.R. Rubin 'Law, Poverty...', op.cit., p.251: 'the characteristic of imprisonment for debt in England was, as the Common Law Commissioners had called attention in 1832, the application of a public, criminal sanction, to a private, civil transaction'.

59. D. Sugarman argues for the importance of conceptual studies of precisely 'the similarities and differences between civil and criminal law' to help in the comprehension of the relationship between law, the state and the economy in the 18th century: 'Law, Economy and the State...', op.cit., esp. p.232 (viz. citation supra, Chapter 1, pp.6-7).

60. E. Durkheim The Rules of Sociological Method (18950(1964), p.52.

61. Infra, Chapter 4.

62. E. Goffman Stigma (1963)(1979), p.9.

63. D. Sauter The Practice of Bankrupts of these Times (1640), p.52. Sauter's source was Strobeus Serm. 42.

64. W. Shakespeare The Merchant of Venice (1600) Act III, scene I.

65. Observations on the State of Bankrupts..., op.cit., p.6.

66. W. Thackeray Vanity Fair (1848)(1978), p.220. Bankruptcy has not really lost its stigma today, despite a report in the Daily Telegraph of 6th June 1980 that 'Bankruptcy no longer carries the same stigma it used to, Registrar John Adams said at Gloucester yesterday. He added: 'there is no slur on illegitimacy, so I don't see there is any slur on bankruptcy these days'.' Cf. infra, Chapter 7, pp.236-9.

67. E. Goffman, op.cit., p.43.

68. T. Goodinge The Law against Bankrupts (1713), p.175. Cf. W.J. Jones, op.cit., p.23. The existence of this tort is unremarkable given the importance of a trader's reputation to his credit-worthiness (infra, Chapter 3).

69. E. Kamenka and A. Tay 'Beyond Bourgeois Individualism...', op.cit., p.135. Cf. D. Nelken 'Is there a Crisis in Law and Legal Ideology?' 9 Journal of Law and Society (1982), p.177 for a criticism of this view.

70. Viz., e.g., M.J. Horwitz The Transformation..., op.cit., passim.

71. Infra, Chapter 10, p.284.

72. Report of the Select Committee Appointed to Consider of the Bankrupt Laws 1817 (486.) v.1 (hereafter 1817 SC)

73. Viz. supra, note 44.

74. 1817 SC, p.26 re the similar situation in Ireland.

75. Ibid, p.66.

76. The £200 bond paid by creditors at the outset of bankruptcy proceedings was returnable if the bankruptcy was proved: 5 Geo.II,c.30 (1732), s.23.

77. Thus, one pamphleteer's anger at creditors who became 'merciless judges in their own cause' Proposals for Promoting Industry and Advancing Proper Credit, Anon. (1732), p.14. Cf. Chapter 3, pp.81-2.

78. Levinthal observed that this dualism of function is a universal feature of 'Bankruptcy' laws: L.E. Levinthal 'The Early History of Bankruptcy Law' 66 University of Pennsylvania Law Review (1918-19), p.223, at p.225.

79. J. Swift Gulliver's Travels (1726)(1973), p.95.

80. Considerations upon Commissions of Bankrupts, Anon. (1727), p.9. This was a rare position amongst pamphleteers calling for bankruptcy reform.

81. Viz. J.C. Oldham 'Special Juries: 18th and 19th Century Usage and Reform' unpublished paper delivered at the Conference on the History of Labour, Law and Crime, the University of Warwick, 1983. Cf. J.C. Oldham 'Origins of the Special Jury' 50 University of Chicago Law Review (1983), 137.

82. Viz. infra, Chapter 7, p.215.

83. In discussing the continued existence of imprisonment for debt for small-scale consumer debtors between 1869 and 1914, G.R. Rubin partially explains this situation with reference to 'that inertia characteristic of legal institutions, which habitually militates against change': 'Law, Poverty...', op.cit., p.242.

84. Sir H.J. Maine Ancient Law (1861) Everyman edition (n.d.), p.189.

85. D. Sauter, op.cit., p.52. Sauter's source was Alex.ab Alex.B6.10.

86. Ibid, p.52; ibid source. Viz. also J.S. Koffler 'Dionysus in Bankruptcy Land' 7 Rutt-Cam. Law Journal (1976), p.655, at p.661 note 12, for other exotic modes of punishment of early 'bankrupts'.

87. By cessio bonorum, the debtor who surrendered his entire estate to his creditors was excused all punishment. Cessio bonorum was a feature of 18th century Scots bankruptcy law. Cf. Lord Meadowbank's recommendation that the English adopt a similar scheme (said to be both inexpensive and fair on creditors) in Royal Bank of Scotland v. Cuthbert (1812) 1 Rose B.L. 462, esp. at p.480.

88. F. Pollock and F. Maitland History of English Law 2nd edition (1968), Vol. 2, p.596.

89. Ibid, p.597. The 'so-called "statute merchant" ' was 13 Edw.I, st.3 (1285).

90. Sir W.S. Holdsworth A History of English Law (1903), Vol. 8, p.236.

91. Ibid, p.234. For the argument that humanitarianism was as much a mode of social control as 'harshness', viz. generally ed. M.J. Wiener 'Humanitarianism or Control? A Synopsium on Aspects of

Nineteenth Century Social Reform in Britain and America' 67 (1) Rice University Studies (1981). Indeed, 'humanitarianism', with its moral claim of representing 'progress' and 'civility', could (at whatever level of consciousness) be a more powerful weapon in recreating particular forms of social discipline.

92. 22, 23 Ch.II,c.20 (1670). For the sensitivity of the legislature to the petitions of imprisoned debtors, viz. J. Innes 'The King's Bench Prison in the Later Eighteenth Century' in eds. J. Brewer and J. Styles, op.cit., p.250.

93. 2, 3 Ann.,c.17 (1703), s.1. Cf. the similar provision in the 4 Ann.,c.19 (1705), s.18 by which Justices of the Peace were encouraged to visit prisons to search for willing bankrupts.

94. The 14, Ch.II,c.24 (1662), s.1 certainly met the immediate needs of Sir John Westenholme. Westenholme, a noble, had invested unsuccessfully in the East India Company. This Act superseded a petition of bankruptcy against him, and protected other 'divers noblemen, gentlemen and persons of quality no way bred up to trade or merchandize' from bankruptcy proceedings. The perceived need for this protection may be taken as being further evidence of the legislative and judicial conception of bankruptcy as crime.

95. The 1705 Act was limited, by s.16, to run for three years while the 1706 Act, by s.9, was to run for two years.

96. Ex parte Burton (1744) 1 Atk. 255, 26 E.R. 163, at p.256, pp.163-4 (E.R.).

97. D.Defoe, op.cit., p.1.

98. J. Swift, op.cit., p.84 (the war between Lilliput and Blefusco is a reference to the War of the Spanish Succession).

99. 6 Cobbett's Parliamentary History of England (1810),p.451. This was part of the Queen's Speech at the opening of Parliament on 25th October 1705 (here, as elsewhere, the contemporary calendar

is used). The 1705 Bankruptcy Bill received its first reading a week later, on 31st October.

100. Thus, the 1703 and 1705 Acts allowing discharge in exchange for enrolment into the army or navy did not extend beyond the War of the Spanish Succession. Cf. the short-lived Liabilities (War-Time) Adjustment Act (1941) by which 'The bankruptcy law [had] been suspended, not certainly de jure, but de facto': M. Harnick 'The Liabilities (War-Time) Adjustment Act (1941)' 5 Modern Law Review (1941), p.125 (referring to s.21 of the Act).

101. Sir W.H. Holdsworth, op.cit., p.233.

102. D. Sauter, op.cit., Viz., e.g., p.5 where there are said to be two kinds of bankrupts: 'the first of them, who by casualties have their substance wasted: the second sort are they, who are impoverished by their own default: these last are the worst sort of men and deserve no pity' (by implication, the first sort did deserve pity).

103. D. Defoe, op.cit.; and elsewhere (viz. infra).

104. Infra, Chapter 3, pp.85-90.

105. Sir W.H. Holdsworth, op.cit., p.229.

106. W. Shakespeare, op.cit., Act IV, scene I.

107. Infra, Chapter 3, pp.61-4.

108. Sir H.J. Maine, op.cit., esp. pp.185-191.

109. Ibid., p.188.

110. Ibid., p.189.

111. Ex parte King (1805) 11 Ves. Jun. 417, 32 E.R. 1148, at p.428, p.1151 (E.R.).

112. D. Hay 'Property, Authority and the Criminal Law', op.cit., p.40.

113. G.M. Trevelyan English Social History (1942)(1980). Haagan has recently noted a similar relationship between 'humanity' and a social order in which 'patronage' played a vital role in his

discussion of the nature of 18th century insolvency law:

'Parliament... essentially... was less interested in creating rational, calculating individuals than it was in reinforcing the attitudes of deference and dependence on which the authority of the propertied classes rested... Like a sinner before God, a defaulter could not justify himself to his creditors. He would be saved by their grace alone... In order to realize justice, it was thought necessary to allow creditors the arbitrary authority to deal with each case unhampered. The creditor's prerogative to show mercy functioned in a way analogous to the pardon power of the criminal law', op.cit., p.237, viz. also p.229. It should be noted, however, that Haagan mistakenly identifies a class of creditors, whereas as has and will be noted, a creditor to one man was usually a debtor to another (cf. P. Haagan, op.cit., p.229).

114. Supra, p.26.

115. M.D. George London Life in the 18th Century (1925)(1970) - George refers, for example, to the master's obligation 'to feed, clothe and house, in sickness and in health, for seven years or more' his apprentice: p.227.

116. Infra, Chapter 4.

117. J. Swift, op.cit., pp.94-5.

118. Cf. the high level of homogeneity of experience amongst 18th century judges suggested in D. Duman The Judicial Bench in England 1717-1875 (1982); also nb. Duman's comment that 'the bar itself exhibited a corporate unity which was almost unaltered by the passage of time... The entire professional milleu of the barrister and judge created a unique occupational outlook', p.11. For a discussion of 'experience', viz. infra, Chapter 6, pp.168-73; and for discussion of judges as a 'disciplinary matrix', viz. infra, Chapter 10, pp. 294 ff.

Chapter Three

1. Viz. M. Weber The Theory of Social And Economic Organization (1947), pp.328-63.

2. Viz., e.g., T. Burger Max Weber's Theory of Concept Formation (North Carolina)(1976), passim, and viz. the bibliography at ibid, pp.215-223.

3. Viz. P. Burke Sociology and History (1980), pp.35-37; and viz., e.g., C.B. MacPherson's history of 17th century political theory: The Political Theory of Possessive Individualism (1962)(1972), esp. pp.46-49. At p.48, MacPherson acknowledges a debt to Weber, amongst others, for his concept of 'models of society'.

4. Viz., e.g., G.P. Fletcher 'Two Modes of Legal Thought' 90 Yale Law Journal (1981) 970, at pp.1001-1003. Also viz. R.M. Unger Law in Modern Society (New York)(1976)(1977), cf. Unger's criticism of ideal types at p.22 with his 'three concepts of law' at pp.48-58.

5. The philosophical problems attached to the construction of ideal types are discussed infra, Chapter 10; as are the reasons why we have opted to establish merchant attitudes towards bankruptcy law by means of ideal typification, but have established legal attitudes towards bankrupcy law with reference to 'structural principles' (later to be re-identified as the foundations of 'paradigms'). Viz. also supra Chapter 2, pp.25-9.

6. R.J. Morris Class and Class Consciousness in the Industrial Revolution 1780-1850 (1979), pp.16-17 referring to A. Briggs The Age of Improvement (1959), pp.116-117.

7. Viz. D. Alexander Retailing in England..., op.cit., p.165, note 15: 'It was an unusual tradesman in this period who did not, at some period in his career, either come very close to insolvency or actually experience it'.

8. This is not to deny the existence of divisions within the ranks of those who earned their living in this way. Although he accepts that contemporaries like Defoe confused the terms, W.J. Jones notes that there were several categories of people who bought cheap and sold dear in the early modern period: 'merchants (overseas traders); tradesmen (skilled craftsmen); and retailers (those who sold the goods of others)', op.cit., pp.58-59. Although Jones is correct to state that 'in lumping together all who made their living through merchandise and trade, the bankruptcy statutes glossed over vast social divisions which were very real' (ibid, p.59), we nevertheless go on to establish in this section a sufficient homogeneity of interest amongst merchants/traders to describe them as having had a 'case' for bankruptcy reform.

9. I.P.H. Duffy 'English Bankrupts...', op.cit., p.295. Duffy describes who could and who could not become a bankrupt in the 18th century at pp.292-304. Viz. also the lists and criteria set out by W. Cooke in The Bankrupt Laws (1785) 7th edition (1817), Vol.1, pp.43 ff.

10. Ibid.

11. M.D. George London Life... , op.cit., Chapter 4, esp. p.162. George states that: 'London trades were... so numerous that it is difficult to find one not represented there', p.162.

12. Op.cit., p.44.

13. (1687) 3 Mod. 155, 87 E.R. 100.

14. W. Cooke, op.cit., p.44: this was his interpretation of the Acts' requirements that 'buying and selling' occurred. For the centrality of the trader's use of credit in judicial notions about who could be bankrupt viz. infra. Chapter 4, p.97.

15. I.P.H. Duffy 'English Bankrupts...', op.cit., p.294.

16. Ibid, p.298. Blackstone also considered the existence of 'mutual credit' to be part of the proper rationale for holding certain occupations to be within the ambit of bankruptcy law: W. Blackstone Commentaries on the Laws of England (1765-69), Vol. 2, p.475. Cf. W. Cooke's rationale, supra, n.14.

17. Op.cit., p.116 et passim. Julian Hoppit is presently working at Cambridge on a PhD. thesis on the success of bankruptcy statistics as economic indicators during the 18th century.

18. Op.cit., p.305.

19. Infra, Chapter 7, pp.185-90.

20. A trader could not become a bankrupt unless he owed debts of more than £100 to one creditor, £150 to two creditors, or £200 to three or more creditors: 5 Ann.,c.22 (1706), s.7.

21. Cf., e.g., R. Porter English Society in the Eighteenth Century (1982), p.93: 'fortunes grew vast more easily in overseas trade'.

22. D. Marshall English People in the 18th Century (1956)(1969), p.18.

23. Part of Marx's definition of a 'class for itself' in the Eighteenth Brumaire of Louis Bonaparte - viz. R. J. Morris, op.cit., p.25.

24. M.E. Tigar Law and the Rise of Capitalism (1977).

25. 'The great achievement of the bourgeoisie in this period [1000-1200 A.D.] was to wrest from signeurs in hundreds of separate localities the recognition of an independent status within the feudal hierarchy... The internal life of the towns was regulated by... collectives of citizens, according to charters written by legalists in the service of the group', ibid, p.11.

26. R.J. Morris, op.cit., p.9

27. E.J. Hobsbawm Industry and Empire (1968)(1977), p.83. E.P. Thompson claims that the middle class had not 'discovered' itself, except possibly in London, until the last three decades of the 18th century: 'Eighteenth Century English Society...',

op.cit., p.142. Cf. R.H. Gretton's celebration of the 'middle class' in 1917: '...it can hardly be said to have been clear political entity before the latter part of the 18th century'. The English Middle Class (1917), p.6.

28. Chapter 7.

29. E.J. Hobsbawm op.cit., pp.82-83.

30. E.P. Thompson 'Patrician Society, Plebeian Culture, op.cit., p.395. viz. also E.P. Thompsom 'Eighteenth Century English Society...', op.cit., pp.142-143.

31. E.P. Thompson 'The Moral Economy of the English Crowd in the 18th Century', op.cit.

32. Thompson enumerates several other grievances plebeians had towards grain merchants; for example: plebeians disliked merchants selling brown as opposed to traditional white bread, they distrusted sale by sample, they wanted local produce to be consumed locally, etc. (ibid).

33. J.G.A. Pocock also notes the distance between the 'trading bourgeoisie' and the 'monied interest' comprising 'soldiers, placemen, rentiers, stockjobbers and parliamentary oligarchs': 'Early Modern Capitalism - the Augustan perception' in eds E.Kamenka and R.S. Neale, op.cit., p.62, at p.82. Cf. R.B. Ferguson 'Commercial Expectations...', op.cit., p.195 where, citing Clapham, he refers to the questionable respectability of 18th century stockbrokers. Viz. also J. Brewer 'Commercialization and Politics', op.cit.,p.212.

34. Thus, when Morris refers to William Paley's belief that 'each rank and station had its own duties and rights' (op.cit., p.9) - these duties and rights were not confined to the rank's relationship with other ranks, but included relationships within a ranking.

35. Credit and debt fell within the experience of most merchants:

'Most entrepreneurs were, at one and the same time, borrowers and lenders, debtors and creditors'. T.S. Ashton An Economic History of England..., op.cit., p.206.

36. Viz. supra, Chapter 2, pp.45-51.

37. Merchants, however, argued that the certificate of discharge should be awarded or withheld by neutral judges rather than by creditors despite any 'special relationship' with their bankrupt debtor: viz. infra, pp.81-2.

38. T.S. Ashton, op.cit., p.206.

39. A. Harding A Social History of Law (1966) p.316. Viz. also ibid pp.315-316: 'By the 18th century...huge quantities of credit were required to power colonial trade, and for the establishment and competitive operation of retail shops'.

40. Cf. the pun in W. Thackeray Vanity Fair (1848) Penguin (1968)(1978), p.324: '... every Englishman in the Duke of Wellington's army paid his way. The remembrance of such a fact surely becomes a nation of shopkeepers. It was a blessing for a commerce-loving nation [France] to be overrun by such an army of customers: and to have such creditable warriors to feed', (my italics). Credit as a 'source of honour', and credit as 'trust in a person's ability and intention to pay at a later time for goods, etc., supplied', share a root in the Latin 'credere': 'believe, trust' - The Concise Oxford Dictionary (1911)(1976), p.240.

41. D. Defoe The Compleat English Tradesman (1726), p.85.

42. Supra, Chapter 1, pp.14-6; Chapter 2, pp.38-9.

43. Infra, Chapter 5, pp.130-1, Chapter 7, pp.216 ff.

44. W. Shakespeare Othello (c.1604) Penguin (1938)(1968), p.78 (Iago's words in Act III, scene 3).

45. D. Defoe 3 (5) The Review (c.1715), pp.17-18.

46. J.G.A. Pocock, op.cit.

47. This point is returned to infra, Chapter 7, pp.180-5.

48. M.D. George, op.cit., p.116.

49. Ibid, p.160.

50. 28 Journal of the House of Commons (1759), p.602 (hereafter: 1759 SC), at p.604.

51. An analogy might usefully be drawn between early 18th century English trading towns, and a late 19th century Scottish trading community as described by George Douglas in The House with the Green Shutters (1901) Cassell and Co. Ltd.(1967)(1971). In that environment, reputation was based upon gossip and people 'belonged' to the community in a real sense: '...he was no disgrace to [the town of] Barbie, but a credit rather. It was not every working man's son came back with five hundred in the bank', p.57.

52. I.e. traders as distinct from the 'monied interest' or 'finance capital': viz. supra, note 33.

53. J. Pitt-Rivers 'Honour and Social Status' in ed. J. Peristiany Honour and Shame (1965), p.22. Pitt-Rivers extrapolates despite himself.

54. Cf. J. Brewer 'Commercialization and Politics', op.cit.,p.207: 'If for much of the 18th century Britain was a collection of regional economies, the most important ways in which these economies were linked was through the circuit of credit'. Cf. D. Marshall, op.cit., p.3 where she refers to international interconnections: 'the tangled knots of trade ventures and interests that bound us to the markets of the world'.

55. Considerations upon Commissions of Bankrupts, Anon. (1727), p.4. However viz. infra Chapter 4 for a derogation from this belief.

56. Viz. infra, Chapter 4, p.98.

57. D. Defoe The Compleat..., op.cit., p.198.

58. D. Defoe Remarks on the Bill..., op.cit., p.27.

59. Cf. Beccaria's explanation for people's preference for leniency in punishments: '...their fear of being injured by others is greater than their desire to inflict injuries themselves'. Crimes and Punishment (1764) Chatto and Windus (1880), p.127.

60. Chapter 5.

61. W. S. Holdsworth, op.cit., Vol. 8, p.232.

62. Viz. supra, Chapter 2, p.44.

63. Viz. supra, n.20.

64. The Compleat..., op.cit., passim.

65. W. Beawes Lex Mercatoria Rediviva (1754) 2nd edition (1761), p.486. For Blackstone's description of unfortunate bankruptcies, viz. the quotation infra, p.71. Mr Savary was J. Savary de Bruslons whose French trading dictionary was translated into English by M. Postlethwayt (viz. infra, n.72).

66. D. Defoe The Compleat..., op.cit., p.199. Cf. the quotation supra, Chapter 2, p.44 from D. Defoe Remarks on the Bill... concerning the nation being driven to compassion by merchants' losses due to the War of the Spanish Succession. Defoe is also seen to argue that there is policy in not forcing bankrupts to flee abroad.

67. Considerations upon Commissions..., op.cit., p.8.

68. Ibid, p.10.

69. Observations on the State of Bankrupts..., op.cit.

70. Ibid, p.1.

71. Ibid, p.24. Thus did Antinomos describe the denial of a certificate of discharge to a bankrupt, and thereby the denial of his capacity to recommence trade.

72. M. Postlethwayt The Universal Dictionary of Trade and Commerce (1751) 4th edition (1774), under the heading 'Bankruptcy'. N.b. this work was largely a translation of a trading dictionary by the Frenchman J. Savary de Bruslons.

73. Op.cit., p.1.

74. Reasons Humbly Offered for a General Insolvent Bill, Anon. (1711), p.7.

75. Op.cit.

76. Ibid, p.10

77. Prior to the inception of the certificate of discharge in 1705, the fear that bankruptcy law could hinder trade was stated by merchants: 'The Lords committee on the decay of rents and trade was told in 1669 that the statutes of artificers and bankrupts were prejudicial to trade': W.J. Jones, op.cit., p.55. Jones doubts, as a matter of fact, whether this was the case: 'It is difficult to measure such things, but there seems very little reason to believe that bankruptcy laws actually damaged trade' (p.55). Jones follows Welbourne in stating that 'perhaps the pathology of the business world deserves a little closer attention than it has received from students of risk' (p.55). For another 18th century call by merchants for the lowering of the risks involved in overseas trade, viz. infra, Chapter 4, pp.98-9.

78. Viz. infra, Chapter 2, p.34.

79. Even before the collapse of the South Sea Bubble Company, merchants referred to stockjobbing as the 'mischievous trade': Remarks on the Late Act..., op.cit., p.8. Viz. also infra, Chapter 5. generally.

80. J. Cohen 'The History of Imprisonment for Debt and its Relation to the Development of Discharge in Bankruptcy' 3 Journal of Legal History (1982) 152.

81. Ibid, p.160.

82. Viz., infra, Chapter 10, p.284.

83. By the 5 Geo.II,c.30 (1732), s.7, the assignees or the Commissioners were to allow a bankrupt, once the dividends to the creditors were paid, £5 per £100 of the estate to a maximum of £200 if the estate yielded 10/- in the pound to creditors; £7.10/- per £100 to a maximum of £250 if the estate yielded 12/6d. in the pound; and £10 per £100 to a maximum of £300 if the estate yielded 15/- or more in the pound. By s.8, if the estate yielded less than 10/- in the pound to the creditors, the assignees and the Commissioners had the discretion whether or not to grant an allowance, and then to a maximum of £3 per £100.

84. The whole analogy is complicated if one considers the modern practice of banks to demand personal guarantees for loans to small private companies.

85. J. Cohen, op.cit., p.162.

86. Ibid, p.13; W. Blackstone, op.cit., Vol. 2, pp.473-474; viz. supra, p.71.

87. For 'sham' bankruptcies, viz. infra, Chapter 6.

88. W. Blackstone, op.cit., Vol. 2, pp.473-474.

89. D. Marshall, op.cit., states that 18th century merchants prospered and 'managed to identify the prosperity of the country with their own'. p.8.

90. Reasons Humbly Offered..., op.cit., p.14.

91. Viz. generally The Creditor's Advocate and the Debtor's Friend, Anon.(1731), and Proposals for Promoting Industry..., op.cit., p.18.

92. Observations..., op.cit., p.10.

93. Ibid, p.31

94. Ibid, p.10. Another author concurred: honest bankrupts are 'obliged to seek their bread in foreign countries, which tend[s] to the prejudice of this nation'. The Creditor's Advocate..., op.cit., p.38.

95. Remarks on the Late Act..., op.cit., p.7. Serge is a 'durable twilled worsted, etc., fabric': The Concise Oxford Dictionary, op.cit., p.1037.

96. Remarks on the Late Act..., op.cit., p.7.

97. Although this may have been a reference to the Crown's suspending and dispensing powers.

98. 5 Ann.,c.22.

99. Remarks on the Late Act..., op.cit., p.5.

100. 1759 SC, p.604. W.J. Jones refers to earlier, Tudor examples of merchant debtors and bankrupts fleeing abroad: op.cit, pp.14-15. M.D. George mentions 18th century emigration by debtors generally: op.cit., pp.152-153. The rogue, John King, whom we will encounter later (infra, Chapter 9, pp.276 ff.), spoke from personal experience when he recounted the well-known tale of the Northern French ports in the late 18th century: 'Calais, as before, has become the Fleet prison of England, and Boulogne is its Newgate' (Fleet and Newgate were debtors' prisons): J. King Letters from France (1805) referring to his time in France during the Peace of Amiens in 1802.

101. Viz. supra, Chapter 2, pp.30-1; and viz. infra, Chapter 9, pp.260-273.

102. Viz. supra, Chapter 2, p.34 for the effect on a bankrupt of failing to receive a certificate of discharge.

103. Considerations upon Commissions..., op.cit., p.19.

104. Ibid, p.13.

105. N. Antinomos Observations..., op.cit., p.10.

106. Remarks on the Late Act..., op.cit., p.4.

107. Considerations upon Commissions..., op.cit., p.9.

108. Creditor's Advocate..., op.cit., p.20.

109. Ferguson has argued, in the context of the 18th and 19th century Stock Exchange and the impact of the Statute of Frauds, that

'Only where markets are characterised by strong collective cohesion or are internally policed should we expect to find the lack of legal guarantee a matter of virtual indifference', R.B. Ferguson 'Commercial Expectations...', op.cit., p.207. The early 18th century merchants, with their personal and honour-based interrelations, had a strong degree of collective cohesion. However they wished a judicial decision over the discharge of bankrupts not so much to guarantee legally the recovery of debts, but to protect the unfortunate bankrupt.

110. The Spectator (1712) H. Morely edition (1883), p.653.

111. Steele, op.cit., p.653.

112. Ibid, p.653.

113. Proposals for Promoting Industry..., op.cit., p.33.

114. Ibid, p.38, referring to the associated mercantile concern that unfortunate bankrupts could be imprisoned for debt at the instigation of a single creditor.

115. Creditor's Advocate..., op.cit., p.32.

116. Viz. supra, p.76.

117. Observations..., op.cit., pp.15-16.

118. I.e. formal bankruptcy proceedings in which Commissioners of Bankruptcy had been appointed.

119. 1759 SC, p.603. His source was the London Gazette in which all bankruptcies were advertised and thus recorded.

120. Viz. supra, pp.65-6.

121. 1759 SC, p.603.

122. 'N. Antinomos' notes that creditors may be the very people 'who are perhaps interested in [the bankrupt's] undoing': op.cit., p.5.

123. 1759 SC, p.604. Viz. supra, p.63.

124. 1759 SC, p.623.

125. Assignees were elected by creditors to gather in and to redistribute the banrkupt's remaing effects.

126. 1759 SC, p.623.

127. We know little about the background of these people save that, like many who gave evidence to the 1759 SC, they were themselves undischarged bankrupts.

128. Ibid, p.604.

129. There were, however, three examples of such prosecutions (which were successful): viz. supra, Chapter 2, n.44.

130. This pamphleteer accepts the lawyers' categorisation of bankrupts as criminals, but unlike lawyers, only applied this lable to those bankrupts with fraudulent intent.

131. Proposals for Promoting Industry..., op.cit., p.23.

132. Viz. infra, Chapter 6.

133. Proposals for Promoting Industry..., op.cit., pp.32-33.

134. I.e. by being refused discharge and being imprisoned for debt.

135. 5 Geo.II,c.30 (1732), s.10 (my italics). This provision first appeared in section 2 of the 5 Anne, c.22 (1706), and remained unaltered until section 18 of the 49 Geo.III, c.121 (1809).

136. Op.cit.

137. Ibid. pp.29-30.

138. Ibid, p.30.

139. Of course, many pamphlets written advocating reform of bankruptcy law would have been penned by bankrupts or ex-bankrupts. D. Defoe's writing on bankruptcy is an example of this, as are E. Robertson's works in the late 18th, early 19th centuries: viz. infra, Chapter 5, pp.140-5.

140. 1759 SC, p.603.

141. Ibid, p.604.

142. Ibid. p.604.

143. 'Nemo judex in causa sua potest'. The importance of this rule to early 18th century judges is clear in Between the Parishes of

Great Charte and Kennington (1742) 2 Str.1173, 93 E.R. 1107: it was held that a Justice of the Peace could not be involved in a decision to remove a pauper from his own parish. The Justice of the Peace contributed towards the 'poor rate', and the court would not overrule 'so fundamental a rule of justice, as that a party interested could not be a judge', p.1173, p.1108 (E.R.), (my italics). The connection between the requirements of business, and procedural justice at Law may be seen in Lon L. Fuller The Morality of Law (1964)(1977), pp.19-27, 44-6.

144. Proposals for Promoting Industry..., op.cit., p.14.

145. W Beawes, op.cit., p.487.

146. Op.cit.

147. Viz. supra, p.72.

148. Remarks on the Late Act..., op.cit., p.6.

149. Proposals for Promoting Industry..., op.cit., pp.35-36. For the influence of Dutch bankruptcy law on English bankruptcy reformers, viz. infra, Chapter 7, n.135.

150. Ibid, p.35.

151. Ibid, p.37.

152. Provisions of this nature were included in the actual Bankruptcy Legislation: cf. s.12 of the 5 Geo.II, c.30 (1732), discussed infra, Chapter 5, pp.109-10.

153. Remarks on the Late Act..., op.cit., p.6.

154. 'N. Antinomos' Observations..., op.cit., p.6.

155. For the stigma attached to bankruptcy, viz. esp. supra, Chapter 2, pp.38-9 and infra, Chapter 7, pp.213 ff.

156. N. Antinomos, op.cit., pp.6-7.

157. The 5 Geo.II,c.30 that substantially remained the law throughout the remainder of the 18th century. The composition of Parliament at the time was such that it was more likely to perceive bankruptcy

law from the judicial rather than the mercantile point of view: 'Parliament was controlled by an oligarchy of landowning aristocrats rather than by what was not yet called 'the middle classes', E.J. Hobsbawm, op.cit., p.26. Duman has identified a considerable landed aristocratic background of early 18th century judges. Between 1727 and 1760, 45% of the judiciary had landowning fathers: D. Duman, op.cit., p.51. The particular preamble to the 1732 Act may have been included to appease the small but growing body of mercantile Members of Parliament: Jones refers to 'the growing importance in politics and society of merchants, financiers, and industrialists [in the 18th century]. Their presence was evident in the House of Commons, it was not absent from the House of Lords, and increasingly they gained the ear of government', op.cit., p.59.

158. In fact, the 1732 Act read 'misfortunes', not 'accidents'.

159. N. Antinomos, op.cit., p.6.

160. 1759 SC, p.604.

161. Each Act of Parliament extended the duration of the availability of discharge for usually between three and five years: viz. supra, Chapter 2, n.95.

162. Infra, Chapter 10.

163. I.D. Balbus 'Commodity Form and Legal Form; an Essay on the "Relative Autonomy" of the Law' in eds. C.E. Reasons and R.M. Rich The Sociology of Law (1978), p.73.

164. Cf., e.g., M.J. Horwitz The Transformation..., op.cit.

165. Cf., e.g., G.P. Fletcher whose description of any external influences that caused transformations of 18th and early 19th century larceny law are so slight as to place him, albeit not absolutely, within this camp (viz. supra, Chapter 2, p.28). Vandevelde too stresses a dichotomy between 'formalist' and 'instrumentalist' approaches to explaining law change:

K.J. Vandevelde 'The New Property of the Nineteenth Century: the Development of the Modern Concept of Property' 29 Buffalo Law Review (1980) 325, at pp.326-327: 'At one end of the spectrum, the formalist explains all legal decisions as logical deductions from previous decisions, and therefore legal thought explains everything. At the other end of the spectrum, the instrumentalist sees legal thought as but a diversion, a sideshow produced merely to justify decisions made entirely for political reasons'. For Vandevelde's alternative mode of legal historical study, viz. infra, Chapter 10, n.32.

166. Balbus concludes that just as the exchange-value of products conceals both their different uses, and their construction through human labour; the notion of the 'legal subject' conceals differences in the needs, and in the socio-economic origins of people. Law is seen to create an 'illusory community' in which individuals use each other as means towards their own egoistical ends (in civil society); whilst, at the same time, consider themselves to be members of the same community (the State). For a critique of the commodity form theory of law, viz. R. Warrington 'Pashukanis and the Commodity Form Theory' in ed. D. Sugarman Legality..., op.cit., p.43 at pp.51-58.

167. These requirements themselves fired by the structural changes in 18th century English trading communities from personalised, honour-based relationships, to relationships that were frequently between near-strangers who knew one another, if at all, only through reputation: viz. infra, Chapter 7.

168. D. Sugarman 'Law, Economy and the State...', op.cit.,p.230 (viz. esp. pp.230-233).

169. Cf. E.P. Thompson 'The Poverty of Theory' in E.P. Thompson The Poverty of Theory and Other Essays (1978), p.288, where he

argues that law is 'sometimes' relatively autonomos. And cf. W. Holt's history of labour conspiracy cases in American Law in which it is argued that naked class interest, as opposed to any 'relative autonomy' of law, characterised developments in this field of law: W. Holt 'The Early Labour Conspiracy Cases, 1805-1842: Judicial Bias and Legitimation in the Common Law', unpublished paper delivered at the fifth annual North American Labor History Conference, Detroit, 1983.

170. Cf. D. Sugarman cited supra, Chapter 1, p.4.

171. Alternatively, merchants may simply have resorted to self-regulation.

172. Viz. infra, Chapter 7, pp.189-90.

173. Viz. supra, Chapter 2, pp.25-9.

Chapter Four

1. Cf. supra, Chapter 3, pp.90-1. This receives fuller theoretical treatment in Chapter 10.
2. It was not until the 1820s that, for example, itinerant pedlars, so vital to inland distribution, typically ceased to be self-employed, and became agents for mercantile firms: J.H. Clapham An Economic History of Modern Britain (1930), Chapter 6; D. Alexander Retailing..., op.cit., Chapter 3.
3. Although, cf. Lord Stowell's vague definition of a factor being 'in common parlance...any agent whatsoever', The Matchless (1822) 1 Hagg. 97, 166 E.R.35, at p.100, p.36 (E.R.).
4. Viz., e.g., the precedent at E. Christian Practical Instructions for Suing Out and Prosecuting a Commission of Bankruptcy (1816), p.34. Viz. also I.P.H. Duffy 'English Bankrupts...', p.295; R. Munday 'A Legal History of the Factor' 6 Anglo-American Law Review (1977), p.221, citing Hatton in the Merchant's Magazine (1734), 9th imp., p.212.
5. Infra, n.41.
6. Cf. Molloy's example of a typical 'letter of instruction' to a factor referring to the principal's property: 'dispose, do, and deal therein, as if it were your own', C. Molloy, De Jure Maritimo et Navali (1676) 7th edition (1722), p.446. Viz. also R.B. Westerfield Middlemen in English Business Particularly Between 1660 and 1760.(1915), pp.354-5.
7. Viz. Bird v. Sedgewick (1693) 1 Salk 110, 91 E.R. 100; 5 Geo.II,c.30 (1732), s.39; A. Cullen Principles of the Bankrupt Law (1800), p.11.
8. Viz. W. Beawes, op.cit., under 'Factor'; R. Munday, op.cit., p.223.
9. Viz. R. Munday, op.cit., p.223.

10. Cf. J. Davidson The Scottish Staple at Veere (1909)(1968), p.390.

11. On factors who read markets well, Molloy stated: 'Such faithful ministers, I say, justly deserve that of our Saviour, Well Done, etc., and to no more be called factors but merchants', op.cit., p.470.

12. Viz. M. Postlethwayt, op.cit., 2nd edition (1757), Vol. 1, p.761.

13. R Munday, op.cit., passim.

14. Seeking to explain the history of the present-day financial factor who purchases companies' book debts to aid cash flow, Munday distorted the realities of 18th century factorage. By focusing upon 'threads of continuity'(op.cit., p.228), Munday's conception of the 18th century factor was that he was a manufacturer's rather than a merchant's man. There were such people (viz. Munday's references to the 8 and 9 Gul.III,c.9 (1695), and to the Blackwell Hall factors whom both Beawes and Westerfield suggest were not typical factors - W. Beawes, op.cit., pp.45-6, R.B. Westerfield, op.cit., p.296), however, as the cases below suggest, factors were generally hired by merchants. Further, the 'threads of continuity' to present day factors could equally well be traced as originating with another set of untypical 18th century factors operating in Panama and Porto Bello who, in part, earned their commission by collecting debts due to their principals from overseas traders (R.B. Westerfield, op.cit., p.355, citing Anon. Inquiry into Misconduct (n.d.), p.32).

15. R.B. Westerfield, op.cit., p.152. Further, the bankruptcy of a factor was clearly less catastrophic to a merchant than was his own bankruptcy.

16. Ibid, p.354.

17. Viz. Molloy, op.cit., p.469

18. Viz. Westerfield, op.cit., p.356.

19. Viz. Davidson, op.cit., pp.183, 391. For 'feigned', or 'sham' bankruptcy, viz. infra, Chapter 6.

20. Viz. A Cullen, op.cit., p.11.

21. Although, in Bird v. Sedgewick, op.cit., it was the fact that the factor gained a credit amongst English traders that was held to make him liable to bankruptcy law.

22. Per Hardwicke L.C. in Ryall v. Rolle (1749) 1 Ves. Sen. 364, 27 E.R. 1074, at p.372, p.1088 (E.R.)(this case is also reported at 1 Atk. 165, 26 E.R. 107).

23. 2 Eq.Ca.Abr.113, 22 E.R. 96.

24. The assignees in bankruptcy were appointed by creditors, especially from amongst their number, to collect in, and then to redistribute the bankrupt's remaining estate.

25. Sir J. Comyns A Digest of the Laws of England (1762), Vol. 1, p.537.

26. Op.cit., p.113, p.96 (E.R.).

27. (1710) 1 Salk 160, 91 E.R. 149.

28. Ibid, p.161, p.149 (E.R.).

29. Scott v. Surman (1742) Willes Rep. 400, 125 E.R. 1235.

30. Ibid, p.407, p.1239 (E.R.).

31. For a discussion of the meaning of a 'correct' legal solution to a problem, viz. infra, Chapter 10, pp.302-3.

32. Op.cit.

33. 2 Ves. Sen. 582, 28 E.R. 372.

34. Ibid, p.585, p.373 (E.R.). Cf. Ryall v. Rolle, op.cit., p.372, p.1088 (E.R.).

35. Ex parte Dumas, op.cit., p.585, p.373 (E.R.). Endurably or not, where the factor had sold the principal's goods, and had mixed the proceeds with his general funds (and thus made the principal's

goods non-identifiable and therefore non-traceable (see below)), Hardwicke held, obiter, that the principal could come in under the factor's commission of bankruptcy as a creditor (ibid; viz. also Ryall v. Rolle, op.cit., report at 1 Atk. 165, 26 E.R. 107, at p.172, p.112 (E.R.), and Scott v. Surman, op.cit., p.404, p.1237 (E.R.) where Burnet and Willes respectively made similar obiter statements). Effectively, in this situation, the factor came to own what he had previously merely possessed. A fiduciary relationship between factor and creditor became a debt relationship (viz. infra, note 41). Only if this was the case could the principal have been permitted to claim under the factor's bankruptcy as a creditor for a share of the factor's remaining and amalgamated funds. Hence judges, admittedly only obiter, and possibly per incuriam, bowed to their conception of mercantile interest by ensuring that a principal never went empty-handed on the bankruptcy of his factor.

36. 5 Ves. Jun. 169, 31 E.R. 528.

37. Ibid, p.173, p.530 (E.R.).

38. Ibid. Cf. Hardwicke's statement that his decision in ex parte Dumas was 'of great consequence', op.cit., p.585, p.373 (E.R.).

39. Viz. supra, pp.100-1.

40. 3 M and S, 105 E.R. 721.

41. Perhaps because of the ill-definition of the nevertheless commonly used property law concept of 'possession' (viz. C.H.S. Fifoot Judge and Jurist in the Reign of Queen Victoria (1959), pp.85-110), judges occasionally mistook the fiduciary relationship between principal and factor as being a trust relationship (viz., e.g., Burdet v. Willet (1708) 1 Eq. Ca. Abr. 370, 21 E.R. 1109, at p.370, p.1109 (E.R.); ex parte Dumas, op.cit., p.585, p.373 (E.R.)). Unlike the trust relationship (where the trustee held the legal,

and the cestui que trust, the equitable estate), a factor's principal retained both legal and equitable ownership over his goods in the factor's possession. Further, whereas the cestui que trust would have sought equitable remedies against a bankrupt trustee; the principal's claim against his bankrupt factor was through his legal or equitable lien over these goods. The principal thus had the choice of an action of trover at law (cf. Scott v. Surman, op.cit.), or the equitable remedy of indebitas assumpsit (cf. Ryall v. Rolle, op.cit.; and viz. W.D. Evans Essays on the Action for Money Had and Received (1802), pp. 4-5). These two courses of action are explained in Scott v. Surman, op.cit., at pp.404-5, p.1238 (E.R.). As to the nature of the fiduciary relationship between principals and factors, and, in particular, the expectation that factors would avoid a conflict of interests, viz. R.B. Westerfield, op.cit., pp.154, 233; J. Davidson, op.cit., pp.390-404.

42. Taylor v. Plumer, op.cit., p.574, p.725 (E.R.).

43. Ibid, p.574, p.725 (E.R.).

44. Ibid, p.574, p.726 (E.R.). By 1879, Jessel M.R. could state that being unable to trace money in equity in the 18th century was merely 'a notion which was prevalent at that time, In re Hallett's Estate (1879) 13 Ch. D. 696, at p.715.

45. 3 P.W. 185, 24 E.R. 1022.

46. As we have seen, factors differed from other agents (supra, p.97). Nevertheless, as late as 1883, judges were still occasionally referring to factors as being a sub-category of agents: 'a factor is an agent entrusted with the possession of goods for the purpose of selling them for his principal', Stevens v. Biller (1883) 25 Ch. 31, at p.37, per Cotton L.J..

47. Op.cit., p.186, p.1023 (E.R.).

48. Ibid.

49. J., Lord Campbell Campbell's Lives of the Lord Chancellors, 4th edition (1857), Vol. 6, p.97.

50. Viz. supra, Chapter 10, p.300.

51. Op.cit., p.97.

52. Supra, p.101.

53. Scott v. Surman, op.cit., p.407, p.1239 (E.R.).

54. Op.cit., report at 1 Atk. 165, 26 E.R. 107, at P.174, p.113 (E.R.).

55. Op.cit., pp.585-6, pp.373-4 (E.R.).

56. Amb. 252, 27 E.R. 168.

57. This 'lien' was held to exist, again despite the fact that this was a bankruptcy case 'in which this court always inclines to equality', ibid, p.253, p.168 (E.R.).

58. Ibid, p.254, p.168 (E.R.).

59. Cf. J.H. Baker's argument that 'the substantive mercantile law... had no existence as a coherent system of principles before the common law itself developed the means of giving it expression. And that development had not proceeded very far by 1700', J.H. Baker 'The Law Merchant and the Common Law before 1700' 38 Cambridge Law Journal (1979) p.295, at p.321. And cf. Fifoot's explanation for a judicial concern to accommodate the requirements of trade despite their institutionally feudal outlook: judges 'shared the complacency engendered by the supremacy of English trade and understood that, if it was to be maintained, they must provide machinery for the discovery and application of professional custom... the judges were as anxious to serve their new customers as these were to be served', C.H.S. Fifoot Lord Mansfield (1936), p.8. Such narrowly instrumentalist explanations of law change are considered and criticised below - infra, Chapter 10, p.284.

60. For the purposes of the argument of the present Chapter, it has been necessary to focus mainly upon the judicial conception of such mercantile wishes.

61. Although viz. infra, p.106.

62. Taylor v. Plumer, op.cit., p.574, p.726 (E.R.).

63. For the fraud of 'sham' bankruptcy, that often manifested itself in such ingeneous guises, viz. infra, Chapter 6.

64. Viz. supra, p.97.

65. Cf. S. Marriner 'Accounting Records in English Bankruptcy Proceedings to 1850' 3 Accounting History (1978), p.4.

66. Viz. supra, Chapter 2, pp.25-9.

67. Viz. supra, Chapter 3, pp.90-3.

68. For 'revolutionary' as opposed to 'normal' law change, viz. infra, Chapter 10, pp.313-6.

Chapter Five

1. A derogation from this belief is described supra, Chapter 4.

2. D. Defoe Remarks on the Bill..., op.cit., p.27. Viz. supra, Chapter 3, pp.64-6, viz. also infra, Chapter 7.

3. Viz. infra Chapter 6.

4. Viz. supra, Chapter 2, pp.24-5. The distinct set of frauds committed during a bankruptcy (non-disclosure , failure to surrender oneself, etc: viz. supra, Chapter 2, pp.33-4), making a bankrupt liable to a separate criminal prosecution, is not discussed in the present chapter.

5. The reasons for this concern are discussed infra, Chapter 7.

6. 5 Geo.II,c.30.

7. Viz. supra, Chapter 3, n.33 for mercantile mistrust of the 'monied interest'. Describing failures that did not arise as a result of misfortune, one early 19th century author placed together 'fraud and speculation': 81 the Gentleman's Magazine (1811), pp.24-25.

8. Viz., e.g., P.G.M. Dickson The Financial Revolution (1967), Chapters 5 and 6. This work offers an invaluable study of public, as opposed to private, credit. Our concern is with the latter (cf. n.7 supra).

9. . Viz. supra, Chapter 3, pp. 75-82.

10. Viz. supra, Chapter 2.

11. Viz., e.g., J. Trevors An Essay to the Restoring of our Decayed Trade (1675) pp.2, 6, 7.

12. Viz., e.g., A View of the Penal Laws Concerning Trade and Traffic (1697), p.245, or A Treatise of Frauds, Covins and Collusions (1710). The latter, whilst being mainly concerned with fraudulent conveyances of land, also contains sections on false weights and measures.

13. Viz., e.g., A Treatise of Frauds..., op.cit.

14. Viz., e.g., Remarks on the Late Act..., op.cit., p.8 et passim.

15. Viz. supra, Chapter 3, p.67.

16. D. Hay 'Property, Authority...', op.cit., p.21.

17. G. Parker A View of Society and Manners (1781), 2 Vols.

18. Ibid., Vol. 1, p.227.

19. Infra, Chapter 10.

20. S. Hall et al Policing the Crisis, Mugging, the State and Law and Order (1978), p.29 (original italics).

21. S. Hall, op.cit., p.29.

22. N.b., however, that the Guardians of Society for the Protection of Trade against Swindlers and Sharpers was established in March 1776: A List of the Members of the Guardians; or Society for the Protection of Trade, against Swindlers and Sharpers (Established March 25th 1776)(1779).

23. 55 the Gentleman's Magazine (1785), 250.

24. Ibid, p.450.

25. N. Bailey Compleat English Dictionary (German/English) in the 1761 and 1796 editions.

26. Ibid, only the 1796 edition.

27. 1785 edition.

28. Supra, pp.111-2

29. Op.cit., Ernest Ben edition (1979), p.85.

30. 51 the Gentleman's Magazine (1781), p.514 (my italics).

31. G. Parker, op.cit., Vol. 2, p.28.

32. F. Grose, op.cit., under 'Swindler'. George Parker's work was probably known to Grose: viz. E.H. Partridge Slang Today and Yesterday (1933), p.75.

33. The Swindler Detected, Anon., (1781), p.3.

34. 58 the Gentleman's Magazine (1788), p.1154.

35. F. Grose, op.cit., under 'Swindler'. Cf. the extremely wide definition of swindling in National Swindling: the Bank Restriction Rate Catechism or the Threadneedle Street Jugglers Exposed 3rd edition (1819): 'to swindle is to cheat under a pretence of trafficking', p.7.

36. Shortly to be renamed, The Times in 1787.

37. The Universal Register 8th Nov. 1786, p.1, col. 4.

38. 58 the Gentleman's Magazine (1788), p.1154.

39. Infra, pp.136 ff.

40. T.E.V. Price Thoughts on the System of Credit (1819), p.31. For a discussion of 19th century views on credit, viz. D. Sugarman and G. Rubin 'Towards a New History...', op.cit., pp.43-47.

41. T.E.V. Price, op.cit., p.10.

42. 13 Pamphleteer (1819), p.364.

43. Viz. infra, Chapter 7, for a fuller discussion of this thesis.

44. J.J. Tobias Crime and Industrial Society in the 19th Century (1967).

45. 53 the Gentleman's Magazine (1783), p.973. Viz. also The Swindler Detected, op.cit., p.3; T.E.V. Price, op.cit., pp.15-16.

46. The Times 10th Dec. 1790, p.3, col. 3. Viz. also The Times 1st Aug. 1786, p.2, col.3; The Swindler - A Comedy, Anon., (1785), p.58.

47. The Examiner 5th April 1812, 1812 Vol., p.217. The author of The Swindler Detected, op.cit., also relied upon the word of eminent people to verify his claims about swindling: many of his 'authentic cases' were related to him by a magistrate.

48. T.E.V. Price, op.cit., pp.15-16.

49. Viz., e.g., E.J. Hobsbawm and G. Rudé Captain Swing (1969)(1973).

50. Cf. the Combination Acts of 1799/1800.

51. Viz., e.g., D. Thomson England in the 19th Century (1950)(1977),p.21.

52. W. Paley Principles of Moral and Political Philosophy (1785), p.542.

53. The Guardians or Society for the Protection of Trade against Swindlers and Sharpers. Viz. infra, pp.144-8.

54. The Swindler Detected, op.cit., p.55.

55. Viz. infra, pp.136-8.

56. The Times 18th July 1786, p.2, col. 4 (my italics).

57. Ibid.

58. The Times 8th Aug. 1786, p.2, col. 4.

59. The Times 22nd Aug. 1786, p.3, col. 1.

60. The Friends of Commerce A Caution to Bankers, Merchants and Manufacturers... (1831), p.11. The panic may have taken longer to travel north of the border.

61. Ibid, p.12.

62. Cf. J. Davis 'The London Garotting Panic of 1862: a Moral Panic and the Creation of a Criminal Class in mid-Victorian England' in eds. V.A.C. Gatrell et al Crime and Law: the Social History of Crime in Western Europe since 1500 (1980), p.190 at p.198: 'A moral panic arises when a society feels threatened. During the panic a certain easily identifiable group, whose distinct image has been refined, or even defined, largely by mass media, becomes a symbol of this threat'.

63. G. Parker, op.cit., Vol.2, p.34. This was a form of 'sham bankruptcy': viz. infra, Chapter 6.

64. For 19th century county court judges' attitudes towards money lenders, viz. G.R. Rubin 'The County Courts and the Tally Trade, 1846-1914' in eds. G.R. Rubin and D. Sugarman, op.cit., p.321 at pp.335-337.

65. R.B. Sheridan, op.cit.

66. W. Thackeray, op.cit.

67. Ibid, p.349.

68. 1817 SC, pp.78-79, 81, 82.

69. 1817 SC, p.82.

70. 1817 SC, p.67.

71. A review of this play appeared in The Times 27th Dec. 1790, p.2, col. 4.

72. Ibid.

73. E. Partridge Penguin Dictionary of Historical Slang (1980), under 'swindler'. The Jewish community tended to live in the East End, viz, e.g., M.D. George, op.cit, p.76 citing J.W. Archenholtz Picture of England (c.1780), p.119.

74. Although, it should be noted that Tobias' study was into working, as opposed to middle-class crime.

75. Cf. M.D. George London Life..., op.cit., pp.133-8.

76. Viz., e.g., Fielding's description of Wild's criminal empire in H. Fielding Jonathan Wild (1743)(1962).

77. Viz. supra, p.118, and infra, p.148.

78. Viz. supra, p.118: however, this was not that uncommon a practice at the time.

79. Viz. supra, p.117.

80. Viz. F. Grose, op.cit., cited supra, p.113; and viz. infra, pp.134-6.

81. Infra, pp.134-6.

82. As we will see, merchants were by now arguing that bankruptcy law's main end should be the clearing of bad debts: infra, Chapter 7.

83. Anon. (1694) Holt K.B. 115, 90 E.R. 962, per Holt C.J.

84. Viz. infra, p.123.

85. (1769) 1 H.Bl.317, 126 E.R. 187.

86. In this case Bulter and Company (C) did in fact exist, but since it knew nothing of the bill, Cox (A) having forged its signature on the bill, it was treated by Mansfield as a fictitious payee.

87. Ibid, p.317, p.187 (E.R.), Mansfield noted the frequency of this form of fraud: 'names are often used of persons who never existed', p.317, p.187 (E.R.).

88. Ibid, p.317, p.187 (E.R.).

89. J.M. Holden History of Negotiable Instruments in English Law (1955), p.146. Apart from the cases mentioned by Holden, there are, in 1792 alone, four cases reported concerning fictitious payee bills of exchange involving Gibson in the British Library's collection of appeal cases: 23 Appeal Cases (1792-1795), pp.241-271.

90. Usually swindles were less organized: viz. supra, p.120 and infra, this chapter.

91. J.M. Holden, op.cit., p.146. The swindling moral panic must have been greatly fired by the litigation and bankruptcies arising out of these firms' use of fictitious payee bills of exchange: 'Paper of this description having issued to a great amount about the year 1788, several of the persons engaged in promoting fictitious credit, became bankrupts, which was the occasion of the public attention being particularly called to the subject', W.D. Evans The Law of Bills of Exchange and Promissory Notes (1802), p.199.

92. Op.cit., p.7. The house would often have a good reputation as was the case in a 'new' swindle described in the Gentleman's Magazine whereby a swindler, before vanishing, paid a £13 fee for a rented room in an Oxford college with a £40 bill of exchange. The swindler received £27 change for this fraudulent bill of exchange: 57 the Gentleman's Magazine (1787), p.83.

93. Op.cit., p.8.

94. Op.cit., p.1.

95. The Morning Chronicle 3rd July 1781, p.1, col.2.

96. The Times 15th July 1786, p.3, col. 1.

97. S. Foote The Bankrupt (1776) in ed. J.Bee The Works of Samuel Foote (3 Vols)(1830), Vol.3, p.241.

98. E. Partridge Penguin Dictionary..., op.cit., under 'swindler'.

99. Foote was also demoralised by a riding accident in which he lost a leg and had to suffer the obvious puns in his enemies' pamphlets. He did, however, write and take the lead in a play entitled The Devil upon Two Sticks (1778).

100. H.M. Belden 'The Dramatic Wrok of Samuel Foote' 80 Yale Studies in English (1929), p.2, quoting from W. Cooke Memoirs of Samuel Foote (3 Vols.), Vol. 2, p.4.

101. There was a 2 volume American edition of his work in 1868. Since writing this, two of Foote's plays ('The Minor' and 'The Nabob') have been published in ed. G.Taylor Plays by Samuel Foot and Arthur Murray (1984).

102. G. Sinko 'Samuel Foote - the Satirist of Rising Capitalism' 47A Prace Wroclawskiego Towarzystwa Naukowego (Wroclaw)(1950) (in English).

103. Op.cit., (Jon Bee edition), p.270.

104. Ibid, p.270.

105. I.P.H. Duffy 'Bankruptcy and Insolvency...', op.cit., Chapter 8.

106. The Times 13th April 1794, p.3, col.4, under the heading 'A few species of swindling'.

107. Op.cit., pp.11-12.

108. Op.cit., p.56.

109. Viz. supra, p.119.

110. Viz. infra, Chapter 6.

111. The Times 13th April 1794, p.3, col. 4. Viz. also The Swindler Detected, op.cit., p.25.

112. S. Hibbert Ware Remarks on the Facility of Obtaining Commercial Credit... (1806), p.6.

113. 1817 SC, p.62. Cf. s.12 of the 1732 Act discussed supra, pp.109-10.

114. The Friends of Commerce, op.cit., pp.10-11.

115. The Swindler Detected, op.cit., p.10. In the early 19th century there was some concern about factors pledging their principals' goods. Following the Report of the 1823 Select Committee on the Law Relating to Merchants, Agents or Factors. (4 Reports Committees (1823), p.1), the 4 Geo.IV,c.83 (1823) was passed including provisions concerned with the effects of a factor pledging his principal's goods (section 3).

116. A. Smith The Wealth of Nations (1776) Book 2, Penguin edition (1978), p.450.

117. Supra, Chapter 1, pp.14-16; Chapter 2, pp.38-9; Chapter 3, pp.62-4.

118. Infra, Chapter 7, pp.216 ff.

119. R.B. Sheridan, op.cit., p.13.

120. P.L. Payne British Entrepreneurship in the Nineteenth Century (1974)(1978), p.25.

121. Viz., e.g., The Times 22nd March 1791, p.3, col. 3. A title also represented influence - cf. J.H. Plumb England in the 18th Century (1950)(1979), p.38 re the importance of influence not in trade but in politics.

122. The Swindler Detected, op.cit., p.9.

123. W. Thackeray, op.cit., Published in 1848, this book concerns the period from 1803-1830s, especially c.1815. As to its historical accuracy J.I.M. Stewart has written: 'The novel is full of topical references and [Thackeray] hardly ever slips up on them. Professors Kathleen and Geoffery Tilloston, in the course of close study, have come upon no more than a handful of anachronisms.' Introduction to the Penguin edition (op.cit.), p.9. The word 'swindle' is employed frequently by Thackeray - viz., e.g., p.433.

124. Ibid, p.438.

125. Ibid, p.439.

126. Ibid, p.439.

127. The Examiner 27th Aug. 1809, 1809 Vol., p.209.

128. Ibid.

129. Ibid.

130. Ibid.

131. Op.cit., Cf. E.P.Thompson 'The Crime of Anonymity' in ed. D. Hay Albion's Fatal Tree, op.cit., Chapter 6.

132. Op.cit., p.3. Cf. The Jew Swindler, op.cit., in which Slang says: 'I begin to think we had better brush from this quarter, and let me be somebody else in another place.'

133. S. Foote, op.cit., p.270

134. The Times 22nd March 1791, p.3, col. 3.

135. The Swindler Detected, op.cit., p.52. For the fear of dissection after death, viz. P. Linebaugh The Tyburn Riot against the Surgeons' in ed. D. Hay et al, op.cit., p.65.

136. Op.cit., p.53.

137. M.D. George discusses this fraud: op.cit, p.227.

138. Cf. Sir Pitt Crawley in Vanity Fair, op.cit.:'What's the good of being in Parliament, he said, if you must pay your debts?', p.123.

139. E.F. Robertson Who are the Swindlers - a Query? (1801), title page.

140. Anon. (1810).

141. Ibid, title page.

142. Viz. supra, pp.109-10.

143. Op.cit., p.4.

144. Op.cit., Chapters 36 and 37.

145. Ibid, p.433.

146. Ibid, p.433.

147. Ibid, p.434.

148. Ibid, p.435.

149. Cf. F. Grose, supra, p.113.

150. Infra, Chapters 6, 7 and 8.

151. 13 the Pamphleteer (1819), p.361.

152. Ibid, p.361.

153. T.E.V. Price, op.cit., p.10.

154. Ibid, p.12.

155. Op.cit., p.31.

156. Ibid, pp.2-3.

157. Ibid, p.6, viz. infra, Chapter 6 for 'sham bankruptcy'.

158. Op.cit., p.vii.

159. The Fashionable Swindler, op.cit., p.44. However cf. G. Parker's greater confidence in the capacity of the law to prevent swindling: op.cit., Vol. 2, p.30.

160. Martin v. Pewtress (1769) 4 Burr 2478, 98 E.R. 299.

161. Ibid, p.2478, p.299 (E.R.).

162. Ex parte Joseph in the matter of Leigh (1811) 1 Rose B.L. 184 at p.189. Viz. infra, Chapter 9, pp.273 ff.

163. The Times 1st Aug. 1786, p.2, col.1.

164. The Times 15th Sept. 1786, p.3, col.1.

165. The Times 14th Aug. 1786, p.3, col.2.

166. The Times 21st Aug. 1786, p.3, col.2.

167. The Times 15th July 1786, p.3, col.1. Viz. supra, p.125.

168. The Times 18th July 1786, p.2, col.4.

169. Cf. The Swindler Detected, op.cit., p.11 : the 'petty swindler' was imprisoned and 'the gentleman's education is completed on board the Justitia'. Viz. also Considerations on Commissions..., op.cit., p.13.

170. The Times 25th July 1786, p.2, col.3.

171. A suspiciously fictional sounding name: cf. 'Lady Sneerwell' in R.B. Sheridan, op.cit.; 'Sharp' and 'Trinket' in The Swindler -

a Comedy, op.cit.; 'Slang' in The Jew Swindler, op.cit.; 'Pillage', 'Resource' and 'Riscounter' in S. Foote, op.cit.; etc..

172. The Times 1st Aug. 1786, p.2, col.3.

173. Cf. the threat from the unlikely-sounding General Jackoo in The Times 28th Aug. 1786, p.2, col.4.

174. One threat ended: '... beware the vengeance of, Many Individuals' The Times 7th Sept. 1786, p.3, col.1.

175. Cf. the description of the man who 'has been known to grin and stare as long as his hawkish eye could follow [his victims]' The Times 10th Aug. 1786, p.3, col.1.

176. The Times 14th Aug. 1786, p.2, col.4.

177. The Times 22nd Aug. 1786, p.3, col.1.

178. The Times 27th Dec. 1790, p.2, col.1.

179. The Times 1st Sept. 1786, p.2, col.4.

180. The Times 18th Aug. 1786, p.3, col.1.

181. The Times 1st Sept. 1786, p.2, col.4.

182. Viz. supra, n.169.

183. S. Foote, op.cit., p.287. In this passage Sir Robert Riscounter was, in fact, responding to allegations of indiscretions between his daughter and one of his clerks. Of note, however, is his prioritising of reputation over either person or property.

184. She died of consumption in Fleet prison in 1805.

185. E.F. Robertson Who are the Swindlers..., op.cit., p.26.

186. E.F. Robertson Dividends of Immense Value (1801), p.6.

187. Who are the Swindlers..., op.cit., p.31.

188. Ibid, p.31.

189. Cited in ΜΑΤ ΘΥΝΕΓΝΟΣ ('Mat Thunegnos') Consolatory Verses of the Late Eliza F. Robertson (1808), p.56.

190. 2 East 92, 102 E.R. 303.

191. I have not investigated a possible doctrinal connection with Chandler v. Crane, Christmas and Co. [1951] 1 All E.R. 426, nor with Hedley Byrne v. Heller [1963] 2 All E.R. 575.

192. The report of the case took up almost a quarter of the Sun 15th July 1801, an eighth of the Morning Herald 15th July 1801, and more than a quarter of The Times 15th July 1801.

193. The Morning Herald 15th July 1801, p.3, col.2.

194. The Sun 15th July 1801, p.3, col.1.

195. Ibid, p.3, col.2-3.

196. Ibid, p.3, col.3.

197. Ibid, p.3, col.3.

198. The Times 15th July 1801, p.3, col.3.

199. The Sun 15th July 1801, p.3, col.3.

200. 'Necessity drew from her pen also a variety of jeux d'ésprits' Consolatory Verses..., op.cit., p.34.

201. Dividends..., op.cit., p.3.

202. Who are the Swindlers..., op.cit., p.33.

203. Ibid, pp.19-20.

204. Ibid, pp.24-25. Cf. the visual imagery involved in the acts of bankruptcy - viz. supra, Chapter 2, p.30.

205. Ibid, p.37, Cf. the several inventories printed in E.F. Robertson The Life and Memoirs of Miss Robertson (1802).

206. Who are the Swindlers, op.cit., p.40.

207. Consolatory Verses..., op.cit., p.287.

208. Viz. supra, n.205.

209. His own client's 'fame' [i.e. reputation] was said to have 'resounded from the fashionable lounge of Bond Street, to the Land's End.' Ibid, p.287.

210. Ibid, p.287.

211. Ibid, p.287; cf. D. Hay 'The Criminal Prosecution in England and its Historians' 47 Modern Law Review (1984), p.1 at p.4: 'the eighteenth century trial revolved to a great extent around assessments of character.'

212. Consolatory Verses..., op.cit., p.299.

213. In The Times report of Haycroft v. Creasy it was written that 'Lord Kenyon, if we heard him right, lately granted a Habeas Corpus to bring a person of that name [Robertson] from the jail of Huntingdon to Maidstone.' The Times 15th July 1801, p.3, col.2.

214. Consolatory Verses..., pp.34, 136, 154. At pp.30-31 it is recorded that at Huntingdon gaol 'until the humanity of the Earl of Sandwich prevented it, she was exhibited as a public shew! '

215. Ibid.

216. Cf. Durkheim's argument that people wish to 'belong' to work-orientated organizations: 'Some Notes on Occupational Groups', The Division..., op.cit., preface to the 2nd edition. This collectivist response to swindling may partly be explained by merchants wishing to belong to an, albeit abstracted, merchant community with the general depersonalisation of trade - viz. infra, Chapter 7.

217. Viz. Chairman's speech reported in The Times, 1st May 1786, p.2, col.2.

218. A list of the Members of the Guardians..., op.cit., p.30

219. Two members had to nominate someone for membership. Before being allowed to join, his name would be placed on board 'in a prominent position'; and the secretary had to ensure that he was not upon the lists of swindlers, Rules and Orders (1816), rules 16, 21.

220. Ibid, p.23.

221. P.1, col.3.

222. P.3, col.2.

223. P.1, col.4.

224. A List of Members..., op.cit., p.30.

225. Rules and Orders, op.cit., p.2. For a discussion of other associations for the prosecution of felons, viz. D. Philips 'Good Men to Associate and Bad Men to Conspire: Associations for the Prosecutions of Felons in England 1770-1860'. Unpublished paper delivered at the conference on The History of Law, Labour and Crime, The University of Warwick, September 1983.

226. Rules and Orders, op.cit., rule 8.

227. Ibid, rule 28.

228. P.2, col.2.

229. P.3, col.3.

230. Reported in The Times, 1st May 1786, p.2, col.2. The chairman at the time was Sir Herbert Mackworth.

231. Op.cit., p.36.

232. Rev. S. Smith Essays Social and Political (1877), reprinted from the 1804 edition of the Edinburgh Review.

233. Ibid, p.26.

234. Ibid. p.24.

Chapter Six

1. W. Beawes Lex Mercatoria..., op.cit., p.486. Viz. supra, Chapter 3, pp.65-66.

2. Op.cit., p.272.

3. Ibid, p.272.

4. Per Sir Samuel Romilly 63 the Examiner (1809), p.265.

5. G. Filangieri The Science of Legislation, 2 Vols., 1st English edition (1806), Vol. 2, p.146. Cf. Major Semple who reportedly considered himself a 'fool' for not having secured his fortune by becoming bankrupt: R. Waitham's evidence to the 1818 Select Committee on the bankrupt laws (Report from the Select Committee Appointed in the Following Session to Consider the Same Subject. 1818 (127.276.277) Vol.1.127.129)(Hereafter: 1818SC), p.69.

6. The price of this perjury was supposedly cheap, perhaps indicating the available supply. In Folkard's sham bankruptcy, the 'prover' allededly received 'a pound note and a dinner': J. Mayhew's evidence to the 1817 SC, p.82. Mayhew was 'sure there are always persons in the Guildhall of the City of London, attending to be hired to prove debts': ibid, p.82.

7. Cf., e.g., ex parte Williamson (1750) 1 Atk. 82, 26 E.R. 54 where Hardwicke L.C. detected such a fraud.

8. J. Mayhew 1817 SC, p.79. One visitor to the Commissioners' rooms at Guildhall, reported: 'On entering the Commissioner's room, I was much surprised at the immense concourse of persons there assembled, and the tumult (not to say riot) consequently occasioned' the Examiner 5th April 1812, p.216. Cf. the Kafkaesque vision of this tumult in E. Welbourne 'Bankruptcy Before the Era of Victorian Reform' 4 Cam.Hist.Jo. (1932-4), pp.51-69.

9. S.W. Sweet 1817 SC, p.53.

10. Byles on Bills of Exchange, 24th edition (1979), p.222. For the operation of conventional bills of exchange, viz. supra, Chapter 5, p.122.
11. 1817 SC, p.78.
12. Ibid, p.78.
13. Ibid, p.78.
14. Ibid, p.78.
15. Filangieri referred to these as 'fictitious securities' emphasising the close relationship between accommodation bills and false debts sworn at sham bankruptcies: op.cit., p.161 (my italics).
16. S.W. Sweet 1817 SC, p.52.
17. Montagu detected such a fraud while himself a commissioner of bankruptcy. A bill for £700 was proved at a bankruptcy but Montagu, by chance, noticed that the paper's water mark was two years later than the date on the bill. The sham creditor (a self-elected assignee to the bankruptcy) reluctantly handed over the bill to the commission by which time the water mark was covered on both sides with thick ink'so as to be invisible'. The assignee confessed his fraud after Montagu told him of 'a particular gas by which all vegetable colours may be obliterated': B. Montagu Some Observations upon the Bill for the Improvement of the Bankruptcy Laws (1822), p.30.
18. Smith v. Knox (1800) 3 Esp. 46, 170 E.R. 533, at p.47, p.533 (E.R.).
19. J.M. Holden op.cit., p.182.
20. J. King Oppression Deemed No Injustices towards Some Individuals (c.1805), p.43. Despite his protestations to the contrary, King himself may well have been just such a bankrupt - viz. infra, Chapter 9, pp.277 ff.
21. Anon. Remarks on the Late Act of Parliament..., op.cit., p.6.

22. D. Defoe 1 The Complete English Tradesman (1726), p.210. Cf. the similar fraud described by P. Price, op.cit., at p.3. Also viz. Considerations upon Commissions of Bankruptcy, op.cit.,p.15, and Proposals for Promoting Industry..., op.cit., pp.32-33.

23. The Bankrupt - a Modern Character (c.1775) in the scrapbook of Fowler, Salisbury (Printers). R. Waitham, a merchant, found no compunction in answering in the affirmative a question posed to him by the Select Committee on the bankrupt laws: 'Are you not of the opinion that the bankrupt law, as it now exists in this country is a scandal and a disgrace to it?' 1817 SC, p.69. And Foote used this national joke of bankruptcy to parody Clive's speech to the House of Commons on May 17th 1773 ('I cannot look upon myself but as a bankrupt') in the prologue to The Bankrupt (op.cit.):

> But if exhausted I give notes today -
> For wit and humour which I cannot pay,
> I must turn bankrupt too - and hop away.
>
> (p.243)

M.M. Belden notes this parody at op.cit., pp.158 ff. It may be recalled here that Sam Foote had lost a leg in a riding accident - viz. supra, Chapter 5, n.99.

24. J.B. Burges Considerations on the Law of Insolvency (1783), p.235.

25. J. King Oppression..., op.cit., p.44.

26. J.B. Burges Considerations..., op.cit., p.335.

27. S.Foote The Bankrupt, op.cit., p.273. This was Sir Robert Riscounter's view - it was countered by that of Pillage who exclaimed: 'The man's mad', p.273.

28. The Examiner 5th April 1812, p.217 (my italics). The author claimed that he had recently heard the Lord Chancellor declare this view in open court, and that it was based upon 'credible information'.

29. 1817 SC, p.82. Cf. Montagu's reference to 'three or more houses in London' conducting this fraudulent business: 1818 SC, p.29.

30. Viz. supra, n.6.

31. 1818 SC, p.29.

32. Ibid, p.30.

33. Ibid, p.31.

34. G. Parker A View..., op.cit., Vol.2, p.34; viz. supra, Chapter 5, p.118-9.

35. 1817 SC, p.82.

36. Himself Jewish.

37. 1818 SC, p.32.

38. Viz. infra, Chapter 9.

39. Viz. supra, Chapter 2.

40. Viz. infra, Chapter 10.

41. For a discussion of this concerted effort, and of the form that the merchants' action took, viz. infra, Chapter 8.

42. This point has implications for general theories of law which are not highly time-specific.

43. The Examiner 5th April 1812, p.217.

44. 1818 SC, p.97. His purpose was to bring to the Select Committee's attention the number and plight of uncertified bankrupts.

45. Ibid, p.97.

46. Montagu's statistics are preferred firstly, because they were available at the time, and secondly, because they alone separated certified from uncertified bankrupts. Other bankruptcy statistics for this period show the same trends, if not the same figures: viz. T.S. Ashton, op.cit., p.254, and viz. generally S. Marriner 'English Bankruptcy Records and Statistics before 1850' 33 Economic History Review (1980), p.351.

47. D. Hay 'Property, Authority...', op.cit., p.33.

48. Viz. infra, Chapter 7, pp.185-90.

49. There was the odd voice to this effect. Wilkinson, an accountant with bankruptcy experience, was questioned by the 1818 Select Committee:

'Q: You are probably of the opinion that certificates are sometimes obtained by collusion and sometimes by fraudulent means?

A: I do not think that it is so much the case now as it used to be some time since, proof of debts being more narrowly watched before commissioners; formerly it frequently happened that certificates were obtained by a continued proof of fictitious debts' 1818 SC, p.107.

50. Later, it will be argued that this acceleration in the annual rate of bankruptcies, particularly during the wars, was another factor leading to the merchants' praxis for the reform of bankruptcy law - viz. infra, Chapter 7, p.191.

51. Although it could be argued either that the fall in the success rate of sham bankruptcies was too slight to make sham bankruptcy any less attractive for fraudulent tradesmen; or that fraudsters (despite their 'education' at the Guildhall - viz. supra, p.158) did not realise that more sham bankruptcies were being detected.

52. Infra, Chapter 7.

53. Viz. supra, Chapter 3.

54. Also viz. Chapter 8 concerning mercantile dissatisfaction about entry into bankruptcy proceedings being through a 'criminal' act of bankruptcy.

55. J. King Oppression..., op.cit., pp.50-51.

56. 87 the Gentleman's Magazine (1817) 387.

57. Viz. supra, p.157.

58. With a view, of course, to selling newspapers through the maintenance of a 'newsworthy' issue.

59. E.P. Thompson 'The Poverty...', op.cit., p.290.

60. In denying the existence of a monolithic 'social totality' entirely protective of the State, and comprising all 'institutions, practices, discourses and struggles', Hirst has also pointed to the importance of the concept of practice in understanding the relationship between social being and social consciousness. In support of activists in contemporary and diverse political struggles, he writes: 'Political situations of action will differ with the types of arenas involved and the practices engaged in, with the contending forces and issues. It does not follow from this that we must therefore consider the political situations as the mere products of the outlooks and 'wills' of their participants. These situations and the nature of the participants themselves depend upon definite conditions, but these conditions do not form a totality. Practices encounter obstacles and opposed forces which differ from their calculative constructions, practices do not determine their own conditions of existence. But these obstacles and forces have no necessary general attributes, they do not form a unitary 'reality' which confronts all practices.' P. Hirst On Law and Ideology (1979), p.5. In Larrain's interpretation of Marx, practice is also seen as an essential element in dialectical theories of social order: 'It is by means of the concept of practice that Marx tries to solve the problem of the relation between consciousness and reality', J. Larrain The Concept of Ideology (1979), pp.40-41.

61. Cf. Thompson's apologia at the head of his notes to that essay: 'This essay is a polemical political intervention and not an academic exercise, and I have not thought it necessary to document every assertion', op.cit., p.385.

62. Ibid, p.270.

63. Ibid, p.362.

64. Anon. 'Observations on Credit...', op.cit., p.360.

65. 'Ideology' here denotes not only that part of social consciousness derived from practical contradictions within a socio-economic system, but includes all aspects of social consciousness-functional and non-functional for the maintenance of the socio-economic system. Larrain has called this the 'ideational superstructure': The Concept of Ideology, op.cit., p.52.

66. By 'empirically provable data' it is not meant to suggest that some ultimate criterion of truth is available. The phrase refers to criteria of truth accepted by the experiencing actors.

67. E.P. Thompson 'The Poverty...', op.cit., p.363.

68. Ibid, p.363.

69. Ibid, p.363.

70. It is not proposed to discuss why some cultures are 'stronger' than others at this point.

71. Cf. A. Gramsci Prison Notebooks (1980), passim for his concept of 'hegemony' and how it is created.

72. 5 Geo.II, c.30 (1732),s.26

73. Ibid, s.10.

74. Ibid, s.10.

75. Ibid, s.10.

76. Viz. supra, p.152.

77. Besides which - Commissioners, who were paid out of the bankruptcy funds, were often keen to dispose of business quickly to obtain a new fee: E. Welbourne 'Bankruptcy before the Era of Victorian Reform' op.cit., p.53

78. The position had not altered by 1853 when Dickens wrote of the effect of a Chancery suit on one of his characters:

'... the uncertainties and delays of the Chancery suit had imparted to his nature something of the careless spirit of a gamester, who felt that he was part of a great gaming system'. C. Dickens Bleak House (1853) Charles Dickens library edition (1910), p.229. Sham bankruptcies that were detected by Lord Chancellors tended to be ones in which certificates were granted within a particularly short period of time - cf. Ex parte Williamson (1750), op.cit.

79. Cf, however, Ex parte Cawthorne (1814) 2 Rose 186.

80. 1817 SC, p.53 per Sweet. Cf. the same point made by Mayhew at 1817 SC, p.77: he claimed that 'it is almost impossible to detect the fraud in the system'.

81. Infra, Chapter 7, pp.211-2.

82. 1817 SC, p.77.

83. Ibid, pp.77-78.

84. Ibid, p.78.

85. 1817 SC, p.49.

86. J. Hope Letters on Credit (1784), p.31.

87. Nor was the position much altered after the return to the gold standard in 1821: 'After 1821, when convertibility [into gold] returned to Bank of England notes, other bankers in London and the provinces usually held their reserves in Bank of England notes. Only the Bank held large quantities of gold covering its issue and its banking operations'. P. Mathias The First Industrial Nation (1969)(1978), p.173.

88. 1818 SC, p.32. Sweet was also of this opinion: 1817 SC, p.53.

89. 1817 SC, p.82.

90. 1818 SC, p.64 (Trebeck was a Commissioner of Bankruptcy).

91. B. Montagu Some Observations..., op.cit., p.26. Montagu was much influenced by Filangieri, an Italian Utilitarian, who had said:

'If the hope of impunity be the great inducement, which leads the commission of crimes, every spark of it should be extinguished'. G. Filangieri The Science..., op.cit., p.155.

92. Supra, p.155. Lavie would not accept Montagu's scheme precisely because of the 'great injustice' to bona fide holders of accommodation bills: 1818SC, p.49.

93. 1818 SC, p.32. B. Montagu Some Observations..., op.cit., p.27 (where, inexplicably, Montagu argues that accommodation bill creditors are more ignorant of the bankrupt's concerns than other creditors).

94. 1818 SC, p.38.

95. Ibid, p.75.

96. Ibid, p.70.

97. Ibid, p.70.

98. Ibid, p.39.

99. Infra, Chapter 7.

Chapter Seven

1. Viz. supra, Chapter 3.

2. W.R. Miller (Review) 29 Economic History Review (1976) 703, at p.704, reviewing P.J. Coleman Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607-1900. Madison (1974).

3. P.J. Coleman Debtors and Creditors in America..., op.cit., p.286.

4. Ibid, p.269. Here, as elsewhere in his book, Coleman collapses judicial and mercantile views of bankruptcy law into one.

5. Ibid, p.283.

6. Ibid, p.284.

7. The central Acts were not passed until 1856 and 1862.

8. Mathias argues that the joint stock form was only fully employed in the late 19th century by firms requiring large plant technology: P. Mathias, op.cit., p.384.

9. Viz. L.S. Pressnell Country Banking in the Industrial Revolution (1956) passim. However viz. infra, p.183.

10. P.J. Coleman Debtors and Creditors in America..., op.cit., p.284.

11. Ibid.

12. Ibid.

13. Viz. D. Alexander, op.cit., Chapter 4; J.H. Clapham, op.cit., Chapter 6.

14. D. Alexander, op.cit., pp.107-9

15. By the 1840s, larger shops were trying to phase out credit sales, bad and doubtful debts often amounting to about 47% of all of a shop's debts: ibid, Chapter 6. However, cf. G.R. Rubin 'The County Courts and the Tally Trade, 1846-1914', op.cit., for a discussion of county courts' attitudes towards the thriving credit-based trade between tallymen and their working-class customers throughout the late 19th and early 20th centuries.

16. P.J. Coleman, op.cit., p.284.

17. Ibid, p.285.

18. Ibid, p.285.

19. Supra, Chapter 5, esp. pp.130-1.

20. Infra, pp.213 ff.

21. Viz., e.g., Haycroft v. Creasy (1801) op.cit., supra, Chapter 5, pp.140-2.

22. P.J. Coleman, op.cit., p.285.

23. C. Dicken's description of Mr. Bounderby in Hard Times (1854), Charles Dickens Library edition (1810), p.13; cf. C.Wilson's description of English entrepreneurs in 'The Entrepreneur...' op.cit., p.172: 'On the whole, the entrepreneur was empirical in his economic views.'

24. Viz. esp. Chapters 8 and 10.

25. T. Davies The Laws Relating to Bankrupts (1744), p.iii.

26. J. Montefiore 1 The Trader's and Manufacturer's Compendium (1804), p.101.

27. M. Postlethwayt Universal Dictionary of Trade and Commerce 4th edition (1774), under 'Bankruptcy'.

28. The lack of success of this informal method of debt-collection may be accounted for by the fact that legally, any of a trader's creditors could overturn a composition by taking out a commission of bankruptcy (cf. ex parte Bennet (1743), op.cit.), or merely by disagreeing with the terms of the composition.

29. 5 Geo.4,c.98/6 Geo.4,c.16 .

30. E. Townsend A View of the Injurious Effects of the Present Bankrupt System... (1822), p.16. Viz. also J. King Remarks on Imprisonment for Debt, on the Recent Progress of the Law and Increase in Lawyers 2nd edition (1804) for an often amusing polemic against lawyers' self-interest.

31. P.3, col.2.

32. B. Montagu Suggestions Respecting the Improvement of the Bankrupt Laws (n.d.) (1820?), p.23.

33. Viz. infra, Chapter 9.

34. 'Scientific' in the sense of being beyond the immediate control of human agents.

35. Infra, pp. 192 ff.

36. P.S. Atiyah The Rise and Fall of Freedom of Contract (1979), p.114.

37. D. Duman The Judicial Bench in England..., op.cit., p.10.

38. Ibid, p.25.

39. Ibid, p.25.

40. M.J. Horwitz The Tranformation..., op.cit., p.2.

41. G.P. Fletcher Rethinking Criminal Law, op.cit., p.100. Viz. supra, Chapter 2, p.28.

42. P.S. Atiyah The Rise and Fall..., op.cit., p.116.

43. Some judges (Mansfield, for example) were, for biographical reasons, more likely to have been influenced than others (Eldon, for instance): viz. ibid, p.129.

44. Viz. esp. supra, Chapter 4; infra Chapter 10.

45. Cf. A. Thomson's argument that, in particular for reasons of self-legitimacy, 'autonomy is not merely a characteristic of law, but the necessary form of law in market capitalism': 'Law and the Social Sciences - the Demise of Legal Autonomy' unpublished paper, delivered at the Conference of Critical Legal Scholarship, The University of Kent at Canterbury, 1981, p.45.

46. Viz. esp infra, Chapter 10, pp.294 ff. As for judges' social origins, as opposed to those of barristers more generally, Duman estimates that between 1790 and 1820, only 17% were sons of merchants; 17% being sons of landowners; and 41% coming from professional backgrounds (barristers, doctors, clergymen,

military officers, etc.): D. Duman The Judicial Bench..., op.cit., p.51.

47. Viz., e.g., the defence counsel's arguments in Fowler v. Padget (1798) 7 Term. Rep. 509, 101 E.R. 1103 (discussed infra., Chapter 9, pp.266-7).

48. Viz., e.g., the debate in the House of Commons of 19th April 1809 reported at 69 the Examiner 23rd April 1809, p.265.

49. Viz. infra, Chapter 8.

50. R.H. Eden An Analysis of the Bill now Depending in Parliament for the Consolidation and Amendment of the Bankrupt Law (1823), p.2; cf. J. King Remarks on Imprisonment for Debt..., op.cit., referring both to imprisonment for debt and to bankruptcy: 'the law should have been plain and intelligible, but it has become intricate and precarious', p.10.

51. Viz. infra, Chapter 9.

52. The 12 Geo.3,c.47 and the 18 Geo.3,c.52.

53. Ibid.

54. Possibly a reference to the expansion in the 1809 Bankruptcy Act (49 Geo.3, c.121) of who could be deemed a 'trader' for the purposes of liability under bankruptcy law.

55. R.H. Eden An Analysis of the Bill..., op.cit., p.2.

56. Viz. supra, Chapter 6, p.166.

57. Viz., e.g., I.P.H. Duffy 'The Discount Policy of the Bank of England During the Suspension of Cash Payments, 1797-1821' 35 Economic History Review (1982) 67 at pp.72, 77, 78; and cf. 210 the Examiner, 9th Feb. 1812, 1812 Vol., p.90, in which annual bankruptcy figures from 1777-1811 are analysed as being'(nearly double) for the last 9 years during which we have been engaged in the war'.

58. D. Alexander Retailing in England..., op.cit., pp.165-6, note 15. Cf. Balzac's description of the French situation in 1837: 'The merchant who does not contemplate possible insolvency is like a general who does not lay his account with a defeat; he is only half a merchant'. Pillerault's words in H. de Balzac The Rise and Fall of César Birotteau (1837) Everyman edition (n.d.), p.286.

59. Supra, Chapter 6.

60. Supra, Chapter 5.

61. L.E. Levinthal 'The Early History of Bankruptcy Law' 66 University of Pennsylvania Law Review (1918-1919), p.223.

62. Ibid, p.225

63. D.E. Evans A Letter to Sir Samuel Romilly, Knt, on the Revision of the Bankrupt Law (1810), p.4.

64. Viz. supra, Chapter 4, p.98.

65. J. Henry Outline of Plan of an International Bankruptcy Code for the Different Commercial States of Europe (n.d.)(1820s?), p.3.

66. Ibid, p.4.

67. E. Townsend A View of the Injurious Effects..., op.cit., pp.5-6.

68. Ibid, p.6.

69. D.E. Evans A Letter to Sir Samuel Romilly, Knt..., op.cit., p.5.

70. J.B. Bruges Considerations..., op.cit., p.335.

71. 1817SC, p.40.

72. R. Courteville Arguments Respecting Insolvency (1760), p.20. Also viz. supra, Chapter 3, pp.66-7.

73. 1817 SC, p.43 (my italics). J. Hunter gave evidence that humanity was widespread amongst creditors who granted certificates 'contrary to their opinion, occasionally' (1817 SC, p.90); and in their questions, the Select Committee themselves revealed an awareness of a perceived 'problem' of humanity: 'when creditors sign certificates, do they not generally do so from motives either of

favour or affection, or without any particular regard to the interests of the bankrupt?' (1818 SC, p.65). The desire for an economically efficient bankruptcy law that could operate to clear bad debts is a stronger explanation for the late 18th century disquiet about creditors' humanity in the certificate decision, than the more general comment of Trevelyan that the 18th century humanitarian spirit 'had been obscured for a while by England's angry fright at the French Revolution': G.M. Trevelyan English Social History, op.cit., p.446.

74. W. Cooke 1818 SC, p.70. B. Montagu was satisfied with certificates being granted out of 'kindness'; however he also stated that kindness was inappropriate where a bankrupt 'has so improperly demeaned himself that the creditor is impartially, and without irritation, convinced that he ought not to be placed in a situation to regain his state in society, and supply the necessities of his family:' 1818 SC, pp.32, 34.

75. Supra, Chapter 2; infra, Chapter 9.

76. Beccaria Crimes and Punishment (1764).

77. Cf. N. Hampson The Enlightenment (1968)(1979), p.156.

78. 1818 SC, p.53. Viz. also Filangieri, op.cit., pp.156-157; Paley, op.cit., p.544; and viz. generally J. Heath Eighteenth Century Penal Theory (1963).

79. Hibbert-Ware, op.cit., p.28. Viz. also Burges, op.cit., p.380; G. Parker, op.cit., p.30; 81 the Gentleman's Magazine (1811), p.24.

80. Op. cit.

81. E. Townsend To the Parishioners of Covent Garden (1810), p.1.

82. E. Townsend To the Creditors of Edmund Townsend of Maiden Lane, Covent Garden (1811), p.3.

83. E. Townsend An Extraordinary History of a Bankruptcy...(1811), p.30.

84. Cf. J. King's comment that the dignity of being honest in bankruptcy, despite opportunities for fraud, left a man 'a martyr to his own integrity' Oppression..., op.cit., p.44.

85. E. Townsend A View..., op.cit., passim.

86. Op.cit., p.176.

87. 1818 SC, p.66.

88. 1818 SC, p.2.

89. Viz. supra, n.74.

90. 1818 SC, p.32, my italics.

91. 1818 SC, p.32.

92. The case is reported as ex parte Knowell (1806) 13 Ves. Jun. 192, 33 E.R. 267.

93. B. Montagu An Inquiry Respecting the Expediency of Limiting the Creditor's Power to Refuse a Bankrupt's Certificate (1809), pp.43-44.

94. 1818 SC, p.32. Cf. the reasons why Townsend thought he had been refused a certificate, pp.198-9, supra.

95. 1818 SC, p.33.

96. B. Montagu Suggestions Respecting the Improvement of the Bankrupt Laws (n.d.)(1820?), p.15. Cf. supra, Chapter 3, pp.77-8.

97. 1818 SC, p.33. In B. Montagu An Inquiry..., op.cit., p.56, Montagu referred to J. Miller's claim that creditors sometimes refused certificates 'to prevent a competitor in trade from renewing his former pursuits': J. Miller The Memorial and Suggestions of the Merchants and Traders of the City of Dublin... (1807), p.7.

98. B. Montague Some Observations on the Bill for the Improvement of the Bankruptcy Laws (1822), pp. 68-73.

99. B. Montagu An Inquiry..., op.cit., p.50

100. B. Montagu Suggestions Respecting..., op.cit., p.16.

101. B. Montagu An Inquiry..., op.cit., p.49.

102. 1 Atk. 207, 26 E.R. 134.

103. Ibid, p.208, p.134 (E.R.). Hardwicke was referring to the fact that, until a certificate was granted, any money in the bankrupt's hands was liable to be forfeited to the assignees. Hardwicke held that this included moneys should they be received by the bankrupt as an allowance.

104. 6 T.R. 548, 101 E.R. 696.

105. Ibid, p.550, p.697 (E.R.).

106. B. Montagu An Inquiry..., op.cit., p.49.

107. W. Thackeray, op.cit., p.217.

108. E. Townsend A View..., op.cit., p.15.

109. Anon. Consideration on a Commission of Bankruptcy... (1789), p.32.

110. Cited in B. Montagu An Inquiry..., op.cit., p.42.

111. Filangieri, op.cit., p.152.

112. Viz., e.g. E. Townsend A View..., op.cit., p.23; 69 the Examiner 23rd April 1809, 1809 Vol., p.265.

113. Viz. supra, Chapter 3, pp.81-2 for early 18th century mercantile dissatisfaction over the absence of the 'nemo judex' rule.

114. 1818 SC, pp.50-54.

115. E. Burke cited at B. Montagu Enquiries Respecting the Insolvent Debtor's Bill with the Opinions of Dr. Paley, Mr.Burke and Dr. Johnson upon Imprisonment for Debt, 2nd edition (1816), preface to second edition, p.VII.

116. J. B. Burges, op.cit., p.336.

117. 1818 SC, p.34.

118. Cited in B. Montagu Thoughts upon the Abolition of the Punishment of Death in Cases of Bankruptcy (1821), p.31. Discussing how the imprisonment for debt of small consumer creditors de facto continued for another century through the County Courts' committal powers, G.R. Rubin notes that 'in 1836, first, arrest on mesne

(i.e. middle) process was abolished under the Act 1 and 2 Vict.,c.110. Second, so the legend tell[s] us...arrest on final process, that is imprisonment for debt, ceased to exist in 1869. It was supposedly swept away by the Debtors Act of that year (32 and 33 Vict.,c.62)...', G.R. Rubin 'Law, Poverty...', op.cit., p.241. Later, Rubin argues that '...the abolition of imprisonment for debt and the expansion of bankruptcy proceedings [a reference to the Bankruptcy Act 1861, 24 and 25 Vict.,c.134, that extended bankruptcy law to non-traders] were two sides of the same coin, in that the structural principles of bankruptcy law on the one hand and of civil proceedings against the body on the other, stand in contradiction to one another. While the object of the former is to enable creditors to share equitably and to permit debtors to undergo a laundering process, the object of committals was, by contrast, to substitute imprisonment for payment of the debt. The former procedure aimed to be economically rational [sic], the latter to be punitive or destructive to economic efficiency; an individual imprisoned for debt was not easily capable of pursuing remunerative activities and, thus, being able to pay off his debts', ibid, p.244.

119. 49 Geo.III, c.121.

119A. Viz., e.g., 1817 SC, p.43 per W.L. Clarke. The Act acquired this name despite Romilly's protestations that it had been substantially altered by the House of Lords: 1818 SC, p.56.

120. Viz. supra, pp.192 ff.

121. W.D. Evans A Letter to Sir Samuel Romilly..., op.cit., p.76.

122. Ibid, p.79.

123. Ibid, p.80. Others wishing to maintain an unchecked power with creditors over discharge included H. Rivington who referred to this as part of the 'spirit of the bankrupt laws' 1817 SC, p.61, and Archdeacon Paley Principles..., op.cit., p.140.

124. 1818 SC, p.104.

125. Ibid, p.33.

126. Ibid, p.33.

127. B. Montagu Some Observations...,op.cit., p.68.

128. 1818 SC, p.70.

129. The 1809 Act had reduced this figure to 3/5 in number and value (section 18). Many merchants argued that this was too few, and that 4/5 should be reintroduced. Some feared that 3/5 made sham bankruptcy too easy. Viz. 1817 SC pp. 65, 70 per S. Sweet, T. Tilson; 1818 SC p.48 per G. Lavie.

130. 1818 SC, pp.18-19.

131. E. Townsend A View..., op.cit., p.22. Cf. Filangieri, op.cit., p.155: 'the creditors should have no longer the power of determining the bankrupt's fate... every other proceeding belongs to justice [i.e. to the court system]'.

132. 1818 SC, p.76.

133. Supra, p.209-10.

134. Viz. W Stevens 1818 SC, p.57. For section 12 of the 5 Geo.II,c.30, viz. supra, Chapter 5, pp.109-10.

135. Report of the 1818 SC, p.18. Viz also the evidence of: Sweet (1817 SC, p.56), Tilson (1817 SC, p.70), Mayhew (1817 SC, p.83), Billing (1817 SC, p.103), Wilkinson (1817 SC, p.107), Wimburn (1817 SC, p.125), Vandercom (1818 SC, p.40), Lavie (1818 SC, p.66), Lockhart (1818 SC, p.104). For Dutch influence on the belief that swindles should be included in the certificate decision, viz. R. Courteville Arguments Respecting Insolvency, op.cit., pp. 19-21, and B. Montagu Suggestions..., op.cit., p.22.

136. 1818 SC, p.53.

137. (1826), 2nd edition (1830), pp.269-270. (Although in parts of his evidence to the 1818 Select Committee, Cullen appeared to be

advocating this scheme - 1818 SC, p.83).

138. Viz. supra, Chapter 2, n.44.

139. Viz., e.g., G.P. Fletcher 'The Metamorphosis...', op.cit., pp. 469 ff; J. Hall Theft, Law and Society, op.cit., Chapter 2.

140. An increasing number of 'swindles' were, in any case, becoming capitally punishable crimes - viz., e.g., D. Hay 'Property, Authority...', op.cit., p.18: '...the number of capital statutes grew from about 50 to 200 between the years 1688 and 1820. Almost all of them concerned offences against property.

141. Viz. supra, p.207.

142. Viz. supra, Chapter 5, pp.134-6.

143. More optimistically than most, but displaying his belief in deterrence theory, G. Parker asserted that 'the sentencing some to be crapped [hanged]; others to lump the lighter [be transported]; and others to nap the stoop [to be pilloried]; have checked the most audacious and glaring parts of swindling', op.cit., Vol. 2, p.30; cf. J. Heath Eighteenth Century Penal Theory, op.cit., passim; and viz. supra, pp.192 ff.

144. B. Montagu Some Observations..., op.cit., p.68.

145. J.B. Burges, op.cit., p.224.

146. 1 Str. 508, 93 E.R. 666.

147. Supra, Chapter 5, pp.109-110.

148. E.g. the difficulties attached to proving a bankruptcy for the purposes of the criminal, as opposed to the civil law (viz., e.g., T. Tilson 1817 SC, p.71); the weighty procedural requirement that, e.g., freed a bankrupt from the death penalty because two instead of all three of his Commissioners in bankruptcy had signed a warrant as to their belief in his culpability (J. Miller, cited in B. Montagu Thoughts on the Abolition..., op.cit., p.39), etc.

149. Viz. G. Lavie 1818 SC, p.45; J. Mayhew 1817 SC, p.78; and viz. supra, Chapter 2, n.44 (Romilly added to this list the fact that 'this excessive cruelty (as always happens where severity is excessive) defeats its object', cited in B. Montagu Thoughts on the Abolition..., op.cit., p.53).

150. D. Philips ' "A New Engine of Power and Authority": the Institutionalization of Law-Enforcement in England 1780-1830' in eds. V.A.C. Gatrell et al, op.cit., p.155 at p.158.

151. Supra, Chapter 5.

152. Supra, pp. 180 ff.

153. Supra, Chapter 3, p.64.

154. R. Courteville Arguments..., op.cit., p.21. Viz. Supra, Chapter 3, pp.61 ff.

155. The Society...against Swindlers had both London and provincial branches (supra, Capter 5, pp.144-8), other societies included the freemasons, the society against vice, and various prosecution societies. Even the corresponding societies had significant merchant membership - Place being a member of the London Branch (per E.P. Thompson The Making of the English Working Class (1963) (1980), p.169).

156. Cf. the bankruptcies of Gibson and Company and Livesy and Company (supra, Chapter 5, p.124); and viz. Chapter 7 of I.P.H. Duffy 'Bankruptcy and Insolvency in London...', op.cit.

157. Supra, Chapter 3, pp. 60 ff.

158. E. Durkheim The Division of Labor in Society (1893) Free Press Edition (1933)(1964), Preface to the Second Edition (pp.1-31).

159. Ibid, p.16.

160. Ibid, p.15.

161. Cf. E. Fromm's notion of the State as psychological need: Escape from Freedom (1941)(1980), p.17. Cf. also P. Berger and

T. Luckmann The Social Construction of Reality (1966)(1975), pp.119-120: 'The symbolic universe shelters the individual from ultimate terror by bestowing legitimation upon the protective structures of the instutional order'.

162. Cf. J.H. Plumb, op.cit., Chapter 8 - the 'middle-classes' are said to desire political change, p.135.

163. W. Cobbett Rural Rides, op.cit., p.37.

164. T.E.V. Price Thoughts..., op.cit.; and cf. such groups as Spence's Philanthropists pressing for 'agrarian socialism' (viz., e.g., E.P. Thompson The Making..., op.cit., pp.176-179).

165. Supra, Chapter 3, pp.71-2.

166. J. Hoppit is presently working at Cambridge on the influence of these factors on bankruptcy rates between 1688 and 1800.

167. Infra, Chapter 9.

168. L. Coser The Functions of Social Conflict (1956), p.34 ,citing Simmel, Sumner, Sorel and Marx.

169. G.H. Mead 'The Psychology of Punitive Justice' 23 American Jo. of Sociology (1918), p.591, cited in R.K. Merton On Theoretical Sociology (1949)(1967), p.115. Witches may be real or imagined (cf. A. Miller The Crucible (1953) and the phenomenon of McCarthyism). They may be manufactured for specific political ends (cf. A. Koestler Darkness at Noon (1940)(1976), p.28: 'and we thought that nowadays [counter-revolutionaries] only occurred in the speeches of No. 1, as scapegoats for his failures', and cf. Hitler's fabrication of 'The Protocols of the Elders of Zion'). The very hunting of witches reified them - cf. Quaesalid, the Kwatiutl Indian faith-healer who, although cynical at first, came to believe in his craft by practising it: C. Levi-Strauss Structural Anthropology (1968), pp. 175 ff.

170. Supra, Chapter 5.

171. E. Durkheim, op.cit., p.26.

172. W. Thackeray, op.cit., p.208. Although Sedley was an unfortunate bankrupt, his chief creditor, Osborne, sought to prove him a swindler - pp.216-217.

173. E. Durkheim, op.cit. p.26.

174. Cf. Montefiore's preference for informal compositions cited supra pp.185-6.

175. W. Thackeray, op.cit., p.208. R.B. Ferguson argues that for a member of the late 19th century Stock Exchange 'the penalty for failure to keep one's bargain was stigmatization as a defaulter, which brought with it expulsion from the exchange', 'Commercial Expectations...', op.cit., p.196. Even this punishment was considered to be insufficient for the bankrupt Sedley.

176. H. Garfinkel 'Order Maintaining Ceremonies' in ed. C.M. Campbell and P. Wiles Law and Society (1979), p.189.

177. Ibid, p.189.

178. Z. Bankowski and G. Mungham Images of Law (1975)(1976), p.87.

179. W. Thackeray, op.cit., p.89. Durkheim stated in the late 19th century that 'we no longer think that the exclusive duty of a man is to realise in himself the qualities of man in general; but we believe he must have those pertaining to his function' - op.cit., p.43.

180. Anon. Considerations on a Commission..., op.cit., pp.29-30.

181. E. Townsend An Extraordinary..., op.cit., p.1.

182. H. Garfinkel, op.cit., pp.190-1.

183. Compare H. Page's description of the commissioners' rooms (1817 SC pp.94, 96, 98) with the description of the court in F. Kafka's The Trial (1925) Penguin edition (1976), p.48. Kafka also described the effect that such proceedings had upon K., the accused: 'K made up his mind to observe rather than speak', p.47.

184. Z. Bankowski and G. Mungham, op.cit., p.89.

185. G. Parker, op.cit., Vol. 1, p.22 (i.e. a commission of bankruptcy).

186. A. Smith The Wealth of Nations (1776) O.U.P. edition (1979), Vol.1, p.342.

187. Supra, Chapter 5, pp.136-8.

188. H. Garfinkel, op.cit., p.192.

189. Supra, pp. 192 ff.

190. Supra, p.196.

191. Supra, pp.201-3.

192. B. Montagu Some Observations..., op.cit., p.31. Viz. supra, Chapter 5, p.158.

193. Op.cit.

194. Ibid, p.97.

195. Viz., e.g., the case reported at 1759 SC, p.623 (supra, Chapter 3, pp 77-8).

196. H. Garfinkel, op.cit., p.193.

197. S. Hibbert-Ware Remarks on the Facility of Obtaining Commercial Credit..., op.cit., p.45.

198. 81 the Gentleman's Magazine (1811), p.24.

199. J.B. Burges, op.cit., p.382

200. T. Arnold The Symbols of Government (1935)(1962), p.133.

201. R.K. Merton, op.cit., p.78.

202. This is, in any case, closer to Arnold's own meaning of the term - viz., e.g., op.cit., p.135: 'The ideal of a fair trial...can be observed objectively if...'.

203. R.K. Merton, op.cit., pp.79-91. Merton thus ensures that functionalism is a 'radical' as opposed to a 'conservative' approach to sociology - ibid, pp.91-96.

204. Ibid, p.105.

205. Ibid, p.105.

206. Ibid, p.105, footnote.

207. These dysfunctions were not so latent as to be entirely unseen at the time: merchants were aware that creditors might have improper motives in the certificate decision, and they had noted the detrimental effects of having 'partial' judges in bankruptcy law (supra, pp.203-4). Nevertheless, no real level of awareness amongst merchants of the contradictions in their arguments is apparent, and Merton certainly cannot conceive of manifest dysfunctions: op.cit., p.105, footnote, especially point '2'.

208. H. Garfinkel, op.cit., p.190. The reforming lawyers may have shared more of the moral indignation at swindlers, than the secular communion with their mercantile customers.

209. Lockhart, a merchant, argued that a lack of distinction between swindlers and unfortunate bankrupts 'exalts the guilty and debases the innocent and meritorious; both may conform to the statute, and both receive their certificates: the one the just object of compassion, consolation and relief; the other of hatred and condign punishment', 1818 SC, p.103.

210. E. Townsend A View..., op.cit., p.14.

211. Supra, pp.185-6.

212. Supra, p.186.

213. Viz. supra, pp. 186-7.

214. W. Thackeray, op.cit., pp.434-435.

215. E. Townsend An Extraordinary..., op.cit., p.2. In the next Chapter it will be seen that creditors preferred to concert an apparently fradulent act of bankruptcy with their insolvent debtors, than to set up an informal composition.

216. R.K. Merton, op.cit., pp.82-84.

217. S. Freud Totem and Taboo (1913) Routledge and Kegan Paul edition (1950)(1961), p.X.

218. A.R. Radcliffe-Brown Taboo (1939), p.10. One example is Roman Catholics avoiding meat at Lent. Viz also infra, pp.236-9.

219. S. Freud, op.cit., p.18.

220. Ibid.

221. A. Smith, op.cit., Vol.1, p.342.

222. J. Ruud Taboo (1960), p.269. Cf. S. Freud, op.cit., p.24; Radcliffe-Brown, op.cit., p.12.

223. G. Filangieri, op.cit., p.149.

224. 1818 SC, Report, p.7.

227. S. Hibbert-Ware Remarks on the Facility..., op.cit., p.45.

228. H. de Balzac, op.cit., p.298.

229. Supra, Chapter 2, pp.38-9; Chapter 3, pp.84-5.

230. E. Goffman, op.cit., p.9.

231. S. Freud, op.cit., p.26. Cf. H.L.A. Hart's notion of the 'internal aspect' of rules: op.cit., p.55 et passim.

233. J. King Oppression..., op.cit., p.53.

234. B. Montagu An Inquiry..., op.cit., p.18.

235. Supra, Chapter 2, pp.38-9. Concerning specifically taboo people, Freud refers to 'the dread of contact' (op.cit., p.25), and M. Douglas refers to 'contagion' (Purity and Danger (1966), p.3).

236. Anon. Considerations on a Commission..., op.cit., p.30. Viz. also W. Thackeray, op.cit., pp.209, 220, 253, 280 concerning the family of the bankrupt Sedley being also 'ruined'; B. Montagu An Inquiry..., op.cit., p.19 concerning the 'wretched' state of a bankrupt's family.

237. 'Acts of atonement and purification' - S. Freud, op.cit., p.20.

238. Radcliffe-Brown, op.cit., p.10.

239. E. Townsend A View..., op.cit., p.17.

240. 1818 SC, p.105.

241. G. Filangieri, op.cit, p.105.

242. 1817 SC, p.65. N.b. the choice of the word 'ordeal' as opposed to some more formal description of bankruptcy proceedings.

243. J Ruud, op.cit., p.273.

244. 1817 SC, p.53. Lockhart stated that by means of the certificate, the bankrupt's character is 'in a degree' restored: 1818 SC, p.105 (supra, p.230).

245. J. King Oppression..., op.cit., p.37.

246. Anon. Considerations upon a Commission..., op.cit., p.30. A similar situation arises for employees who are successful in modern unfair dismissal cases in Industrial Tribunals: 'there is some research evidence to suggest that potential employers are put off hiring those who have used the statutory machinery successfully, so that these people risk an even longer than average period of unemployment', K. Williams 'Unfair Dismissal: Myth and Statistics' 12 Industrial Law Journal (1983) 157. Williams was referring to L. Dickens' survey 'Unfair Dismissal Applications and the Industrial Tribunal System' Industrial Relations Research Unit of the Social Science Research Council, Reprint Series no. 32 (reprinted from 9 Industrial Relations Journal (1978/9)) in which she finds that 'although most applicants are seeking money as compensation [for unfair dismissal], this survey shows that a number are primarily concerned to achieve something else by applying to a tribunal, often to clear their name' (my italics), p.18. One of the employers involved in the survey stated that 'a litigant even (especially?) if successful will not be regarded as an ideal recruit by employers and any financial gain will be outweighed by irreparable damage to career prospects', ibid, p.18. Cf. the comment of a sales manager in another survey: 'although I won [as an unfairly dismissed employee], it was not a happy solution. Wherever I have worked since my employers seem to know

about it. I think I would have been better off not going to court', K. Williams and D. Lewis 'The Aftermath of Tribunal Reinstatement and Re-engagement' Research Paper no. 23, Department of Employment, June 1981. Viz.also L. Dickens et al 'Re-employment of Unfairly Dismissed Workers: the Lost Remedy' 10 Industrial Law Journal (1981), p.160.

247. W. Beawes, op.cit., p.487 (original italics).

248. Anon. 'Morality of Insolvency' 8 the Merchants Magazine and Commercial Review (1843), p.294.

249. 52 the Gentleman's Magazine (1782), pp.138-140. D.E. Evans also wrote of a moral duty to repay one's debts after discharge, but stated that 'where it happens actually to take place, it becomes recorded as a singular and conspicuous instance of integrity', op.cit., p.78.

250. J. Pitt-Rivers 'Honour and Social Status', op.cit., p.28.

251. M.J. Horwitz The Transformation..., op.cit., p.3.

252. P. Mathias The First Industrial Nation, op.cit, p.34.

253. S. Freud, op.cit., p.26.

254. Ibid, p.32.

255. Ibid, p.4.

256. Ibid, p.33. This idea is also expressed in J. Ruud's concept of the 'rule of Antithesis' - op.cit., pp.290-301. It helps to explain the fear of 'contagion' - contact with the transgressor could lead to temptation (supra. notes 235, 236).

257. Viz., e.g., E. Bott 'A Rejoinder to E. Leach' in ed. J.S. La Fontaine The Interpretation of Ritual (1972). Fromm's comment that Freud was, in fact, discussing the attributes of 18th and 19th century 'capitalist' man works in our favour when applying Freud's theory precisely to 18th century 'capitalist' man: op.cit., pp.7-9.

258. J.S. Mill 5 Collected Works Essays on Economy and Society (1850-79) Routledge and Kegan Paul edition (1967), p.733.

259. W. Cooke Memoirs of Samuel Foote, op.cit., Vol. 3, pp.12-14.

260. Gramsci too wrote of the cohesive effect of ambivalence: 'The peasant's attitude towards the intellectual is double and appears contradictory... his admiration is mingled with instinctive elements of envy and impassioned anger. One can understand nothing of the collective life of the peasantry [if this 'subordination' is ignored]' Selections from Prison Notebooks, op.cit., p.14.

261. Radcliffe-Brown, op.cit., p.45 et passim.

262. The diversity of taboos in different societies is clear from J.G. Frazer's chapters on taboo in The Golden Bough (1911). Ruud explains why some objects or events are taboo merely by stating that they are 'perceived perils': op.cit., p.301.

263. Op.cit., passim. The early 18th century 'special bond' between creditors and debtors (supra, Chapter 3, pp.61 ff.) is insufficient explanation as to why late 18th century merchants wished creditors to have such power over their bankrupt's future, and such power to investigate into their bankrupt's past (viz. supra, pp.180 ff. for a discussion of the depersonalisation of trade).

264. M. Douglas, op.cit., p.4.

265. Ibid, p.29.

266. Cf. J. Gibbs 'The Kpelle Moot: a Therapeutic Model for the Informal Settlements of Disputes' 33 Africa 1.

267. Despite Merton's warning (supra, p.223) that not all cultural items necessarily have social functions, and despite Douglas' teleology, this interpretation of the certificate of discharge coincides neatly with the evidence.

268. Supra, p.192.

269. Interim Report of the Insolvency Law Review Committee (1980) Cmnd. 7968. Viz also Sir K. Cork Insolvency Law and Practice, Report of the Review Committee, June 1982, Cmnd. 8558.
In particular, cf. ibid, para. 30: 'The roots of insolvency law are embedded deep in our legal, social and economic history'.

270. Interim Report..., op.cit., cl. 2.

271. Again, even honest, unfortunate debtors are seen to be in need of 'rehabilitation', or status reinstatement.

272. Interim Report..., op.cit., cl.2 (my italics).

273. Ibid, cl.3 (my italics).

274. Ibid, cl.16 (my italics).

275. A Revised Framework for Insolvency Law, Department of Trade and Industry, Cmnd. 9175, February 1984.

276. Interim Report..., op.cit., cl. 24.

277. A. Goldman ' 'How Cork got Sunk with Trace' and Surfaced Again - Just' 81 (14) Law Society Gazette (1984) 1058, at p.1059.

Chapter Eight

1. 1817 SC, p.40, per P. George. Viz. supra, Chapter 7, pp 191 ff.
2. Infra, Chapter 10.
3. B. Montagu Some Observations..., op.cit., p.25. Viz. supra, Chapter 2, and infra, Chapter 9.
4. J. Montefiore A Commercial Dictionary... (1803), under 'Bankrupt' (my italics).
5. W. Cooke 1818 SC, p.73.
6. Ex parte Bennet (1743), op.cit., per Hardwicke L.C. at p.528, p.717 (E.R.).
7. S. Amory 1818 SC, p.58.
8. This had long been the law, cf. Remarks on the late Act..., op.cit., p.6.
9. W. Stevens 1817 SC, p.47. Viz. also B. Montagu Some Observations..., op.cit., p.14, and R.H. Eden A Practical Treatise of the Bankrupt Law (1826), p.37.
10. E.E. Deacon 1 The Law and Practice of Bankruptcy (1827), p.82.
11. J.H. Wilkinson 1817 SC, p.106.
12. R.H. Eden An Analysis of the Bill...(1823), p.20.
13. Re Insolvency Law, viz.: H. Rivington 1817 SC, p.60; B. Montagu Some observations..., op.cit., p.25. Re the Scots law of 'Sequestration', viz.: B. Montagu 1818 SC, p.23; S. Amory 1818 SC, p.58; R.H. Eden An Analysis..., op.cit., p.22; Re French Law, viz.: R.H. Eden An Analysis..., op.cit., p.22; B. Montagu Some observations..., op.cit., p.25. Re Swiss Law, viz.: B. Montagu Some observations..., op.cit., p.25.
14. R.H. Eden An Analysis..., op.cit., p.22. A. Cullen was 'not aware of any material objection' to self-declaration (1818 SC, p.81); while B. Montagu simply described it as 'just' (1818 SC, p.23).
15. Supra, Chapter 6.

16. A. Cullen 1818 SC, p.81.

17. G. Lavie 1818 SC, p.46. Cf also W.L. Clarke: 'it does not follow that the body of creditors are thereby injured' (1817 SC, p.43); S. Amory stated that concerted acts of bankruptcy were the general class of'even the most respectable commissions which issue' (1818 SC, p.58). The high incidence of concerted acts for the benefit of creditors is evidenced in the large number of cases on the subject in the Reports post 1760 (viz. infra, generally), and cf. W. Cooke's comment that 'it frequently happens that traders in declining circumstances call their creditors together to inspect their affairs, and determine whether a commission shall issue against them or not' W. Cooke 1 The Bankrupt Laws 7th edition, ed. G. Roots (1817), p.91. This coincides with the modern notion of 'debt-counselling' by creditors.

18. In his footnote to Prosser v. Smith (1816) 1 Holt 442, 171 E.R. 297, at p.447, p.298 (E.R.), Holt stated that this method was 'very frequently resorted to'. Prosser v. Smith, in fact, concerned a concerted denial.

19. W. Stephens 1817 SC, p.47. Eden referred to insolvent tradesmen being 'entrapped into an unwary admission of what is not substantially true' An Analysis..., op.cit., pp.20-21.

20. For the growth of mens rea as part of acts of bankruptcy - viz. infra, Chapter 9.

21. This is not to say that personal relationships between creditors and debtors were necessarily harmonious - cf. Osborne's method of concerting an act of bankruptcy with Sedley in W. Thackeray, op.cit.: 'You villain, why do you shrink from plunging into the irretrievable Gazette?', p.217

22. Infra, Chapter 10.

23. Supra, Chapter 2, pp.30-1; infra Chapter 9, pp.262-3.

24. Infra, Chapter 9.

25. Hooper v. Smith (1763) 1 Black Rep. 441, 96 E.R. 252, at p.442, p.253 (E.R.). It is unclear whether this point was an obiter dictum or the ratio decidendi; however Mansfield certainly raised it to the latter status in Eyre v. Birbeck (1785) 2 T.R. 596, 100 E.R. 320, footnote b).

26. Royal Bank of Scotland v. Cuthbert (1812), op.cit., at p.480.

27. Peakes N.P. 38, 170 E.R. 71.

28. Ibid, p.38,p.71,(E.R.).

29. Assignees had already been chosen, and had already gathered Kilner's remaining estate into their possession.

30. Ibid, p.39, p.71 (E.R.).

31. Ibid, p.39, p.71 (E.R.).

32. W.S. Holdsworth, op.cit., Vol. 12, p.580.

33. Supra, n.25.

34. 2 T.R.595, 100 E.R. 319 note a).

35. Ibid, p.596, p.320 (E.R.).

36. In Fowler v. Padget (1798), op.cit. Viz. infra, Chapter 9, pp.265-71.

37. Supra, n.25.

38. Roberts v. Teasdale, op.cit., p.39, p.71 (E.R.).

39. W.S. Holdsworth, op.cit., Vol.12, p.579.

40. Roberts v. Teasdale, op.cit., p.41, p.72 (E.R.). Grose and Buller J.J. concurred with the narrow ground.

41. Supra, n.25.

42. 1 Esp. 108, 170 E.R. 295.

43. Ibid, p.108, p.295 (E.R.). No significant cases on concerted acts of bankruptcy occurred between Roberts v. Teasdale and Stewart v. Richman.

44. Supra, Chapter 4.

45. Op.cit.; viz. supra, n.36.

46. Ibid, p.514, p.1106 (E.R.).

47. Most concerted acts would not be objected to, and would appear to the judge as including criminal intent.

48. Roberts v. Teasdale, op.cit., p.41, p.72 (E.R.).

49. Ibid, p.41, p.72 (E.R.).

50. Fowler v. Padget, op.cit., p.514, p.1107 (E.R.).

51. If Kenyon's position was strategic, it nevertheless remained confusing: formally, at least, the crime that judges wished to deter was the manifestly criminal act of bankruptcy (supra, Chapter 2; infra, Chapter 9). In this context, it is difficult to imagine how Kenyon could have accepted a procedural bankruptcy based upon a bona fide act of bankruptcy. For an alternative explanation of Kenyon's later view of bankruptcy, viz. infra, Chapter 9, p.268.

52. I.e. precisely the inception of self-declaration of bankruptcy in 1824/25: infra, Chapter 10.

53. Ex parte Bourne (1809) 1 Holt 449, 171 E.R. 299, per Eldon L.C. at p.449, 299 (E.R.). Eldon declared that 'many commissions' had been supported on this ground (p.449, p.299 (E.R.)). An example was Tappenden v. Burgess (1803) 4 East 230, 102 E.R. 818, per Ellenborough L.C.: privy creditors were 'estopped' from relying upon a concerted act of bankruptcy, however 'neither reason, justice or policy warrant us in carrying the estoppel further' (p.235, p.821 (E.R.)). The reference to 'policy' was a reference to judicial attempts to create law relevant to the requirements of merchants. This clearly was a consideration for Ellenborough.

54. Viz., e.g., Gibbs C.J.'s obiter dicta in Back v. Gooch (1815) Holt N.P. 13, 171 E.R. 144, at p.16, p.145 (E.R.): 'the law will not permit [a fraudulent conveyance] to be done with a view to

defeat the operation of the bankrupt laws'. While 'it cannot be insisted upon by those who assent to it', non-privy creditors could petition bankruptcy upon it.

55. Ex parte Bourne, op.cit., p.449, p.229 (E.R.).

56. Report of ex parte Bourne at (1809) 16 Ves. Jun. 145, 33 E.R. 939, at p.146, p.939 (E.R.). Cullen was in favour of self-declaration of bankruptcy on a statutory basis: 1818 SC, p.81.

57. Infra, Chapter 10.

58. Supra, Chapter 7, pp. 208 ff.

59. At least, according to the merchants' own criteria of rationality.

60. This is not to say that early 18th century merchants preferred inefficiency: there was a change of emphasis, and earlier merchants took account of factors other than economic efficiency such as honour and compassion: supra, Chapter 3, pp.61-4.

61. In the later period, the borrower may have been known by reputation to his lender; however personal knowledge and a personal bond over and above the legal debtor/creditor relationship would have been less likely.

62. Supra, Chapter 7, p.211-2.

63. R.M. Unger Law in Modern Society, op.cit., p.31.

64. Ibid, p.24.

65. This association has a 'rational basis', if not a 'necessary interdependence', ibid, p.25.

66. Ibid, p.26.

67. Infra, Chapter 10, p.309-13.

Chapter Nine

1. Supra, Chapter 3, pp. 90-3.
2. Supra, Chapter 4.
3. Supra, Chapter 2, p.28.
4. Cf. M. Weber The Protestant Ethic..., op.cit., passim.
5. Viz. supra, Chapter 7, pp.192 ff. for the late 18th century belief in deterrence theory.
6. 13 Eliz.1, c.7 (1570), s.1.
7. 1 Jac.1, c.15 (1604), s.2 (my italics).
8. The 18th century statutes made no mention of the perpetrator's intention - e.g. the 10 Ann.1, c.15 (1711) simply stated that if someone committed an act of bankruptcy he 'should be accounted and adjudicated a bankrupt to all intents and purposes', s.1.
9. Fowler v. Padget (1798), op.cit.
10. Supra, Chapter 2, p.31.
11. Supra, Chapter 2, n.37.
12. Bull N.P., p.39.
13. Co. B.L., p.95.
14. Holt Rep. 95, 91 E.R. 101; 1 Salk 110, 90 E.R. 951.
15. Op.cit.; viz. supra, Chapter 2, p.30.
16. Supra, Chapter 2, p.31.
17. Cf. infra, Chapter 10, p.314.
18. Op.cit.
19. Ibid, p.95.
20. Co. B.L. 95.
21. Ibid, p.95.
22. Ibid, p.95.
23. Ibid, p.95
24. The case was cited at some length in Fowler v. Padget, op.cit., at p.512, p.1105 (E.R.). The report is probably accurate: Aldridge v.

Ireland was only decided six years earlier than Fowler v. Padget and Ashurst J. had sat in both cases. Lawrence J. read the earlier case from his notebook during the proceedings of the latter case.

25. Op.cit.
26. Ibid, p.512, p.1105 (E.R.).
27. Ibid, p.509, p.1104 (E.R.).
28. Ibid, p.512, p.1105 (E.R.).
29. Ibid, p.513, p.1106 (E.R.). Perhaps anticipating the judgement that mens rea was relevant to acts of bankruptcy, the defence counsel also argued that, on the facts of the case, Fowler must have realised that his creditors would be delayed (viz. p.512, p.1105 (E.R.)), and that his uncaring attitude towards his creditors, not even leaving word of his whereabouts (p.513, p.1106 (E.R.)), amounted to an intentional delay of his creditors.
30. Ibid, p.514, p.1106 (E.R.).
31. Supra, Chapter 8, p.251.
32. Fowler v. Padget, op.cit., p.515, p.1107 (E.R.).
33. Supra, Chapter 8, p.252.
34. Supra, Chapter 2, p.28.
35. 1 Bac. Abr. (1768) 251, under 'bankrupt'.
36. Supra, p.261.
37. Op.cit., p.251.
38. Op.cit., s.2 (my italics).
39. 2 Strange 809, 93 E.R. 863.
40. Op.cit.
41. Ibid, p.127.
42. Fowler v. Padget, op.cit., p.515, p.1107(E.R.).
43. Although this case is mentioned at Co. B.L. 72, the fullest report of it is in Fowler's counsels' submissions in Fowler v.

Padget, op.cit., p.510, p.1105 (E.R.).

44. Fowler v. Padget, op.cit., pp.510-11, p.1105 (E.R.).

45. Ibid, p.515, p.1107 (E.R.).

46. 1 Camp. 279, 170 E.R. 957.

47. 5 T.R. 575, 101 E.R. 322.

48. Supra, p.270.

49. Garret v. Moule, op.cit., p.577, p.323 (E.R.).

50. 9 East 487, 103 E.R. 659.

51. Ibid, p.496, p.662 (E.R.).

52. (1801) 2 East 5, 102 E.R. 269.

53. Supra, Chapter 2.

54. Ex parte King (1805), op.cit, p.424, p.1151 (E.R.).

55. Ex parte Joseph (1811) 18 Ves. Jun. 340, 34 E.R. 345, at p.342, p.346 (E.R.). Mansfield said no more than that creditors 'ought, in justice' to sign certificates of fair bankrupts: Smith v. Bromley (1760) 2 Dougl. 696, 99 E.R. 441, at p.697, p.442 (E.R.).

56. B. Montagu Some Observations..., op.cit., p.68.

57. Supra, Chapter 2, pp 21-2.

58. Op.cit.

59. Ex parte Joseph, op.cit., p.342, p.346 (E.R.).

60. Ibid, p.342, p.346 (E.R.). This fact did not prevent Eldon L.C. from penalising a bankrupt for his pre-bankruptcy affairs other than through refusal of discharge. In Ex parte Gardner (1812) 1 Rose 377, a creditor petitioned the Lord Chancellor to refuse a bankrupt's certificate on the basis of pre-bankruptcy frauds. This petition was dismissed because 'neither the Great Seal nor the commissioners can withhold the certificate for misconduct, unless upon misconduct under the bankruptcy' (p.379). Now, it was normal for unsuccessful petitions to be dismissed with the petitioner paying his own and the bankrupt's costs (viz., e.g.,

Ex parte The Bank of Scotland (1812) 1 Rose 375). However in Ex parte Gardner, the bankrupt was forced, because of his pre-bankruptcy behaviour, to pay the full costs of his defending himself from a petition that was dismissed.

61. See below.

62. The seminal case is usually said to be Bagg's Case (1615) 11 Co. Rep. 93b, 77 E.R. 1271, however viz. E.G. Henderson The Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century (1963), pp.46-65 for earlier examples.

63. S.A. de Smith Constitutional and Administrative Law (1971)(1983)p.60. viz. also E.G. Henderson, op.cit., pp.80-82.

64. R.v. Baker (1762) 3 Burr. 1265, at p.1267.

65. Mandamus could have been available against Commissioners in bankruptcy: their decision over discharge coincided with the 18th century rationale for the availability of mandamus in that the unsuccessful bankrupt had no other legal remedy for what could have been 'a failure of justice' (E.G. Henderson, op.cit., pp. 141-2). Further, the prerogative writ of certiorari lay against sewers Commissioners (E.G. Henderson, op.cit., pp.79-106). The legal arguments against mandamus being available against Commissioners in bankruptcy were not discussed in the bankruptcy cases referred to below; the precedents on mandamus suggested that it should not be available against 'purely administrative decisions' where statute had given 'a free discretion' (Sir W. Holdsworth, op.cit., Vol. 10, pp.243, 248, 251-2) and Holt had held, obiter, that Commissioners in Bankruptcy, admittedly before they held a decision over discharge post 1706, 'had only an authority, and not a jurisdiction' (The Case of Cardiff Bridge (1700) 1 Ld. Raym. 580, 91 E.R. 1287, at p.580, p.1288 (E.R.)). As will be seen,

the late 18th century bankruptcy cases involved refusals of mandamus on the basis of the Bankruptcy Acts referring to decisions of Commissioners and the Lord Chancellor over discharge; and on the basis of policy reasons for these separate decisions.

66. Ex parte Williamson, op.cit.

67. Ibid, p.82, p.54 (E.R.).

68. Viz. Anon. The Real Calumniator Detected being Candid Remarks on Mr King's Apology...(1798), and cf. King's pamphlets: Mr King's apology or a Reply to his Calumniators (1798); Oppression Deemed no Injustice.. op.cit.; Thoughts on the Difficulties and Distresses in which the Peace of 1783 has Involved the People of England...(1783); Mr King's Speech at Egham with Thomas Paine's Letter to him on it and Mr King's Reply as they appeared in the Morning Herald (1793).

69. King was successful in one libel case where newspapers had reported that he had remunerated two girls twice for exercising 'scholastic discipline inflicted with more than customary severity' upon them: J. King Mr King's Apology...,op.cit., p.5. The author of The Real Calumniator Detected..., op.cit., suggested that he may have bribed the girls to recant. In another case, Lord Kenyon refused to hold a vicar liable for publishing an allegedly scandalous book about King of which King could not prove the existence: J. King Mr King's Apology..., op.cit., p.30.

70. J. King Mr King's Apology..., op.cit., p.26; J. King Oppression..., op.cit., p.26.

71. He accused magistrates of 'imbecility': J. King Mr King's Apology..., op.cit., p.2; and 'was rash enough to dispute Lord Kenyon's authority': J. King Oppression..., op.cit., p.14.

72. P.R.O. B3.5526.

73. Cf. the vivid descriptions of the course of the Revolution in J. King's Letters from France, op.cit., (re August to November 1802).

74. Ex parte King (1805), op.cit., p.418, p.1149 (E.R.).

75. Ibid, p.421, p.1150 (E.R.).

76. Ibid, p.420, p.1149 (E.R.).

77. Ibid, p.420, p.1149 (E.R.).

78. Ibid, p.421, p.1150 (E.R.).

79. Ibid, p.419, p.1149 (E.R.).

80. Ibid, p.420, p.1150 (E.R.).

81. Ibid, p.420, p.1150 (E.R.).

82. Ibid, p.419, p.1149 (E.R.).

83. Supra, p.274.

84. Ex parte King (1806) 13 Ves. Jun. 181, 33 E.R. 263, at p.182, p.263 (E.R.). King also failed to obtain a declaration that mandamus would lie from King's Bench: Ex parte King (1805) 7 East 91, 103 E.R. 36, per Ellenborough C.J. Cf. King's failure to obtain discharge as late as 1808: Ex parte King (1808) 15 Ves. Jun. 127, 33 E.R. 703, again before Eldon L.C..

85. Section 10.

86. Ex parte King (1805), op.cit., pp.420-21, p.1150 (E.R.).

87. Ex parte Williamson (1750), op.cit., p.83, p.55 (E.R.).

88. Anon. (1753) 1 Atk. 84, 26 E.R. 55.

89. Ibid, p.84, p.55 (E.R.).

90. Ex parte Bangley (1810) 17 Ves. Jun. 117, 34 E.R. 45, at pp.118-9 p.46 (E.R.).

91. Ibid, p.117, p.46 (E.R.).

92. 1 Rose 176.

93. 2 Co B.L. 8th edition (1809), p.274.

94. 1 Rose 266.

95. Buck 5.

96. Supra, n.85.

97. Ex parte Lord (1816) 2 Rose 421, at p.423.

98. Op.cit. The only precedent for this case was an obscure decision by Lord Macclesfield while he was Lord Chancellor (thus dating the case some time between 1718 and 1725): Anon. Dav. 437.

99. Ex parte Crawthorne, op.cit., p.187.

100. (c. 1811-12) 1 Rose 371.

101. Ibid, p.371. It is interesting to note the discharged bankrupt being nevertheless referred to as 'the bankrupt'.

102. Buck 430 (per Eldon L.C.).

103. Ex parte Allen (n.d.) 7 Vin. Abr. 134. Cf. 5 Geo.II,c.30 (1732),s.10 by which four-fifths in number and value of creditors for over £20 were empowered to grant a certificate for consideration by the Commissioners and Lord Chancellor.

104. Tudway v. Bourn (1759) 2 Burr, 97 E.R. 529.

105. Ex parte Joseph (1811), op.cit.

106. Ex parte Johnson (1745) 1 Atk. 81, 26 E.R. 53.

Chapter Ten

1. T.S. Kuhn The Structure of Scientific Revolutions (1962) 2nd edition (1970) (Hereafter SSR); T.S. Kuhn 'Logic of Discovery or Psychology of Research?','Reflections on my Critics' in eds. I. Lakatos and A. Musgrave Criticism and the Growth of Knowledge (1970)(1981) (hereafter CGK) pp.1-23 (hereafter CGK_1) and pp.231-278 (hereafter CGK_2) respectively; T.S. Kuhn 'Second Thoughts on Paradigms' in ed. F. Suppe The Structure of Scientific Theories (1974), pp.459-482 (hereafter SST).

2. Cf. K. Renner The Institutions of Private Law..., op.cit.

3. T.S. Kuhn SSR, p.138. Cf. B. Barnes T.S. Kuhn and Social Science (1982), pp.4-5 on the reaction of 'the vast majority of professional historians' against this 'Whig history' by which the past is understood in terms of the present.

4. Cf. M.J. Horwitz 'The Conservative Tradition in the Writing of American Legal History' 17 American Jo. of Legal History (1973) 275, at p.283.

5. L.C.B. Gower Principles of Modern Company Law (1954)(1979), Chapter 2, entitled 'History of Company Law to 1825', p.25. For an example of a legal history which posits a mono-linear development of legal norms to the present, viz. B.F. Brenner 'Nuisance Law and the Industrial Revolution' Jo. of Legal Studies (1972), p.404, in which 19th century judges are said to have been aware of environmental issues in nuisance cases.

6. Kuhn SSR, p.138.

7. Cf. M.J. Horwitz 'The Conservative Tradition...', op.cit., p.283: 'The parallels between lawyers' legal history and scientists' history of science seems incredibly striking... Both, in short, use history to justify and glorify the present'. D. Hay refers to the effects of this 'presentism' as being 'disastrous as an

intellectual method for recovering the past' - not even 'sex and hunger' survived from the past to the present in much the same form: D. Hay 'The Criminal Prosecution in England...', op.cit., pp.18-19.

8. Cf. how Munday's mono-linear approach to the history of factors ('there is a readily perceived thread of continuity running through the story': op.cit., pp.222-3) led him to be incorrect conclusions about the role of factors in 18th century trade - supra, Chapter 4, n.14. Cf. M.J. Horwitz 'The Conservative Tradition...', op.cit., pp.275-6.

9. Cf. de Smith's description of the development of the office of Lord Chancellor: 'Of the modern ministerial offices, a few are traceable to the Tudor period and even earlier. The office of Lord Chancellor was primarily judicial in its origins; Wolsey was probably the last Lord Chancellor to be the highest officer of the State; today the Lord Chancellor remains a prominent member of the Cabinet as well as head of the Judiciary' op.cit., p.197. Note, however, P. Rock's argument that any understanding of the past must involve an assumption of some continuity of meanings: 'a faith in the immutability of social forms... underpins all social explanation' P. Rock 'Some Problems of Interpretative Historiography' 27 British Jo. of Sociology (1976) 353, at p.364; and cf. Levinthal's claim that there are certain 'universals' in bankruptcy laws (supra, Chapter 7, p.192), and the comparison between 18th century and modern bankruptcy - supra, Chapter 7, pp.236-9.

10. Supra, Chapter 3, p.92.

11. Supra, Chapter 2, p.25.

12. Supra, Chapters 2 and 9.

13. P. Feyerabend 'Consolations for the Specialist' CGK p.197, at p.200.

14. CGK$_2$, p.245.

15. A reference to J. Watkins' article 'Against Normal Science' CGK, p.25, at p.33. Watkins' point differs from that of Feyerabend, the former concluding that 'Kuhn sees the scientific community on the analogy of a religious community and sees science as the scientist's religion.' (p.33). By his grouping of Watkins' with Feyerabend's points, Kuhn apparently does not take the former's conclusions seriously. It is interesting to note Feyerabend later referring to science as a myth: P. Feyerabend Against Method (1975), e.g. at p.299. Cf. R. Bhaskar 'Feyerabend and Bachelard: Two Philosophies of Science' 94 New Left Review (1975), p.31 at p.41.

16. CGK$_2$, p.245. However, referring to T. Kuhn 'Comments' in T. Kuhn The Essential Tension (1977), B. Barnes notes that Kuhn 'has tended to discourage the extension of his ideas to forms of culture other than science' but Barnes argues that Kuhn's description of science 'has revealed nothing fundamentally distinctive in the culture of science' T.S. Kuhn..., op.cit., p.15.

17. M. Foucault The Archaeology of Knowledge (1969)(1972), p.5, referring to the actual, and for Foucault the preferred direction of the modern 'history of ideas'. Kuhn acknowledges his debt to historians of literature, music, the arts, politics, and other cultural activities for his ideas on 'scientific development as a succession of tradition-based periods punctuated by non-cumulative breaks' SSR(Postscript), p.208. Cf. C.G.A. Bryant 'Kuhn, paradigms and sociology' 26 British Journal of Sociology (1975), p.354, at p.355.

18. M. Foucault The Archaeology..., op.cit., passim.

19. M. Weber ' "Objectivity" in Social Science and Social Policy' 50 The Methodology of the Social Sciences (1949), pp.101-103.

20. M. Foucault The Order of Things (1966)(1970), passim.

21. J. Piaget Structuralism (1968)(1973), p.132. As to whether Kuhn 'merely describes' or explains scientific development, viz. infra, p.291.

22. J. Piaget, op.cit., p.134.

23. M. Foucault The Archaeology...,op.cit., passim.

24. Indeed, the concept of 'discursive formations' provided some remarkable insights into the history of sexuality. For example, Foucault was able to reconstruct the history of modern sexuality by rejecting the traditional claim of 19th century 'sexual repression', arguing that the sexual discursive formation effectively ensured 'the proliferation of specific pleasures and the multiplication of disparate sexualities': M. Foucault The History of Sexuality (1976)(1981), Vol.1, p.49.

25. J. Piaget, op.cit., p.134.

26. M. Foucault The Archaeology..., op.cit., p.135.

27. Ibid, p.139.

28. Ibid, p.11.

29. Ibid, p.172. Cf. Foucault's attempt to give a diachronic history of the role of the confession: 'The confession...has undergone a considerable transformation... For a long time it remained firmly entrenched in the practice of penance. But with the rise of Protestantism, the Counter Reformation, eighteenth century pedagogy, and nineteenth century medicine, it gradually [?] lost its ritualistic and exclusive localization.' The History..., op.cit., p.63.

30. Urry and Harvey both stress the importance of the paradigm concept in explaining change: J. Urry 'Thomas S. Kuhn as a Sociologist of Knowledge' 24 British Journal of Sociology (1973), p.462; L. Harvey 'The Use and Abuse of Kuhnian Paradigms in the Sociology

of Knowledge' 17 Sociology (1982), p.85, at p.87.

31. This did not, however, prevent Piaget from employing Kuhnian notions in Structuralism: 'the organism is, in a way, the paradigm structure' (p.44); 'progress in physics never takes the form of "adding on" new information - new discoveries M, N always lead to a complete recasting of preceding knowledge A, B, C while leaving room for some future discovery of Q, R, S' (p.45).

32. Cf. Vandevelde's methodology in his history of changes in the American legal conception of property: 'Rather than attempting to explain the cause of particular decisions, it attempts to describe the structure of legal thought', op.cit., p.326. Vandevelde aruges that; in opposition to legal histories, whether 'formalist' or 'instrumentalist' (viz. infra, Chapter 3, pp.90-1), which attempt to explain legal change; a descriptive account of the 'nature of legal thought' is essential to legal historical work. In the present study of 18th century bankruptcy law, it is seen that, via a rigid methodology based upon Kuhn's theory of scientific development, a detailed study of the structures of legal thought does not preclude us from seeking to explain law change. In so doing, insights offered by both 'formalism' and 'instrumentalism' prove to be invaluable. Vandevelde's study was precluded from the possibility of explaining law change as a result of the weak theoretical framework which he employed in his reconstruction of the structures of legal thought. Basing his work on the tension between the individual and the state; Vandevelde vaguely referred to trademark schemes which 'began to crumble as the turn of the century approached' (op.cit., p.344); to things simply 'becoming apparent to the courts' (ibid, p.355); to old legal conceptions becoming 'fatally anachronistic' (ibid, p.357); and to a considerable level of awareness amongst judges

of the contemporary relevance of legal structures of thought- courts 'avoided paralysis by deciding cases according to public policy' (ibid, p.366).

33. Supra, Chapter 3, pp.52 ff.. G.P. Fletcher was, until quite recently, influenced by the paradigm concept: viz. 'Fairness and Utility in Tort Theory' 85 Harvard Law Review (1972) 537, esp. at p.540, note 2. However, unconcerned with explaining why law change occurs, Fletcher now states that 'the notion of "ideal types" is better suited [than "paradigms"] to the synchronic analysis of the interwoven conceptions of the [legal] Right', G.P. Fletcher 'Two Modes...', op.cit., p:1001. Fletcher's objections to "paradigms" are discussed below.

34. Cf. M. Weber The Protestant Ethic..., op.cit., with M. Cornforth Dialectical Materialism (1967). Our description of the changes in the 18th century trading community as being based upon the depersonalisation of trade (supra, Chapter 7, pp.180-5) has both idealist and materialist overtones. Since the thrust of the thesis is concerned with the response of law to changing socio-economic circumstances, the changes in the mercantile community do not receive as full theoretical treatment as the mode of law change in response to these changes. The depersonalisation of trade is posited as the necessary and sufficient impetus behind the shift from one ideally typified mercantile community to the other.

35. E.P. Thompson 'The Poverty..., op.cit., passim, viz. esp. p.288: 'I found that the law did not keep politely at a "level", but was at every bloody "level".'

36. Viz., e.g., L. Althusser and E. Balibar Reading Capital (1970).

37. Viz. supra, Chapter 1, n.23.

38. Supra, Chapter 3, pp.90-3.

39. As set out in SSC, passim. Cf. T. Kuhn SST, p.482: 'unfortunately... I allowed the term's applications to expand... Inevitably, the result was confusion.'

40. Cf. Kuhn's argument that learning takes place not through 'generalization', but through establishing 'natural families': infra, pp. 297 ff.

41. D. Shapere 'The Structure of Scientific Revolutions' 73 Philosophical Review (1964), 383, at p.385.

42. M. Masterman 'The Nature of a Paradigm' CGK, p.59, at pp.61-65. Some of her interpretations are incorrect (e.g. number 2 at p.61 where she misinterprets Kuhn as saying that paradigms are 'myths') and some are repeats (e.g. number 1 at p.61 and number 6 at p.62 which, in their respective contexts, are the same point). Nevertheless, Masterman is correct in identifying many different senses of the term.

43. T. Kuhn SSR, p.120.

44. Supra, Chapter 2, pp.25-9.

45. G.P. Fletcher 'Two Modes...', op.cit., p.1001.

46. T. Kuhn SSR, p.X.

47. G.P. Fletcher 'Fairness and Utility', op.cit., p.540, note 12.

48. T. Kuhn SSR, p.10.

49. Ibid, pp.37, 76.

50. T. Kuhn CGK_2, pp.271, 273; T. Kuhn SSR (Postscript), pp.174, 181.

51. Cf. G.P. Fletcher 'Fairness and Utility...', op.cit., p.540 note 12: 'there is admittedly an element of fashion in using words like "paradigm" and "model".' Despite Fletcher's later renunciation of the term (in 'Two Modes...', op.cit.), the same issue of the Yale Law Journal that contained Fletcher's objections to the term 'paradigm' also carried an article by K. Van Wezel Stone entitled 'The Post-War Paradigm in American Labor Law' 90 Yale Law

Journal (1981), p.1509; cf. same issue p.1250. For objections to this use of the word, as opposed to the concept of 'paradigm' by sociologists and others, viz. L. Harvey 'The Use and Abuse...', op.cit., passim, and D.L. Eckberg and L. Hill 'The Paradigm Concept and Sociology: a Critical Review' 44 American Sociological Review (1979), p.925, at p.926.

52. However cf. P. Feyerabend's polemical 'How to Defend Society against Science' 11 Radical Philosophy (1975), p.3, at p.6 where he asserts that 'Kuhn's ideas are interesting but, alas, they are too vague to give rise to anything but lots of hot air.'

53. T. Kuhn SSR (Postscript), p.175.

54. Ibid, p.182. Cf. CGK_2, pp.271-272; and cf. the earlier term 'institutional matrix' at SSR, p.93.

55. SSR (Postscript), p.175.

56. Ibid, p.187. At CGK_2, pp.271-272 Kuhn states that he would have preferred to have called 'exemplars', 'paradigms'; however he felt that he had lost control of the latter term. Eckberg and Hill describe 'exemplars' as the central element in the 'paradigm concept': op.cit., p.927.

57. SST, pp.461-2; SSR (Postscript), pp.178-9. For the necessity of sociological criteria to establish communities of practitioners, viz. L. Pearce Williams 'Normal Science, Scientific Revolutions and the History of Science' CGK, p.49. For other attempts at setting requisite criteria, viz. the citations at SSR (Postscript), p.176, note 5; the references at A.E. Musgrave 'Kuhn's Second Thoughts' 22 British Jo. of the Philosophy of Science (1971), p.287, p.297; J.B. Lodahl and G. Gordon 'The Structure of Scientific Fields and the Functioning of University Graduate Departments' 37 American Sociological Review (1972), p.57. In Musgrave's article, it is argued that there is little hope that scientific communities

may be identified sociologically, op.cit., pp.287-288.

58. M. Rheinstein Max Weber on Law in Economy and Society (1954)(1969), pp.198-204.

59. Ibid, pp.198-204; D. Duman, op.cit., Chapter 2; D. Duman The English and Colonial Bars in the Nineteenth Century (1983), pp.20-29 (where it is argued that increasing educational requirements were intended to filter out lower class entrants to the bar), pp.79 ff, p.110; B. Abel-Smith and R. Stevens Lawyers and the Courts 1750-1965 (1970).

60. D. Duman The English and Colonial Bars..., op.cit., p.205, viz. also pp.37 ff; D. Duman The Judicial Bench..., op.cit., pp.11, 24-25, 160.

61. D. Duman The English and Colonial Bars..., op.cit., pp.181-4. Cf. R. Stevens Law and Politics. The House of Lords as a Judicial Body, 1800-1976 (1978).

62. D. Duman The English and Colonial Bars..., p.78.

63. Ibid, p.204.

64. Ibid, p.204. The phrase is borrowed from M.S. Larson The Rise of Professionalism, a Sociological Analysis (1977), p.40.

65. D. Duman The English and Colonial Bars..., op.cit., pp.37 ff.

66. Ibid, p.26, viz also p.79.

67. The seventh and eighth questions come from SSR (Postscript), pp.178-9. The final question at SST, p.462 cannot be asked of the monolithic judiciary: is communication with other groups arduous?

68. D. Duman The Judicial Bench..., op.cit., pp.15, 24-25, Chapter 6. (e.g.: 'The judges closest friendships were generally with their colleagues...', p.160).

69. John, Lord Campbell, op.cit., Vol. VI, p.97.

70. T. Kuhn SSR, p.11.

71. Viz. D. Duman The English and Colonial Bars..., op.cit., pp.111, 181-4 respectively for the other criteria of nepotism and political allegiance.

72. T. Kuhn CGK_2, p.254.

73. T. Kuhn SSR (Postcript), pp.181-191; CGK_2, pp.271-272; SST, pp.463-472. For a less sophisticated attempt to define a 'disciplinary matrix', and for an example of social scientists attempting to establish their own fields as involving a disciplinary matrix, viz. G.E. White 'Truth and Interpretation in Legal History' 79 Michigan Law Review (1981) 594, esp. at p.605: 'One senses that scholarship in given disciplines or professions is conducted within what Kuhn used to call "paradigms" and now calls "disciplinary matrices": contexts based upon shared professional assumptions about the scope, direction, and design of research.' Eckberg and Hill used the concept of 'exemplars' as opposed to 'disciplinary matrices' in their attempt to identify fields of sociological inquiry as 'paradigmatic': supra, n.56.

74. Supra, n.56.

75. I.e. 'force equals mass times acceleration.'.

76. A.K.R. Kiralfy describes how, although it did not gain its full force until the 19th century, 'it was in the eighteenth century... that the ratio decidendi of the case became the basis of argument before the court' Potter's Outlines of English Legal History (1923)(1958), p.29. For a claim to a medieval judicial conception of 'obiter dicta', viz. A.K.R. Kiralfy Potter's Historical Introduction to English Law and its Institutions (1932)(1962), p.339, viz. generally pp.274-80.

77. Ex parte Lord (1816), op.cit., p.423 per Eldon L.C. referring to Ex parte Williamson (1750), op.cit.

78. Supra, Chapter 9.

79. Scott v. Surman (1742), op.cit.,p.403, p.1237 (E.R.). Cf. Ellenborough L.C.'s appeal to 'reason, justice [and] policy' in Tappenden v. Burgess (1803), op.cit., p.235, p.821 (E.R.).

80. CGK_2, p.252.

81. L. Wittgenstein Philosophical Investigations (1953)(1981). The actual word 'paradigm' is used in sections 20, 50, 51, 57, 300, 385. Kuhn, in SSR, is ambiguous about his debt to Wittgenstein. Prior to discussing Wittgenstein's notion of 'family resemblances' (infra), Kuhn's footnote reads: 'Wittgenstein, however, says almost nothing about the sort of world necessary to support the naming procedure he outlines. Part of the point that follows cannot therefore be attributed to him'. (SGR, p.45, note 2). Cf. R. Keat and J. Urry's criticism of Kuhn that he fails 'to analyse the relations between the institutional features of the scientific community and other elements of the societies in which these institutions exist' Social Theory as Science (1975), pp.209-10. Infra, note 153, it is argued that this criticism is not entirely fair. As to Wittgenstein's concept of a 'paradigm', viz. C.G. Luckhart 'Beyond Knowledge: Paradigms in Wittgenstein's later Philosophy' 39 Philosophy and Phenomenological Research (1978), p.240 in which three characteristics of Wittgenstein's 'paradigms' are noted: 1. they are standards of comparison; 2. they are agreed upon by those engaging in a practice that employs them; 3. they are neither true nor false but 'in a sense "beyond" or "above" truth and falsity' (p.244).

82. L. Wittgenstein, op.cit., s.6.

83. Ibid, s.116.

84. Ibid, s.88. Wittgenstein, however, adds that'inexact... does not mean "unusable" ', thus a request to come to dinner at 1 o'clock 'exactly' has meaning even without a definition of what the

requestor meant by 'exactly' (s.88.)

85. Ibid, s.67.

86. Ibid, s.69. Thus the choice of the term 'family resemblances': 'the various resemblances between members of a family: build, features, colour of eyes, gait, temperament, etc. etc. overlap and criss-cross in the same way - And I shall say: 'games' form a family' (s.67).

87. This 'central' and 'most novel' element (SSR(Postscript), p.187) is explained at length in Kuhn's extended description of how young 'Johnny' learns the difference between swans, ducks and geese (SST, pp.473-482). Viz. also B. Barnes 'On the Conventional Character of Knowledge and Cognition' 11 Philosophy of the Social Sciences (1981) p.303 (Kuhn is discussed specifically at p.312) and B. Barnes T.S. Kuhn..., op.cit., pp.23 ff.

88. SSR(Postscript), p.176.

89. SSR(Postscript), p.175. For the absence of any 'neutral observational language', viz. CGK_2, pp.266-7.

90. In this respect, a better phrase than 'language-community' may be 'discursive formation-community': viz. supra, pp. 288 ff.

91. T. Kuhn SSR(Postscript), pp.187-190; SST, pp.467, 470-71. Cf. contemporary methods of teaching 'law' by means of question (puzzle) sheets. And cf. the questions at the end of sections in, e.g., J.C. Smith and B. Hogan Criminal Law - Cases and Materials (1975)(1980).

92. Kuhn himself draws this analogy at SSR, p.23. More recently, however, he appears to have lost track of the analogy. At CGK_2, p.275, he claims that 'criterion-learning' is like case law, and 'similarity-learning' is like codified law. This is certainly incorrect. Either it is the reverse of what Kuhn describes, or, in a sense, both involve 'similarity-learning'.

93. Stewart v. Richman (1794), op.cit., p.108, p.295 (E.R.).

94. The absence of such an explicit rule is clear from two of Hardwick L.C.'s judgments: 'the more modern laws have considered [bankrupts] as unfortunate insolvents' (ex parte Capot (1739), op.cit., p.220, p.14 (E.R.)); and '[a bankrupt] is guilty of a crime and a tort' (ex parte Bennet (1743), op.cit., p.528, p.717 (E.R.))(viz. supra, Chapter 2, pp.22-3). The latter decision was to reinstate and was to remain the judicial exemplar throughout the 18th and early 19th centuries.

95. Infra, pp.313 ff.

96. Supra, n.56.

97. Cf. SSR(Postscript), p.176: to avoid a 'circularity' that is either 'vicious' or 'difficult', I have stressed the word 'help'. G. Radnitzky has referred to such 'hermeneutic circles' as not 'vicious' but as 'circulus fructuosus': Contemporary Schools of Metascience (1973), p.215. A. P. Simmonds notes that 'the greater our collection of instances of expression articulated in a common socio-historical environment, the more confidently we can identify the documentary reference that they share' and gives precisely the example of law: 'a judge comes to his decision by construing the requirements set by judicial precedent, but this authority comprises decisions no different than his own' Karl Mannheim's Sociology of Knowledge (1978), pp.85, 87 respectively.

98. Supra, Chapters 2, 4, et passim.

99. SSR(Postscript), p.179. The danger is, of course, that a corresponding community might not actually exist - e.g. theories of 'matter' were 'tools', not 'paradigms' (CGK_2, p.255.)

100. CGK_2, p.257.

101. CGK_2, p.269.

102. SSR, p.150.

103. G.P. Fletcher 'Two Modes...', op.cit, p.1001.

104. Supra, p.284.

105. Viz. infra, pp.315 ff.

106. G.P. Fletcher 'Two Modes...', op.cit., p.1001. (Cf. the similar comments of K. Llewelyn in The Bramble Bush (1930)(1956).)
Another possible reason for the lack of paradigmatic labels for judicial exemplar - networks could be the generalist nature of judges' work; however cf. Kuhn SSR(Postscript), p.178; 'Usually individual scientists, [particularly the ablest], will belong to several such groups either simultaneously or in succession.'

107. Supra, n.51.

108. G.P. Fletcher 'Two Modes...', op.cit., p.1001. Cf. Wittgenstein's 'language-games' (in Kuhnian terms, networks of exemplars - viz. Wittgenstein, op.cit., s.50): 'we can avoid ineptness or emptiness in our assertions only by presenting the model as what it is, as an object of comparison - as, so to speak, a measuring-rod; not as a preconceived idea to which reality must correspond' op.cit., s.131.

109. Supra, Chapter 9.

110. Garret v. Moule (1794), op.cit., p.575, p.322 (E.R.), per Kenyon C.J.

111. CGK_1, p.4.

112. CGK_1, p.10.

113. SSR, p.52.

114. SSR, p.24.

115. Viz. F. Suppe 'The Search for Philosophic Understanding of Scientific Theories' SST, p.142.

116. CGK_1, p.5. N.b.: Masterman called 'normal science' a 'crushingly obvious fact', (CGK, p.60). Popper is indebted to Kuhn for this notion (CGK, p.52) which he accepts as existing, but sees as 'a danger to science and, indeed, to our civilization' (CGK, p.53).

To turn to sociology to discover its 'normality' is, for Popper, 'surprising and disappointing' (CGK, p.57). Kuhn counters Toumlin's claim (at CGK,pp.39-47) that there are too many micro-revolutions in normal science for it to be distinguishable from 'revolutionary science' (infra, pp. 313 ff.), by stating that the enormity of a revolution is only perceived by the relevant scientific community (CGK_2, p.252). This goes some way towards answering B. Barnes' similar criticism at T.S. Kuhn..., op.cit., p.56. P. Feyerabend, despite Kuhn's own concrete examples, exclaims: 'Was there ever a period of normal science in the history of thought? No - and I challenge anyone to prove the contrary', 'How to Defend Society...', op.cit., p.6.

117. N.b., practising scientists rarely repeat 'exemplar' experiments. This is also true of judges: if there is clear precedent, expensive litigation is unlikely to occur.

118. Conflicting interpretations of past cases by counsel is, in fact, institutional to the court situation - cf. the discussion of Fowler v. Padget (1798), op.cit, supra, Chapter 9, pp. 265 ff.

119. Sometimes in a crossword puzzle, two words appear to solve a clue. Only when more of the crossword is done is one revealed as being correct.

120. This may be a judicial value in commercial affairs ('the Lord Chancellor said, he had discoursed with merchants about the matter, who had held this to be the practice amongst them': Godfrey v. Furzo (1733), op.cit., p.186, p.1023 (E.R.)), but not in the criminal law where the ritualistic autonomy of the law has mystifying and legitimating functions (viz. D. Hay 'Property...', op.cit., passim).

121. Supra, Chapter 4.

122. Ryall v. Rolle (1749), op.cit., p.372, p.1088 per Hardwicke L.C..
It is interesting to note this usually silent paradigm being articulated when judges derogate from it - viz. infra, pp.307 ff.

123. (1708), op.cit.

124. Cf. Taylor v. Plumer (1815), op.cit.

125. Supra, Chapter 4: jewels (L'Apostre v. Le Plaistrier (1708), op.cit.); bills of exchange (Scott v. Surman (1742), op.cit.); bills of exchange already cashed by the assignees of a factor's bankruptcy (Ex parte Dumas (1754), op.cit.); money placed in an amalgamated fund by a factor and then removed again as a separate fund (Ex parte Sayers (1800), op.cit.); etc..

126. Scott v. Surman (1742), op.cit., p.407, p.1237 (E.R.), per Willes C.J..

127. The lack of revolt by factor-hiring merchants over this issue of non-earmarked money may be explained by the fact that if a principal failed to recover his goods directly, he could nevertheless secure some return by entering the factor's bankruptcy as a general trade creditor. The legal justification for this situation was strained: viz. supra, Chapter 4, n.35.

128. Kuhn does not believe that a later paradigm can be called 'a better approximation of the truth'(CGK_2, p.265), just that it can be a more successful tool for normal science (cf. R. Bhaskar 'Feyerabend and Bachelard...', op.cit., p.36 ff.). Consequently, normal science will always produce anomalies, it will never reproduce nature 'as it is'. Similarly, law will never satisfy the expectations and requirements of every group in society. Furthermore, while one may assume that natural reality is constant ('nature cannot be forced into an arbitrary set of conceptual boxes', CGK_2, p.263), social reality is not (e.g. the two different trading communities in the early and late 18th century). In normal legal development

too, there will always be anomalies. Cf. P. Goodrich's comment, based upon an unrefined notion of a 'paradigm', that '...Kuhn rather boldly asserts that when a sufficient number of contradictions accumulate) within a paradigm of knowledge, the paradigm is abandoned in favour of a new one':'The Antinomies of Legal Theory...' 3 Legal Studies (1983), p.1 at p.1.

129. SSR, p.7.

130. SSR, pp.52-65.

131. Supra, p.300.

132. L. Harvey notes that for the Sociology of Knowledge, the

> '[paradigm] concept is useful... only if it provides a link between the internal history of change in established knowledge and the wider Western philosophic context' 'The Use and Abuse...', op.cit., p.85. The restriction of the'wider context' to Western philosophy seems unnecessarily narrow.

133. T.E.V. Price Thoughts..., op.cit., p.10.

134. J. King Oppression..., op.cit., p.43.

135. 1817 SC, p.40 per P. George.

136. Cf. SSR, p.63 where Kuhn describes a psychology experiment in which subjects reacted to anomalous cards in a pack (e.g. a red six of 'spades') firstly by failing to notice any peculiarity; secondly, with confusion; and finally by seeing them for what they were (J.S. Bruner and L. Postam 'On the Perception of Incongruity: a Paradigm' 18 Journal of Personality (1949), p.206).

137. SSR, pp.5, 65.

138. SSR, p.78.

139. Robertson v. Oakley (1801), op.cit., p.299.

140. Supra, Chapter 9, pp.273 ff..Eldon blamed creditors' humanity, not Commissioners or Lord Chancellors, for the failure to stem swindling by the refusal of certificates of discharge (Ex parte

King (1805), op.cit., p.424, p.1151 (E.R.).

141. Supra, Chapter 9, pp.280-1.

142. Supra, Chapter 2, p.25.

143. Hooper v. Smith (1763), op.cit., p.442, p.253 (E.R.).

144. (1790), op.cit.

145. Supra, Chapter 8, pp.253.

146. R. Starn 'Historians and Crisis' 52 Past and Present (1971), p.3, at p.8.

147. Ibid, p.3.

148. Ibid, p.16.

149. Ibid, p.18.

150. SSR, p.82.

151. Ibid, p.8.

152. Ibid, p.69.

153. Ibid, p.69. Cf. T.S. Kuhn The Copernican Revolution (1957), pp.135-43 which largely counters R. Keat and J. Urry's claim that Kuhn fails to place scientific communities in their social setting (supra, note 81). In SSR, Kuhn is also clear that external factors are vital to understanding scientific development: after a bibliography of his own publications on the subject, Kuhn remarks that 'it is... only with respect to the problems discussed in this essay that I take the role of external factors to be minor', p.X, note 4, p.69.

154. Supra, Chapter 7, pp. 185 ff.

155. I.P.H. Duffy 'Bankruptcy and Insolvency...', op.cit., in which the increase is accounted for by the discount policy of the Bank of England (also viz. I.P.H. Duffy 'The Discount...', op.cit.), the effects of the Napoleonic Wars, the circulation of bills of exchange, etc. Duffy's description of 1810 as a 'crisis' year (chapter 6) is an example of the use of that word as a metaphor.

The 'ill-health' of the British economy, and the number of bankruptcies in that year, are said to have reached a 'feverish' level (cf. R. Starn, op.cit., p.4; J. Habermas Legitimation Crisis (1976), p.1). N.b. also that the large number of bankruptcies in 1810 may have been influenced by the 1809 Bankruptcy Act making certificates easier to obtain, and thus making bankruptcy more attractive for failing traders (viz. infra, pp.316 ff.) and cf. I.P.H. Duffy 'English Bankrupts...', op.cit..

156. Supra, Chapter 2, p.25.

157. SSR, p.68. The requirement of persistent failure saves this definition from being tautologous.

158. Ibid, pp.67-68.

159. Ibid, p.83.

160. Ibid, p.69.

161. Raikes v. Poreau (1786), op.cit., p.95, per Buller J.

162. Garret v. Moule (1794), op.cit., p.108, p.295(E.R.),per Lord Kenyon.

163. Ex parte Lord (1816), op.cit., p.423, per Eldon L.C.

164. SSR, p.83.

165. Ibid, p.148, et passim.

166. Hooper v. Smith (1763), op.cit., p.442, p.253, per Lord Mansfield.

167. Ex parte King (1805), op.cit., p.424, p.1151, per Eldon L.C.

168. Stewart v. Richman (1794), op.cit.,

169. Supra, Chapters 2 and 9.

170. (1798), op.cit. Viz. supra, Chapter 9, pp.265-271.

171. For discussion of the aftermath of a paradigm-shift, viz. infra, pp.318-9.

172. D. Duman presents judges as having been quite independent of the interests of the mercantile class. Judges' social origins were mainly landed or professional families (The Judicial Bench..., op.cit., pp.51-52); their professional socialisation was long and

segregated (Ibid, pp.72 ff); they kept the society of 'their colleagues but also members of the cabinet, important literary figures, and members of the aristocracy' (Ibid, p.159): they married 'daughters of men belonging to the upper professions and the middling and lesser gentry' (Ibid, p.164); their sons avoided 'the lower professions and business' (Ibid, p.167); and judges invested either in land or in Government securities or other forms of stock-holding (Ibid, pp.127-139; viz. supra, Chapter 3, n.33 for mercantile hostility to the 'monied interest'). Moreover, 'as a result of their social background and of their professional socialization and training, the judges were inculcated with the ideology of the propertied classes', Ibid, p.102. Cf., however, W. Holt who argues that judges and merchants shared the ideology of their shared capitalist class: 'Categories of kinship or occupational or social status are not determinative of membership in a class (though each is important)': 'Morton Horwitz and the Transformation of American Legal History' 23 William and Mary Law Review (1982) 663, at p.718.

173. Supra, Chapter 2, p.28. This problem is beyond the scope of the present work.

174. 1817 SC, p.77.

175. 1817 SC, p.107.

176. 14 Cobbett's Parliamentary Debates (1809), p.97.

177. Ibid, p.98.

178. Kuhn remarks that younger men (barristers were generally younger than judges) are more likely to take up the mantle of a new paradigm: SSR, pp.90, 151-2, 166.

179. R.H. Eden An Analysis..., op.cit., p.2.

180. Op.cit.

181. Op.cit.

182. Op.cit.

183. Op.cit.

184. 40 Parliamentary Debates (1819), p.252.

185. 5 Geo.IV,c.98 (1824), s.6; and 6 Geo.IV,c.16 (1825), s.6.
Section 7 of each act specifically allowed debtors and creditors to agree to self-declaration of bankruptcy.

186. Supra, Chapter 7, pp.213 ff.

187. By section 122. Inexplicably, the provision in section 120 of the 1824 Act allowing the Lord Chancellor to override the objection of one obstinate creditor did not re-appear in the 1825 Act.

188. Cf. T. Kuhn SSR, pp.23, 153; CGK_1, p.20.

189. E.E. Deacon The Law and Practice of Bankruptcy, op.cit., Vol. 1, p.82.

190. Although this was not true of the beliefs of all outside trade - cf. J.S. Mill's opinion of bankrupts, supra, Chapter 7, p.234.

191. T. Kuhn, SSR, p.111.

192. Ibid, p.86.

193. CGK_2, p.269.

194. Supra, Chapter 7, pp. 213 ff.

Appendices

Appendix One

Outline of bankruptcy proceedings, 1732-1809

1. A creditor 'strikes a docket' : i.e. he petitions the Lord Chancellor to issue a 'commission of bankruptcy' against a debtor.

   The creditor lodges with the Lord Chancellor:

   a) an affidavit as to the extent of the debt; and

   b) a bond for £200, returnable if the debtor is declared bankrupt.

2. The Lord Chancellor directs the case to 'Commissioners in Bankruptcy'.

   In London bankruptcies, the case is given to a group of 5 Commissioners chosen from one of the 14, full-time groups. In provincial bankruptcies, the Lord Chancellor appoints 3 special Commissioners, often on the recommendation of the petitioning creditor's solicitor.

3. The Commissioners take evidence from the debtor's creditors, associates, and family. In London any 3 Commissioners from the group may be involved (the 3 may differ during the proceedings; they may try to hear more than one case at a time (their fees are paid by the cases before them); and they may adjourn the proceedings to secure a second fee, or to re-open the case in a local coffee-house away from the tumult of their rooms).

The Commissioners must decide whether the debtor:

a) is a 'trader' (viz. text supra, Chapter 3, pp.56-8); and

b) owes one creditor over £100, two creditors a total of over £150, or three or more creditors a total of over £200; and

c) has committed an 'act of bankruptcy' (viz. infra, appendix two).

If a), b) and c) are satisfied, the Commissioners declare the debtor a 'bankrupt'.

The bankrupt can ask the court to review this decision by, e.g., issuing a writ of habeas corpus.

4. The Commissioners now do two things:

a) they advertise the bankruptcy in the London Gazette. The advertisement orders the bankrupt to surrender his estate and, within 42 days, his person to the commission;

b) they send officials ('messengers') to the bankrupt's house to serve notice of the bankruptcy. The messengers seize the bankrupt's moveable belongings. Sometimes the messengers are appointed as provisional 'assignees' with duties to make an inventory of the bankrupt's estate, to value it, and (occasionally) to manage it.

5. The Commissioners arrange a first meeting of the creditors within 14 days of the declaration of bankruptcy.

6. At any time between the declaration of bankruptcy and the final redistribution of the estate, creditors may swear debts under the commission. The Lord Chancellor settles all disputes.

7. The first meeting of the creditors is held. Although few creditors will have heard of the bankruptcy by this time, 'assignees in bankruptcy' are elected from amongst those present.

8. The assignees begin to gather in the estate, to run down the bankrupt's business, and to auction his belongings. They prepare lists of debts owed on the basis of debts sworn before the Commissioners.

9. The second meeting of the creditors is held. The Commissioners examine the bankrupt and order him to prepare a statement of his affairs. More debts are sworn.

10. The third meeting of the creditors is held. This supposedly occurs 42 days after the declaration of bankruptcy, however the Lord Chancellor usually grants an extension to give the bankrupt time to prepare his accounts. The bankrupt and the accounts are examined. False accounts, or his failure to attend the meetings, render the bankrupt liable to a criminal prosecution and the death penalty (such prosecutions are rare). The creditors decide whether to award the bankrupt a 'certificate of conformity' - this is the first step towards the 'certificate of discharge', releasing a bankrupt from debts accrued before the bankruptcy. Four-fifths in number and value of the creditors for over £20 must sign the certificate. They may choose to do so at a later date, or never. Without a certificate of discharge, any moneys received by the bankrupt may be claimed by the assignees.

11. 4-18 months after the declaration of bankruptcy, the assignees divide out the remaining estate amongst the creditors in proportion to their debts. The first of these 'dividends' should be 4-12 months after the declaration of bankruptcy; the last should be within 18 months of the declaration. Assignees can force, on pain of imprisonment, even a certified bankrupt to attend dividend meetings.

12. After the final distribution of dividends, the bankrupt who has conformed to the requirements of the Acts is entitled to an 'allowance' which the assignees will have saved for him. If the estate yields 10/- in the £, the bankrupt receives 5% up to £100; if it yields 12/- in the £, he receives 7½% up to £250; if it yields 15/- in the £, he receives 10% to £300. If it yields less than 10/- in the £, the Commissioners and assignees have the discretion to award him up to 3%.

13. If the creditors sign a 'certificate of conformity', the Commissioners then decide whether to 'allow' it. If they do, they pass it on to the Lord Chancellor.

14. The Lord Chancellor decides whether to 'confirm' the certificate. The Lord Chancellor will allow even creditors for less than £20, or creditors who have already signed it, to petition him against confirmation. He will neither demand reasons for, nor in any way influence refusal to sign on the part of creditors or the Commissioners. Once the Lord Chancellor has confirmed the certificate of discharge, the trader is no longer 'bankrupt', his pre-bankruptcy debts are cleared, and he is free to recommence trading.

Viz. esp., 5 Geo.II,c.30 (1732)

W. Cooke The Bankrupt Laws, op.cit.

S. Marriner 'English Bankruptcy Records...', op.cit.

E. Welbourne 'Bankruptcy before the Era...', op.cit.

F.J.J. Cadwallader 'In Pursuit...', op.cit.,

Chapters 19-23.

Appendix Two

'Acts of bankruptcy', 1570-1825.

Below is a paraphrase of each of the major 'acts of bankruptcy' upon which an 18th/early 19th century bankruptcy could be founded. The statutory source of each 'act of bankruptcy' is indicated. Each new Act included the preceding 'acts of bankruptcy'.

13 Eliz.I,c.7 (1570)

1) departing the realm

2) keeping house, departing from the dwelling house, denying the creditors, taking sanctuary

3) willingly be arrested for debt

4) willingly be outlawed or imprisoned

1 Jac.I,c.15 (1604)

5) willingly or fraudulently allow goods to be sequestrated

6) fraudulent conveyance

7) remaining in gaol for more than 6 months after arrest for debt (changed to 2 months by 21 Jac.I,c.19 (1623), infra)

21 Jac.I,c.19 (1623)

8) taking up a position with Parliamentary privilege

9) trying to persuade creditors to accept a lesser sum, or repayment at a later time than debt due

10) debt of £100 or more not settled within 6 months (repealed by 10 Ann.I,c.15 (1711))

11) be arrested for a debt of over £100, then escape from gaol, or gain common bail (repealed by 10 Ann.I,c.15 (1711))

5 Geo.II,c.30 (1732)

12) offer preferential treatment for a creditor if he will issue a commission of bankruptcy against the debtor.

5 Geo.IV,c.98 (1824)

13) self-declaration.

Appendix Three

Statutory provisions relating to the 'certificate of discharge', 1705-1825.

Except where indicated, each Act included the preceding provisions concerning discharge.

1. 4 Ann.,c.17 (1705)

   s.19: the first provision in English law allowing bankrupts discharge from debts accruing before the declaration of bankruptcy. Awarded by the Commissioners and the Lord Chancellor on the basis of behaviour during the actual bankruptcy.

   s.15: certain pre-bankruptcy behaviour (e.g., losing £5 in any one day, or £100 in toto, 12 months prior to the bankruptcy) automatically denied the opportunity of discharge (versions of this provision remained a part of 18th century bankruptcy law - viz., e.g., 5 Geo.II,c.30 (1732),s.12).

   s.16: Act to run for 3 years (continuation Acts, e.g. 7 Ann., c.25 (1708), were enacted throughout the 18th century).

2. 5 Ann.,c.22 (1706)

   s.2: 4/5 in number and value of the creditors under the commission had to sign the certificate before the confirmation and allowance of the Commissioners and the Lord Chancellor. Creditors' power uncontrollable - they could, therefore, take account of pre-bankruptcy affairs.

3. 5 Geo.II,c.30 (1732)

   s.10: 4/5 in number and value of the creditors for over £20 each had to sign the certificate.

4. 49 Geo.III,c.121 (1809)

s.18: number and value of creditors (for over £20 each) reduced to 3/5. Appointees may sign the certificate on behalf of the creditors.

5. 5 Geo.IV,c.98 (1824)

Substantially similar to 6 Geo.IV,c.16 (1825), infra; however cf.:

s.122: if, after 18 months, a single creditor prevents the necessary number and value being reached for the certificate, the Commissioners may nevertheless sign the certificate. The bankrupt may petition the Lord Chancellor to award him discharge. Creditors who refuse to sign the certificate are notified, and may be heard by the Lord Chancellor against his granting discharge.

6. 6 Geo.IV,c.16 (1825)

s.122: during the first 6 months, 4/5 in number and value of the creditors for over £20 each had to sign a certificate. Six months after the final examination of the bankrupt (at the third creditors' meeting - viz. supra, appendix 1), 3/5 in number and value of the creditors, or 9/10 in number alone of the creditors for over £20 had to sign the certificate.

s.123: s.122 of 5 Geo.IV, c.98 (1824)(supra) repealed.

s.124: overseas creditors could authorise an appointee (after attestation by a notary public, British Minister of Consul) to sign the certificate.

s.133: the bankrupt could offer a composition after the final examination, but before the dividends were awarded. If the creditors agreed, the Lord Chancellor was forced to supersede (i.e. overturn) the commission of bankruptcy. The bankrupt had

to give 21 days notice of a meeting in which he would offer such a composition through an advertisement in the London Gazette. If 9/10 in number and value of the creditors for over £20 agreed, the bankrupt had to give 21 days notice of a second meeting to agree once more to the composition. The proportions of the creditors who could finally agree to such a composition were: s.134: 9/10 in number of creditors for over £20 each; or 9/10 in value of all of the creditors (regardless of the extent of their debt). Special notice of such a composition had to be communicated to creditors for over £50 who were out of England before such a composition could occur.

Bibliography of Works Cited

1. Primary Sources

a) Cases

Aldridge v. Ireland (1792) 7 Term. Rep. 512, 101 E.R. 1105.

Ex parte Allen (n.d.) 7 Vin. Abr. 134.

Anon. (1694) Holt K.B. 115, 90 E.R. 962.

Anon. (c.1718-1725) Dav. 437

Anon. (1753) 1 Atk. 84, 26 E.R. 55.

Back v. Gooch (1815) Holt N.P. 13, 171 E.R. 144.

Bagg's Case (1615) 11 Co. Rep. 93b, 77 E.R. 1271.

Bamford v. Baron (1787) 2 T.R. 595, 100 E.R. 319.

Ex parte Bangley (1810) 17 Ves. Jun. 117, 34 E.R. 45.

Ex parte The Bank of Scotland (1812) 1 Rose B.L. 375.

Ex parte Bennett (1743) 2 Atk. 526, 26 E.R. 716.

Bennett v. Farnell (1807) 1 Camp. 129, 170 E.R. 902; 1 Camp. 180, 170 E.R. 921.

Ex parte Bessaro (1812) 1 Rose B.L. 266.

Bird v. Sedgewick (1693) 1 Salk. 110, 91 E.R. 100.

Ex parte Bourne (1809) 1 Holt 449, 171 E.R. 299, 16 Ves. Jun. 145, 33 E.R. 939.

Ex parte Brown (1811) 1 Rose B.L. 176.

Burdet v. Willet (1708) 1 Eq. Ca. Abr. 370, 21 E.R. 1109.

Ex parte Burton (1744) 1 Atk. 255, 26 E.R. 163.

Ex parte Bennet (1743) 2 Atk. 527, 26 E.R. 716.

Bromley v. Goodere (1743) 1 Atk. 75, 26 E.R. 49.

Ex parte Capot (1739) 1 Atk. 219, 26 E.R. 141.

Ex parte Cawthorne (1814) 2 Rose B.L. 186.

Chandler v. Crane, Christmas & Co. [1951]1 All. E.R. 426.

Chapman v. Lampshire (1687) 3 Mod. 155, 87 E.R. 100.

Cooper v. Chitty (1756) Burr. 20, 97 E.R. 166.

Do Gols v. Ward (1734) Forr. 243, 25 E.R. 748.

Ex parte Dumas (1754) 2 Ves. Sen. 582, 28 E.R. 372.

Eldon L.C. General Order (1809) 2 Co. B.L. 274.

Eyre v. Birbeck (1785) 2 T.R. 596, 100 E.R. 320.

Fowler v. Padget (1798) 7 Term. Rep. 509, 101 E.R. 1103.

Ex parte Gardner (1812) 1 Rose B.L. 377.

Garret v. Moule (1794) 5 Term. Rep. 575, 101 E.R. 322.

Gibson (1792-1795) 23 Appeal Cases 241-271 (British Library collection).

Godfrey v. Furzo (1733) 3 P.W. 185, 24 E.R. 1022.

Groome v. Potts (1796) 6 T.R. 548, 101 E.R. 696.

Ex parte Gulston (1753) 1 Atk. 139, 26 E.R. 91.

Mr William Gulston's Case (1742) T. Davies The Law Relating to Bankrupts (1744), p.30.

Gulston v. Dale (1742) 1 Atk. 193, 26 E.R. 125.

Ex parte Hall (1753) 1 Atk. 201, 26 E.R. 130.

In Re Hallett's Estate (1879) 12 Ch. D. 696.

Hawkes v. Saunders (1784) Co. B.L. 72; 7 Term. Rep. 510, 101 E.R. 1105.

Haycroft v. Creasy (1801) 2 East 92, 102 E.R. 303.

Hedley Byrne v. Heller [1963] 2 All E.R. 575.

Hooper v. Smith (1763) 1 Black Rep. 441, 96 E.R. 252.

Hopkins v. Ellis (1705) Holt Rep. 95, 91 E.R. 101; 1 Salk. 110, 90 E.R. 951.

Ex parte Johnson (1745) 1 Atk. 81, 26 E.R. 53.

Ex parte Joseph (1811) 18 Ves. Jun. 340, 34 E.R. 345.

Ex parte Joseph in the matter of Leigh (1811) 1 Rose B.L. 184.

Ex parte King (1805) 11 Ves. Jun. 417, 32 E.R. 1148.

Ex parte John King (1805) 7 East 91, 103 E.R. 36.

Ex parte King (1806) 13 Ves. Jun. 181, 33 E.R. 263.

Ex parte King (1808) 15 Ves. Jun. 127, 33 E.R. 703.

Ex parte Knowell (1806) 13 Ves. Jun. 192, 33 E.R. 267

Kruger v. Wilcox (1755) Amb. 352, 27 E.R. 168

L'Apostre v. Le Plaistrier (1708) 2 Eq. Ca. Abr. 113, 22 E.R. 96.

Ex parte Lingood (1742) 1 Atk. 240, 26 E.R. 154.

Lingood v. Eade (1747) 1 Atk. 196, 26 E.R. 127.

Ex parte Lord (1816) 2 Rose B.L. 421.

Martin v. Pewtress (1769) 4 Burr. 2478, 98 E.R. 299.

The Matchless (1822) 1 Hagg. 97, 166 E.R. 35.

Nowers v. Colman (1816) Buck 5.

Between The Parishes of Great Charte and Kennington (1742) 2 Str. 1173, 93 E.R. 1107.

Prosser v. Smith (1816) 1 Holt 442, 171 E.R. 297.

R. v. Baker (1762) 3 Burr. 1265.

R. v. Inhabitants of Glamorganshire (the Case of Cardiff Bridge) (1700) 1 Ld. Raym. 580, 91 E.R. 1287

R. v. Pear (1779) 2 East P.C. 685, 168 E.R. 208.

Raikes v. Poreau (1786) Co. B.L. 95.

Ramsbottom v. Lewis (1808) 1 Camp. 279, 170 E.R. 957.

Ex parte Reed (1819) Buck. 430.

Roberts v. Teasdale (1790) Peakes N.P. 38, 170 E.R. 71.

Robertson v. Liddell (1809) 9 East 487, 103 E.R. 659.

Robertson v. Oakley (1801) Consolatory Verses of the Late Eliza F. Robertson, Anon. (1808), p.287.

Royal Bank of Scotland v. Cuthbert (1812) 1 Rose B.L. 462.

Ryall v. Rolle (1749) 1 Ves. Sen. 348, 27 E.R. 1074; 1 Atk. 165, 26 E.R. 107.

Ex parte Sayers (1800) 5 Ves. Jun. 169, 31 E.R. 528.

Scott v. Surman (1742) Willes Rep. 400, 125 E.R. 1235.

Shuttleworth v. Bravo (1800) 1 Str. 508, 93 E.R. 666.

Smith v. Bromley (1760) 2 Dougl. 696, 99 E.R. 441.

Smith v. Knox (1800) 3 Esp. 46, 170 E.R. 533.

Stevens v. Biller (1883) 25 Ch. 31.

Stewart v. Richman (1794) 1 Esp. 108, 170 E.R. 295.

Stone v. Freeland (1769) 1 H. Bl. 317, 126 E.R. 187.

Ex parte Tallis (c. 1811-1812) 1 Rose B.L. 371.

Tappenden v. Burgess (1803) 4 East 230, 102 E.R. 818.

Tatlock v. Harris (1789) 3 T.R. 174, 100 E.R. 517.

Taylor v. Plumer (1815) 3 M. and S. 562, 105 E.R. 721.

Tudway v. Bourn (1759) 2 Burr. 718, 97 E.R. 529.

Vere v. Lewis (1789) 3 T.R. 182, 100 E.R. 522.

Vernon v. Hankey (1787) Co. B.L. 95.

Whitecombe v. Jacob (1710) 1 Salk. 160, 91 E.R. 149.

Ex parte Williamson (1750) 1 Atk. 82, 26 E.R. 54.

Woodier's Case (c. 1730-1734) Bull N.P.39.

b) Statutes

13 Edw.I, st.3(1285).

34, 35 Hen.VIII,c.4(1542).

13 Eliz.I,c.7(1570).

1 Jac.I,c.15(1604).

14 Ch.II,c.24(1662).

22, 23 Ch.II,c.20(1670).

8 and 9 Gul.III,c.9(1695).

2, 3 Ann,c.17(1703).

4 Ann,c.17(1705).

4 Ann,c.19(1705).

5 Ann,c.22(1706).

7 Ann.c.12(1708).

10 Ann,c.15(1711).

5 Geo.II,c.30(1732).

12 Geo.III,c.47(1772).

18 Geo.III,c.52(1777).

49 Geo.III,c.121(1809).

4 Geo.IV,c.83(1823).

5 Geo.IV,c.98(1824).

6 Geo.IV,c.16(1825).

1 and 2 Will.IV,c.56(1831).

4 and 5 Geo.VI,c.24(1941).

c) Miscellaneous Primary Sources

J.W.Archenholtz Picture of England (c.1780).

Audley The Way to be Rich (1662).

N.Bailey Compleat English Dictionary (1761) and (1796).

'Bankrupt' 1 Bacon's Abridgement (1768), p.251.

The Bankrupt - a Modern Character (c.1785).

W.Beawes Lex Mecatoria Rediviva (1754) 2nd edition (1761).

Beccaria Crimes and Punishment (1764)(1880).

J.Bee (ed) The Works of Samuel Foote (1860), 3 Vols..

W.Blackstone Commentaries on the Laws of England (1765-69).

J.B.Burges Considerations on the Law of Insolvency (1783).

E.Christian Practical Instructions for Suing Out and Prosecuting a Commission of Bankruptcy (1816).

Cobbett's Parliamentary Debates.

W.Cobbett Cobbett's Parliamentary History of England.

W.Cobbett Rural Rides (1830)(1981).

Sir J.Comyns A Digest of the Laws of England (1762).

Considerations on a Commission of Bankruptcy... (1789).

Considerations upon Commissions of Bankrupts, Anon. (1727).

Consolatory Verses of the Late Eliza F. Robertson, ΜΑΤ ΘΥΝΕΓΝΟΣ ('Mat Thunegnos') (ps.) (1808).

W.Cooke The Bankrupt Laws (1785) 7th edition (1817), 2 Vols..

W.Cooke Memoirs of Samuel Foote (1805), 3 Vols..

T.Cooper The Bankrupt Law of America Compared with the Bankrupt Law of England. Philadelphia (1801).

R.Courteville Arguments Respecting Insolvency (1760).

The Creditor's Advocate and the Debtor's Friend, Anon.(1731).

A.Cullen Principles of the Bankrupt Law (1800).

T.Davies The Law Relating to Bankrupts (1744).

E.E.Deacon The Law and Practice of Bankruptcy (1827), 2 Vols.

H.de Balzac The Rise and Fall of César Birotteau (1837).

D.Defoe The Compleat English Tradesman (1726).

D.Defoe Remarks on the Bill to Prevent Frauds Committed by Bankrupts (1706).

D.Defoe 3(5) The Review (c.1715), p.17.

C.Dickens Bleak House (1853)(1910).

C.Dickens Hard Times (1854)(1910).

G.Douglas The House with the Green Shutters (1901)(1971).

E.H.East A Treatise of the Pleas of the Crown (1803)(1972).

R.H.Eden An Analysis of the Bill Now Depending in Parliament for the Consolidation and Amendment of the Bankrupt Law (1823).

R.H.Eden A Practical Treatise of the Bankrupt Law 2nd edition (1826).

D.E.Evans A Letter to Sir Samuel Romilly, Knt., on the Revision of the Bankrupt Law (1810).

W.D.Evans Essays on the Action for Money Had and Received... (1802).

W.D.Evans The Law of Bills of Exchange and Promissory Notes (1802).

The Examiner.

The Fashionable Swindler, Anon. (1810).

H.Fielding Jonathan Wild (1743)(1962).

G.Filangieri The Science of Legislation, 2 Vols., 1st English edition (1806).

S.Foote The Bankrupt (1776) in ed. J.Bee (ps.) The Works of Samuel Foote (1830), 3 Vols., Vol.3, p.241.

S.Foote The Devil upon Two Sticks (1778).

The Friends of Commerce A Caution to Bankers, Merchants and Manufacturers.. (1831).

The Gentleman's Magazine.

T.Goodinge The Law Against Bankrupts (1713).

F.Grose A Classical Dictionary of the Vulgar Tongue (1785).

Sir M.Hale Pleas of the Crown (1678)(1972).

Hatton The Merchant's Magazine (1734), p.212.

J. Heath Eighteenth Century Penal Theory (1963)(readings).

J. Henry Outline of Plan of an International Bankruptcy Code for the Different Commercial States of Europe (c.1820s).

S.Hibbert-Ware Remarks on the Facility of Obtaining Commercial Credit... (1806).

J.Hope Letters on Credit (1784).

Inquiry into Misconduct, Anon.(n.d.).

The Jew Swindler, Anon.(c.1790).

J.King Letters from France (1805).

J.King Mr. King's Apology or a Reply to his Calumniators (1798)

J.King Mr. King's Speech at Egham with Thomas Paine's Letter to him on it and Mr. King's Apology as they appeared in the Morning Herald (1793).

J.King Oppression Deemed no Injustice towards some Individuals (c.1805).

J.King Remarks on Imprisonment for Debt, on the Recent Progress of the Law and Increase in Lawyers 2nd edition (1804).

J.King Thoughts on the Difficulties and Distresses in which the Peace of 1783 has Involved the People of England... (1783).

A List of the Members of the Guardians; or Society for the Protection of Trade, against Swindlers and Sharpers, Anon.(1799).

The London Gazette

J.S.Mill 5 Collected Works, Essays on Economy and Society (1850-1879) (1967).

J.Miller The Memorial and Suggestions of the Merchants and Traders of the City of Dublin...(1807).

C.Molloy De Jure Maritime et Navali (1676) 7th edition(1722).

B.Montagu An Inquiry Respecting the Expediency of Limiting the Creditors' Power to Refuse a Bankrupt's Certificate (1809).

B.Montagu Some Observations upon the Bill for the Improvement of the Bankruptcy Laws (1822).

B.Montagu Suggestions Respecting the Improvement of the Bankrupt Laws (c.1820).

B.Montagu Thoughts upon the Abolition of the Punishment of Death in Cases of Bankruptcy (1821).

J.Montefiore A Commercial Dictionary...(1803).

J.Montefiore The Trader's and Manufacturer's Compendium (1804).

'Morality of Insolvency', Anon.8 The Merchant's Magazine and Commercial Review (1843), p.294.

The Morning Chronicle

The Morning Herald

National Swindling: the Bank Restriction Rate Catechism or the Threadneedle Street Jugglers Exposed, Anon., 3rd edition (1819).

Observations on the State of Bankrupts under the Present Laws,Nomius Antinomos (ps.)(1760).

W.Paley Principles of Moral and Political Philosophy (1785).

The Pamphleteer.

G.Parker A View of Society and Manners (1781), 2 Vols..

Parliamentary Debates.

M.Postlethwayt The Universal Dictionary of Trade (1751) 4th edition (1774).

T.E.V.Price Thoughts on the System of Credit (1819).

Proposals for Promoting Industry and Advancing Proper Credit, Anon.(1732).

P.R.O. B.3.5526 (re J.King).

The Real Calumniator Detected being Candid Remarks on Mr King's Apology..., Anon.(1798).

Reasons Humbly Offered for a General Insolvent Bill, Anon. (1711).

Remarks on the Late Act to Prevent Frauds Committed by Bankrupts..., Anon. (1707).

Report of the Select Committee Appointed to Consider of the Bankrupt Laws 1817 (486.)v.1.

Report from the Select Committee Appointed in the Following Session to Consider the Same Subject [i.e. the Bankrupt Laws] 1818 (127.276.277.) v1.1.127.129.

E.F.Robertson Dividends of Immense Value (1801).

E.F.Robertson The Life and Memoirs of Miss Robertson(1802).

E.F.Robertson Who Are the Swindlers - a Query? (1801).

Rules and Orders (of the Guardians or Society for the Protection of Trade against Swindlers and Sharpers), Anon.(1816).

D.Sauter The Practice of Bankrupts of these Times (1640).

Select Committee on the Bankrupt Laws (1759) 28 Journal of the House of Commons (1759), p.602.

Select Committee on the Law Relating to Merchants, Agents, or Factors 4 Reports, Committees (1823).

W.Shakespeare The Merchant of Venice (1600)(1972).

W.Shakespeare Othello (1604)(1968).

R.B.Sheridan School for Scandal (1777)(1979).

A.Smith Lectures on Jurisprudence (c.1762-66) O.U.P. edition (1978).

A.Smith The Wealth of Nations (1776) O.U.P. edition (1979).

Rev.S.Smith 'The Suppression of Vice' (1804) in Rev.S.Smith Essays Social and Political (1877), p.21.

J.Steele The Spectator (1712)(1888), p.653.

The Sun.

J.Swift Gulliver's Travels (1726)(1973).

The Swindler - a Comedy, Anon.(1785).

The Swindler Detected, Anon.(1781).

G.Taylor (ed.) Plays by Samuel Foote and Arthur Murray (1984).

W Thackeray Vanity Fair (1848)(1978)

The Times

E.Townsend To the Creditors of E.Townsend of Maiden Lane, Covent Garden (1811).

E.Townsend An Extraordinary History of a Bankruptcy... (1811).

E.Townsend To the Parishioners of Covent Garden (1810).

E.Townsend A View of the Injurious Effects of the Present Bankrupt System... (1822).

A Treatise of Frauds, Covins and Collusions, Anon.(1710).

J. Trevors An Essay to the Restoring of our Decayed Trade (1675).

The Universal Register.

A View of the Penal Laws Concerning Trade and Traffic, Anon.(1697).

2. Secondary Sources

R.L.Abel 'Torts' in ed. D.Kairys The Politics of Law: a Progressive Critique (1982), p.185.

B.Abel-Smith and R.Stevens Lawyers and The Courts 1750-1969 (1970).

D.Alexander Retailing in England During the Industrial Revolution (1970).

L.Althusser and E.Balibar Reading Capital (1970).

T.Arnold The Symbols of Government (1935)(1962).

H.W.Arthurs 'Special Courts, Special Law: Legal Pluralism in Nineteenth Century England' in eds. G.R.Rubin and D.Sugarman Law, Economy and Society: Essays in the History of English Law, 1750-1914 (1984), p.380.

T.S.Ashton An Economic History of England in the Eighteenth Century (1955)(1972).

P.S.Atiyah The Rise and Fall of Freedom of Contract (1979).

J.S.Auerbach Unequal Justice (1976).

J.H.Baker 'The Law Merchant and the Common Law before 1700' 38 Cambridge Law Journal (1979) 295.

I.D.Balbus 'Commodity Form and Legal Form; an Essay on the "Relative Autonomy" of Law' in eds. C.E.Reasons and R.M.Rich The Sociology of Law (1978), p.73.

Z.Bankowski and G.Mungham Images of Law (1975)(1976)

B.Barnes 'On the Conventional Character of Knowledge and Cognition' 11 Philosophy of the Social Sciences (1981), p.303.

B.Barnes T.S.Kuhn and Social Science (1982).

P.W.J.Bartrip 'County Court and Superior Court Registrars, 1820-1875: the Making of a Judicial Official' in eds G.R.Rubin and D.Sugarman Law, Economy and Society: Essays in the History of English Law, 1750-1914 (1984), p.349.

H.Beale and T.Dugdale 'Contracts between Businessmen: Planning and the Use of Contractual Remedies' 2 British Journal of Law and Society (1975) 18.

P.Beirne and R.Sharlet (eds) Pashukanis: Selected Writings on Marxism and Law (1980).

M.M.Belden 'The Dramatic Works of Samuel Foote' 80 Yale Studies in English (1929).

P.Berger and T.Luckman The Social Construction of Reality (1966)(1975).

R.Bhaskar 'Feyerabend and Bachelard: Two Philosophies of Science' 94 New Left Review (1975), p.31.

E.Bott 'A Rejoinder to E.Leach' in ed. J.S. La Fontaine The Interpretation of Ritual (1972).

R.Bowles Law and the Economy (1982).

B.F.Brenner 'Nuisance Law and the Industrial Revolution' Journal of Legal Studies (1972), p.404.

J.Brewer 'Commercialization and Politics' in eds. N.McKendrick, J.Brewer and J.H.Plumb The Birth of a Consumer Society: the Commercialization of Eighteenth Century England (1982), p.210.

J.Brewer and J.Styles (eds.) An Ungovernable People (1980).

A.Briggs The Age of Improvement (1959).

J.S. Bruner and L.Postam 'On the Perception of Incongruity: a Paradigm' 18 Journal of Personality (1949), p.206.

C.G.A.Bryant 'Kuhn, Paradigms and Sociology' 26 British Journal of Sociology (1975),p.354.

T.Burger Max Weber's Theory of Concept Formation North Carolina (1976).

P.Burke Sociology and History (1980).

Byles on Bills of Exchange 24th edition (1979).

F.J.J.Cadwallader 'In Pursuit of the Merchant Debtor and Bankrupt (1066-1732)' unpublished University of London PhD thesis, 1965.

C.M.Campbell and P.Wiles Law and Society (1979).

J.Lord Campbell Campbell's Lives of the Lord Chancellors 4th edition (1857).

M.R.Chesterman 'Family Settlements on Trust: Landowners and the Rising Bourgeoisie' in eds.G.R.Rubin and D.Sugarman Law, Economy and Society: Essays in the History of English Law, 1750-1914 (1984), p.124.

J.H.Clapham An Economic History of Modern Britain (1930).

R.C.Clarke 'The Interdisciplinary Study of Legal Evolution' 90 Yale Law Journal (1981), p.1238.

J.Cohen 'The History of Imprisonment for Debt and its Relation to the Development of Discharge in Bankruptcy' 3 Journal of Legal History (1982) 152.

S.Cohen and A.Scull (eds.) Social Control and the State (1983).

P.J.Coleman Debtors and Creditors in America. Insolvency, Imprisonment for Debt, and Bankruptcy 1607-1900 Madison (1974).

Sir K.Cork 'Insolvency Law and Practice. Report of the Review Committee' presented to Parliament by the Secretary of State for Trade, June 1982, Cmnd. 8558.

M.Cornforth Dialectical Materialism (1952).

L.Coser The Functions of Social Conflict (1956).

The Daily Telegraph.

J.Davidson The Scottish Staple at Veere (1909)(1968).

J.Davis 'The London Garotting Panic of 1862: a Moral Panic and the Creation of a Criminal Class in mid-Victorian England' in eds.V.A.C. Gatrell et al Crime and Law: a Social History of Crime in Western Europe since 1500.(1980).

S.A.de Smith Constitutional and Administrative Law (1971)(1983).

L.Dickens et al 'Re-employment of Unfairly Dismissed Workers: the Lost Remedy' 10 Industrial Law Journal (1981), p.160.

L.Dickens 'Unfair Dismissal Applications and the Industrial Tribunal System'. Inudstrial Relations Research Unit of the Social Science Research Council, Reprint Series no.32 (reprinted from 9 Industrial Relations Journal (1978/9)).

P.G.M.Dickson The Financial Revolution (1967).

M.Douglas Purity and Danger (1966).

I.P.H.Duffy 'Bankruptcy and Insolvency in London in the late 18th and early 19th century' unpublished Oxford D.Phil.thesis, 1973.

I.P.H.Duffy 'The Discount Policy of the Bank of England During the Suspension of Cash Payments, 1797-1821' 35 Economic History Review (1982)67.

I.P.H.Duffy 'English Bankrupts, 1571-1861' 24 American Journal of Legal History (1980),p.283.

D.Duman The English and Colonial Bars in the Nineteenth Century (1983).

D.Duman The Judicial Bench in England 1727-1875 (1982).

E.Durkheim The Division of Labor in Society (1893)(1964).

E.Durkheim The Rules of Sociological Method (1895)(1964).

D.L.Eckberg and L.Hill 'The Paradigm Concept and Sociology: a Critical Review' 44 American Sociological Review (1979), p.925.

R.B.Ferguson 'Commercial Expectations and the Guarantee of Law: Sales Transactions in Mid-Nineteenth Century England' in eds. G.R.Rubin and D.Sugarman Law, Economy and Society: Essays in the History of English Law, 1750-1914 (1984),p.192.

P.Feyerabend Against Method (1975).

P.Feyerabend 'Consolations for the Specialist' in eds. I.Lakatos and A.Musgrave Criticism and the Growth of Knowledge (1970)(1981), p.197.

P.Feyerabend 'How to Defend Society against Science' 11 Radical Philosophy (1975),p.3.

C.H.S.Fifoot Judge and Jurist in the Reign of Queen Victoria (1959).

C.H.S.Fifoot Lord Mansfield (1936).

G.P.Fletcher 'Fairness and Utility in Tort Theory' 85 Harvard Law Review (1972), p.537.

G.P.Fletcher 'Manifest Criminality, Criminal Intent, and the Metamorphosis of Lloyd Weinreb' 90 Yale Law Journal (1980),p.319.

G.P.Fletcher 'The Metamorphosis of Larceny' 89 Harvard Law Review (1976),p.469.

G.P.Fletcher Rethinking Criminal Law Boston (1978).

G.P.Fletcher 'Two Modes of Legal Thought' 90 Yale Law Journal (1981), p.970.

M.W.Flinn Origins of the Industrial Revolution (1966).

M.Foucault The Archaeology of Knowledge (1969)(1972).

M.Foucault The History of Sexuality (1976)(1981),Vol.1.

M.Foucault The Order of Things (1966)(1970).

J.G.Frazer The Golden Bough (1911) Abridged edition (1963).

S.Freud Totem and Taboo (1913)(1961).

E.Fromm Escape from Freedom (1941)(1980).

R.Fryer et al (eds.) Law, State and Society (1981).

L.L.Fuller The Morality of Law (1964)(1977).

H.Garfinkel 'Order Maintaining Ceremonies' in eds. C.M.Campbell and P.Wiles Law and Society (1979).

V.A.C.Gatrell et al eds. Crime and Law: the Social History of Crime in Western Europe since 1500 (1980).

M.D.George London Life in the 18th Century (1925)(1970).

J.Gibbs 'The Kpelle Moot: a Therapeutic Model for the Informed Settlement of Disputes' 33 Africa 1.

C.J.Goetz and R.E.Scott 'Principles of Relational Contracts' 67 Virginia Law Review (1981) 1089.

E.Goffmann Stigma (1963)(1979).

A.Goldman ''How Cork got sunk without Trace' and Surfaced again - Just' 81 (14) Law Society Gazette (1984), p.1058.

P.Goodrich 'The Antinomies of Legal Theory: An Introductory Survey'. 3 Legal Studies (1983), p.1.

L.C.B.Gower Principles of Company Law (1954)(1981).

A.Gramsci Prison Notebooks (1929-1935)(1980).

R.H.Gretton The English Middle Class (1917).

P.H.Haagan 'Eighteenth-Century English Society and the Debt Law' in eds. S.Cohen and A.Scull Social Control and the State (1983) p.222.

J.Habermas Legitimation Crisis (1976).

J.Hall Theft, Law and Society 2nd edition (1952).

S.Hall et al (eds) Policing the Crisis, Mugging, the State, and Law and Order (1978).

N.Hampson The Enlightenment (1968)(1979).

A.Harding A Social History of Law (1966).

M.Harrick 'The Liabilities (War-Time) Adjustment Act 1941' 5 Modern Law Review (1941),p.125.

H.L.A.Hart The Concept of Law (1961).

M.Hartwell The Industrial Revolution and Economic Growth (1971).

L.Harvey 'The Use and Abuse of Kuhnian Paradigms in the Sociology of Knowledge' 17 Sociology (1982), p.85.

D.Hay, P.Linebaugh et al (eds.) Albion's Fatal Tree (1975)(1977).

D.Hay 'The Criminal Prosecution in England and its Historians' 47 Modern Law Review (1984).p.1.

D.Hay 'Property, Authority and the Criminal Law' in D.Hay, P.Linebaugh et al (eds.) Albion's Fatal Tree (1975)(1977),p.40.

F.A.Hayek The Constitution of Liberty (1960)(1976).

F.A.Hayek Law, Legislation and Liberty (1976).

R.H.Helmholtz 'Bankruptcy and Probate Jurisdiction before 1571' 48 Missouri Law Review (1983),p.415.

E.G.Henderson The Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century (1963).

P.Hirst On Law and Ideology (1979).

E.J.Hobsbawn Industry and Empire (1968)(1977).

J.M.Holden History of Negotiable Instruments in English Law (1955).

B.A.Holderness 'Credit in a Rural Community, 1660-1800' 3 Midland History (1975).

Sir W.S.Holdsworth A History of English Law (1903)(1066).

W.Holt 'The Early Labor Conspiracy Cases, 1805-1842: Judicial Bias and Legitimation in the Common Law' unpublished paper delivered at the fifth annual North American Labor History Conference, Detroit, 1983.

W.Holt 'Morton Horwitz and the Transformation of American Legal History' 23 William and Mary Law Review (1982),p.663.

M.J.Horwitz 'The Conservative Tradition in the Writing of American Legal History' 17 American Journal of Legal History (1973), p.275.

M.J.Horwitz 'The Dictrine of Objective Causation' in ed. D.Kairys The Politics of Law: a Progressive Critique (1982), p.201.

M.J.Horwitz 'The History of the Public/Private Distinction' 130 University of Pennsylvania Law Review (1982),1423.

M.J.Horwitz The Transformation of American Law, 1780-1860 (1977).

J.Innes 'The King's Bench Prison on the Later Eighteenth Century' in eds. J.Brewer and J.Styles An Ungovernable People (1980),p.250.

Interim Report of the Insolvency Law Review Committee, Cork, Cmnd. 7968, 1980.

E.Jenks A Short History of English Law (1934).

W.J.Jones 'The Foundations of English Bankruptcy: Statutes and Commissions in the Early Modern Period' 63(3) Transactions of the American Philosophical Society (1979).

F.Kafka The Trial (1925)(1976).

D.Kairys (ed.) The Politics of Law: A Progressive Critique (1982).

E.Kamenka and A.Tay 'Beyond Bourgeois Individualism: the Contemporary Crisis in Law and Legal Ideology' in ed. E.Kamenka and R.S.Neale Feudalism, Capitalism and Beyond (1975),p.126.

E.Kamenka and R.S.Neale (eds.) Feudalism, Capitalism and Beyond (1975).

E.Kamenka and A.Tay (eds.) Law and Social Control (1980).

E.Kamenka and A.Tay 'Social Traditions, Legal Traditions' in eds. E.Kamenka and A.Tay Law and Social Control (1980),p.3.

E.Kamenka and A.Tay ' 'Transforming' the Law, 'Steering' Society' in eds. E.Kamenka and A.Tay Law and Social Control (1980), p.105.

R.Keat and J.Urry Social Theory as Science (1975).

D.Kennedy 'The Structure of Blackstone's Commentries' 28 Buffalo Law Review (1979)205.

A.K.R.Kiralfy Potter's Historical Introduction to English Law and its Institutions (1932)(1962).

A.K.R.Kiraffy Potter's Outlines of English Legal History (1923)(1958).

J.S. Koffler 'Dionysus in Bankruptcy Land' 7 Rut.Cam.Law Journal(1976)655.

T.S.Kuhn The Copernican Revolution (1957).

T.S.Kuhn The Essential Tension (1977).

T.S.Kuhn 'Logic of Discovery or Psychology of Research?' in eds. I.Lakatos and A.Musgrave Criticism and the Growth of Knowledge (1970) (1981), p.1.

T.S.Kuhn 'Reflections on my Critics' in eds. I.Lakatos and A.Musgrave Criticism and the Growth of Knowledge (1970)(1981),p.231.

T.S.Kuhn 'Second Thoughts on Paradigms' in ed. F.Suppe The Structure of Scientific Theories (1974),p.459.

T.S.Kuhn The Structure of Scientific Revolutions (1962) 2nd edition (1970).

J.S. La Fontaine (ed.) The Interpretation of Ritual (1972).

I.Lakatos and A.Musgrove (eds.) Criticism and the Growth of Knowledge (1970)(1981).

W.M.Landes and R.A.Posner 'The Positive Theory of Tort Law' 15 Georgia Law Review (1981) 851.

J.H.Langbein 'Albion's Fatal Flaws' 98 Past and Present (1983) 96.

J.Larrain The Concept of Ideology (1979).

M.S.Larson The Rise of Professionalism, a Sociological Analysis (1977).

L.E.Levinthal 'The Early History of Bankruptcy Law' 66 University of Pennsylvania Law Review (1918-19), p.223.

C.Levi-Straus Structural Anthropology (1968).

R.Lewis 'Contracts between Businessmen: Reform of the Law of Firm Offers and an Empirical Study of Tendering Practices in the Building Industry' 9 Journal of Law and Society (1982) 153.

P.Linebaugh 'Eighteenth Century Crime, Popular Movements and Social Control' 25 Bulletin of Society for the Study of Labour History (1972).

P.Linebaugh 'The Tyburn Riots against the Surgeons' in ed. D.Hay et al, Albion's Fatal Tree (1975)(1977),p.65.

K.Llewelyn The Bramble Bush (1930)(1951).

J.B.Lodahl and G.Gordon 'The Structure of Scientific Fields and the Functioning of University Graduate Departments' 37 The American Sociological Review (1972),p.57.

C.G.Luckhart 'Beyond Knowledge: Paradigms in Wittgenstein's Later Philosophy' 39 Philosophy and Phenomenological Research (1978),p.240.

S.Macaulay 'Non-Contractual Relations in Business' 28 American Sociological Review (1963) 45.

N.McKendrick, J.Brewer and J.H.Plumb (eds) The Birth of a Consumer Society: the Commercialization of Eighteenth Century England (1982).

C.B.MacPherson The Political Theory of Possessive Individualism (1962) (1972).

Sir H.J.Maine Ancient Law(1861) Everyman edition (n.d.).

S.Marriner 'Accounting Records in English Bankruptcy Proceedings to 1850' 3 Accounting History (1978),p.4.

S.Marriner 'English Bankruptcy Records and Statistics before 1850' 33 Economic History Review (1980),p.351.

D.Marshall English People in the 18th Century (1956)(1969).

M.Masterman 'The Nature of a Paradigm' in eds. I.Lakatos and A.Musgrave Criticism and the Growth of Knowledge (1970)(1981),p.59.

K.Marx The Eighteenth Brumaire of Louis Bonaparte(1926).

P.Mathias The First Industrial Nation (1969)(1978).

G.H.Mead 'The Psychology of Punitive Justice' 23 American Journal of Sociology (1918),p.591.

P.Medd Romilly: a Life of Sir Samuel Romilly, Lawyer and Reformer (1968).

R.K.Merton On Theoretical Sociology (1949)(1967).

A.Miller The Crucible (1953)(1868).

W.R.Miller (Review) 29 Economic History Review (1976), p.704.

B.R.Mitchell Abstract of British Historical Statistics (1962).

R.J.Morris Class and Class Consciousness in the Industrial Revolution 1780-1850 (1979).

R.Munday 'A Legal History of the Factor' 6 Anglo-American Law Review (1977),p.221.

A.E.Musgrave 'Kuhn's Second Thoughts' 22 British Journal of the Philosophy of Science (1971),p.287.

D.Nelken 'Is there a Crisis in Law and Legal Ideology?' 9 Journal of Law and Society (1982),p.177.

J.C.Oldham 'Origins of the Special Jury' 50 University of Chicago Law Review (1983), p.137.

J.C.Oldham 'Special Juries: 18th and 19th Century Usage and Reform' unpublished paper delivered at The Conference on the History of Law, Labour and Crime, University of Warwick, 1983.

E.A.Parry The Law and the Poor (1914).

E.Partridge Penguin Dictionary of Historical Slang (1980).

E.H.Partridge Slang Today and Yesterday (1933).

E.B.Pashukanis 'The General Theory of Law and Marxism' in eds. P.Beirne and R.Sharlet Pashukanis: Selected Writings on Marxism and Law (1980),p.37.

P.L.Payne British Entrepreneurship in the Nineteenth Century (1974)(1978).

J.G.Peristiany (ed.) Honour and Shame (1965).

D.Philips 'Good Men to Associate and Bad Men to Conspire: Associations for the Prosecution of Felons in England 1770-1860' unpublished paper delivered at the Conference on the History of Law, Labour and Crime, The University of Warwick, 1983.

D.Philips ' "A New Engine of Power and Authority" : the Institutionalization of Law-Enforcement in England 1780-1830' in eds. V.A.C.Gatrell et al Crime and Law: the Social History of Crime in Western Europe since 1500 (1980).

J Piaget Structuralism (1968)(1973).

J.Pitt-Rivers 'Honour and Social Status' in ed.J.Peristiany Honour and Shame (1965).

L.Pearce Williams 'Normal Science, Scientific Revolutions and the History of Science' in eds. I.Lakatos and A.Musgrave Criticism and the Growth of Knowledge (1970)(1981), p.49.

T.F.T.Plucknett A Concise History of the Common Law 5th edition (1956).

J.H.Plumb England in the 18th Century (1950)(1979).

J.G.A.Pocock 'Early Modern Capitalism - the Augustan Perception' in eds. E.Kamenka and R.S.Neale Feudalism, Capitalism and Beyond (1975), p.62.

F.Pollock and F.Maitland History of English Law 2nd edition (1968).

R.Porter English Society in the Eighteenth Century (1982).

L.S.Pressnell Country Banking in the Industrial Revolution (1956).

W.Prest 'Why the History of the Professions is not Written' in eds. G.R.Rubin and D.Sugarman Law, Economy and Society: Essays in the History of English Law, 1750-1914 (1984), p.300.

A.R.Radcliffe-Brown Taboo (1939).

G.Radnitzky Contemporary Schools of Metascience (1973).

K.Renner The Institutions of Private Law and their Social Functions (1949)(1976).

A Revised Framework for Insolvency Law, Department of Trade and Industry, Cmnd.9175, Feb.1984.

M.Rheinstein Max Weber on Law in Economy and Society (1954)(1969).

P.Rock 'Some Problems of Interpretative Historiography' 27 British Journal of Sociology (1976),p.353.

A.G.Roeber 'Authority, Law and Custom: the Rituals of Court Day in Tidewater Virginia, 1720 to 1750' 47 William and Mary Quarterly (1980)29.

G.R.Rubin 'The County Courts and the Tally Trade, 1846-1914' in eds. G.R.Rubin and D.Sugarman Law, Economy and Society: Essays in the History of English Law, 1750-1914 (1984),p.321.

G.R.Rubin and D.Sugarman (eds.) Law, Economy and Society: Essays in the History of English Law 1750-1914 (1984).

G.R.Rubin 'Law, Poverty and Imprisonment for Debt, 1869-1914' in eds. G.R.Rubin and D.Sugarman Law,Economy and Society: Essays in the History of English Law, 1715-1914 (1984).

J.Ruud Taboo (1960).

S.Scull and A.Cohen (eds.) Social Control and the State (1983).

D.Shapere 'The Structure of Scientific Revolutions' 73 Philosophical Review (1964), p.383.

A.P.Simmonds Karl Mannheim's Sociology of Knowledge (1978).

A.W.B.Simpson 'The Horwitz Thesis and the History of Contract' 46 University of Chicago Law Review (1979)533.

G.Sinko 'Samuel Foote - The Satirist of Rising Capitalism' 47A Prace Wroclawskiego Towarzystwa Navkowego (1950) (in English).

J.C.Smith and B.Hogan Criminal Law. Cases and Materials (1975)(1980).

R.Starn 'Historians and Crisis' 52 Past and Present (1971),p.3.

R Stevens Law and Politics. The House of Lords as a Judicial Body 1800-1976 (1978).

J.Styles 'Controlling the Outworker: the Embezzlement Laws and Industrial Outwork in Eighteenth Century England' unpublished paper delivered at the Conference on the History of Law, Labour and Crime, the University of Warwick, 1983.

D.Sugarman, J.N.J.Palmer and G.R.Rubin 'Crime, Law and Authority in Nineteenth Century Britain' 2 Middlesex Polytechnic History Journal (1982) 28.

D.Sugarman 'Law, Economy and the State in England, 1750-1915: Some Major Issues' in ed. D.Sugarman Legality, Ideology and the State (1983),p.213.

D.Sugarman (ed.) Legality, Ideology and the State (1983).

D.Sugarman 'Theory and Practice in Law and History' in ed. R.Fryer et al Law, State and Society (1981), p.70.

D.Sugarman and G.R.Rubin 'Towards a New History of Law and Material Society in England, 1750-1914' in eds. G.R.Rubin and D.Sugarman Law, Economy and Society: Essays in the History of English Law, 1750-1914 (1984),p.1.

F.Suppe 'The Search for Philosophic Understanding of Scientific Theories' in ed. F.Suppe The Structure of Scientific Theories (1974).

F.Suppe (ed.) The Structure of Scientific Theories (1974).

'Synopsium of Change in the Common Law: Legal and Economic Perspectives' 9 Journal of Legal Studies (1980) 189.

D.Thompson England in the 19th Century (1950)(1977).

E.P.Thompson 'The Crime of Anonymity' in eds. D.Hay, P.Linbaugh et al Albion's Fatal Tree (1975)(1977).

E.P.Thompson 'Eighteenth Century English Society - Class Struggle without Class' 3 Social History (1978),p.133.

E.P.Thompson The Making of the English Working Class (1963)(1980).

E.P.Thompson 'The Moral Economy of the English Crowd in the 18th Century' 50 Past and Present (1971),p.76.

E.P.Thompson 'Patrician Society, Plebeian Culture' 7 Journal of Social History (1974),p.382.

E.P.Thompson 'The Poverty of Theory' in E.P.Thompson The Poverty of Theory and Other Essays (1978).

E.P.Thompson Whigs and Hunters (1977).

A.Thomson 'Law and the Social Sciences - the Demise of Legal Autonomy' unpublished paper, delivered at the Conference of Critical Legal Scholarship, The University of Kent at Canterbury, 1981, p.45.

M.E.Tigar Law and the Rise of Capitalism (1977).

J.J.Tobias Crime and Industrial Society in the 19th Century (1967).

G.M.Trevelyan English Social History (1942)(1980).

W.Twining Karl Llewelyn and the Realist Movement (1973).

R.M.Unger Law in Modern Society New York (1976)(1977).

J.Urry 'Thomas S.Kuhn as a Sociologist of Knowledge' 24 British Journal of Sociology (1973), p.462.

K.Van Wezel Stone 'The Post-War Paradigm in American Labour Law' 90 Yale Law Journal (1981),p.1509.

K.J.Vandevelde 'The New Property of the *Nineteenth Century*: the Development of the Modern Concept of Property' 29 Buffalo Law Review (1980),p.325.

J.Walter 'Grain Riots and Popular Attitudes to the Law' in eds. J.Brewer and J.Styles An Ungovernable People (1980), p.47.

R.Warrington 'Pashukanis and the Commodity Form Theory' in ed. D.Sugarman Legality, Ideology and the State (1983), p.43.

J.Watkins 'Against Normal Science' in eds. I. Lakatos and A.Musgrave Criticism and the Growth of Knowledge (1970)(1981),p.25.

M.Weber ' "Objectivity" in Social Science and Social Policy' 50 The Methodology of the Social Sciences (1941), p.101.

M.Weber The Protestant Ethic and the Spirit of Capitalism (1930)(1978).

M.Weber The Theory of Social and Economic Organization (1947).

M.J.Weiner (ed) 'Humanitarianism or Control? A Symposium on Aspects of Nineteenth - Century Social Reform in Britain and America' 67 (1) Rice University Studies (1981) 1.

E.Welbourne 'Bankruptcy Before the Era of Victorian Reform' 4 Cambridge Historical Journal (1932-4), p.51.

R.B.Westerfield Middlemen in English Business Particularly between 1660 and 1760 Yale (1915).

G.E.White Tort Law in America (1980).

G.E.White 'Truth *and Interpretation* in Legal History' 79 Michigan Law Review (1981),p.594.

K.Williams and D.Lewis 'The Aftermath of Tribunal Reinstatement and Re-engagement' Research Paper no.23, Department of Employment, June 1981.

K.Williams 'Unfair Dismissal: Myth and Statistics' 12 Industrial Law Journal (1983) 157.

C.Wilson 'The Entrepreneur in the Industrial Revolution in Britain' in C.Wilson Economic History and the Historian: Collected Essays (1969) p.156.

L.Wittgenstein Philosophical Investigations (1953)(1981).