The History of Imprisonment for Debt and its Relation to the Development of Discharge in Bankruptcy

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Imprisonment for debt occupied a prominent place in English law for over six hundred years, yet surprisingly little is known about how, when, and why it was used. Although imprisonment for debt was a topic of great concern to nineteenth-century authors and social critics such as Dickens, it remains in many respects a historical puzzle to modern lawyers who understand personal bankruptcy rather than civil imprisonment to be the characteristic method of adjudicating the rights and liabilities of insolvent debtors.

This paper examines the origins and development of imprisonment for debt, and attempts to explain why the practice persisted until the mid-nineteenth century despite the

"It strikes me, Sam," said Mr. Pickwick, leaning over the iron-rail at the stairhead, "It strikes me, Sam, that imprisonment for debt is scarcely any punishment at all."

"Think not, sir?" inquired Mr. Weller.

"You see how these fellows drink, and smoke, and roar," replied Mr. Pickwick. "It's quite impossible that they can mind it much."

"Ah, that's just the very thing, sir," rejoined Sam, "they don't mind it; it's a regular holiday to them—all porter and skittles. It's the t'other vuns as gets done over, with this sort o' thing; them down-hearted fellers as can't svig away at the beer, nor play at skittles neither; them as would pay if they could, and gets low by being boxed up. I'll tell you wot it is, sir; them as is always a idlin' in public-houses it don't damage at all, and them as is always a workin' when they can, it damages too much 'It's unekal,' as my father used to say wen his grog warn't made half-and-half: 'It's unekal, and that's the fault on it.'"

—Charles Dickens, The Pickwick Papers
availability of a modern form of bankruptcy from the early eighteenth century. Parliament enacted the earliest bankruptcy statutes in the mid-sixteenth century, but eighteenth-century statutes first provided for the discharge of debts. The ability to obtain discharge was confined to “traders,” persons who earned their living by “buying and selling,” nontraders were ineligible for debt. The perpetuation of this distinction between traders and nontraders until the mid-nineteenth century seems in retrospect the most curious aspect of the history of imprisonment for debt.

I. The Early History of Imprisonment for Debt

Imprisonment for debt did not exist in the earliest period of common law. A plaintiff could not procure the arrest of his alleged debtor either in advance of suit or after judgment. The plaintiff's execution remedies were the writs of fieri facias and levans facias. The former directed the sale of goods and chattels, the latter allowed the rents and profits of the judgment debtor's lands to be seized and applied to the satisfaction of the debt. In high feudal theory, arrest of the person was prohibited because of his obligation to serve his lord. Similarly, lands were thought to be immune from execution in order not to impose a tenant on the lord.

The first statute authorizing the detention of a defendant upon initiation of a civil suit was the Statute of Marlbridge (1267). The provision dealt with an isolated case, a lord's arrest of his bailiff who failed to make an accounting. The act authorized the bailiff's arrest pending trial, providing that the bailiff owned no land. When such pretrial detention was extended to other types of cases, it became known as imprisonment upon mesne process.

The act of 1267 did not provide for the detention of the bailiff once he had been adjudicated to be liable. Fifteen years later, the statute of Acton Burnel (1283 or 1285) provided not only for the arrest but also for imprisonment of a merchant's debtor. The statute allowed the merchant to bring his debtor before an official to have the debts and due date formally acknowledged. If the due date expired without payment of the debt the official could attach and sell the debtor's chattels to raise the sum owed. A debtor without property could be imprisoned until he reached a composition with his creditor. The creditor could insist on the continued confinement of the debtor as long as the creditor contributed to the prisoner's subsistence.

The Statute of Merchants (1285) expanded the merchant creditor's power to imprison the debtor after judgment by providing for confinement regardless of whether or not the debtor possessed sufficient chattels to satisfy his debt. In the same year the Statute of Westminster II gave the feudal lord similar power to detain his debtor until a composition was reached. Succeeding statutes extended imprisonment for debt to all actions in debt and detinue, actions on the case, and actions in annuity and covenant.

The introduction of imprisonment for debt into the common law significantly increased the creditor's coercive power over a debtor. The Statute of Acton Burnel identified the coercive purpose, stating that imprisonment of a debtor should continue until he "made agreement (with his creditors) or his freinds for him." Confine ment was meant to compel payment of the debt, not as punishment for the previous failure to pay.

This coercive imprisonment can be distinguished from two other uses of imprisonment recognized by medieval jurists. Custodial (or preventative) imprisonment was interlocutory, to prevent flight prior to adjudication of the dispute. Imprisonment upon mesne process illustrates the private-law use of this form of imprisonment. In the other use of imprisonment, called penal or punitive, the defendant was confined following adjudication as a sanction for committing the prohibited act. Penal imprisonment is usually associated only with criminal proceedings.

Within this framework, imprisonment for debt stands out as a typical form of coercive imprisonment. Although it might be argued that imprisoning the debtor had punitive overtones, the coercive purpose predominated, since the defendant could always terminate the imprisonment by paying the debt.

II. The Origins of Bankruptcy

By the early fourteenth century debtors had devised various means of evading coercive imprisonment. The ancient taking refuge in a sanctuary enabled a debtor to immunize himself from arrest or imprisonment by remaining within a protected enclave. Simple flight, if successful, enabled a debtor to depart from the kingdom without repaying his creditors, but exile was a high cost. An absconding debtor could be deemed an outlaw, which would result in the escheat of his possessions, if any, to the Crown; in that case, the creditor received nothing unless he specially petitioned the King for a share of the assets. A debtor could "keep house," since the common law forbade entry into a man's house for the purpose of executing civil process, ostensibly on account of the maxim that "a man's house is his castle."

Debtors' ability to circumvent imprisonment gave rise to the earliest bankruptcy law. Although the modern conception of bankruptcy is rateable distribution of the bankrupt's assets among his creditors (resulting in the discharge of the bankrupt's obligation to pay existing debts), the original purpose was simply to facilitate execution against a debtor. The bankruptcy act of 1542 authorized the Chancellor and other bankruptcy commissioners, on petition of the creditor, to summon the bankrupt before them, examine the bankrupt upon his oath, and if necessary imprison him until he forfeited his
possessions. The bankrupt’s estate was distributed by the Chancellor; however, distribution did not discharge the bankrupt’s liability for claims that were not fully paid.

The bankruptcy procedure prescribed by the Elizabethan act proved inadequate to deter the fraudulent debtor, and in 1570 Parliament promulgated a new statute which attempted to prevent the prevalent frauds perpetrated by debtors. The 1570 act also changed the definition of who could be declared a bankrupt. The statute narrowed the definition of a bankrupt to include only traders and merchants, persons who earned their living by “buying and selling.” A debtor who fell outside this definition, a non-trader, could not be declared a bankrupt.

The Elizabethan statute formed the cornerstone of bankruptcy law for well over a century. Despite its coercive provisions, the statute did introduce a fundamental aspect of modern bankruptcy law, the equal distribution of the bankrupt’s assets among his creditors. The Case of Bankrupts, decided in 1584, discussed this aspect of the 1570 statute. The Court stated that the intent of the statute “was to relieve the creditors of the bankrupt equally, and that these should be on equal and rateable proportion observed in the distribution of the bankrupt’s goods against the creditors.”

The other principal characteristic of modern bankruptcy law, discharge of the bankrupt’s existing liabilities, did not enter the law until the early eighteenth century. An act of 1705 provided that traders who complied with it would be relieved of liability upon existing debts. The statute also reserved an allowance of five per cent of the estate to the bankrupt.

The 1705 act, like much legislation of the time, contained a “sunset” provision setting a date for its expiration, but subsequent bankruptcy statutes re-enacted the provision for discharging the bankrupt’s liability upon existing debts. Because discharge provided limited liability for the bankrupt, it gave him a strong incentive to submit voluntarily to bankruptcy proceedings.

Discharge in bankruptcy was a change of great importance and novelty. Holdsworth believes that it was devised in response to mercantile difficulties existing immediately prior to the passage of the 1705 act, although he was not able to locate explicit evidence of legislative intent. He follows the explanation of Lord Hardwicke in *Ex parte Burton* (1744) who claimed that the statute of 1705 “which was temporary at first, and never intended to be a perpetual law . . . was made in consideration of two long wars which had been very detrimental to traders, and rendered them incapable of paying their creditors.”

The early statutes do not, however, disclose any particular Parliamentary concern with limiting the liability of traders. The primary purpose of the 1705 act, titled “An Act to Prevent Frauds Frequently Committed by Bankrupts,” was said to be the familiar one of protecting creditors from fraudulent debtors. The preamble asserted that bankruptcy was caused “not so much by reasons of losses and unavoidable misfortunes,” but rather by an “intent to defraud and hinder (creditors) of their just debts and duties to them due and owing.”

Similar language can be found in the bankruptcy acts of 1718 and 1732. This language suggests that discharge developed more out of a wish to induce traders to submit voluntarily to bankruptcy proceedings for the benefit of creditors than out of a concern to limit the liability of debtors embarrassed as a result of wartime hardship.

Whatever the motivation behind the discharge provisions, once enacted they served the crucial function of granting a new start to the insolvent trader. This grant of limited liability really changed the character of bankruptcy from a creditor’s remedy to a relief benefiting insolvent traders.

III. Relief for the Insolvent Debtor

Coercive imprisonment provided a powerful remedy to the creditor but, from the outset, the statute law authorizing him to imprison his debtor drew no distinction between solvent and insolvent debtors. Critics of the law of imprisonment for debt pointed out that it was paradoxical to confine a debtor who lacked assets for the ostensible purpose of compelling him to pay his debts. One seventeenth-century tract argued that it was “not agreeable to the Rule of Justice, to thrust all kind of Debtors into prison together in a heap, without respect to (their) . . . more or less guilt of fraud or obstinacy.” Beginning in the late sixteenth century, the Privy Council and Parliament had developed various means for distinguishing between the solvent and insolvent debtor, in order to relieve somewhat the latter.

The bankruptcy statutes of 1542 and 1570 imposed severe penalties upon the debtor who sought to evade imprisonment by flight or keeping house, but by the last quarter of the sixteenth century another course of avoiding imprisonment could be followed. The debtor could petition the Privy Council to help him settle his dispute with his creditors. Dawson has observed that “the largest class of (private) litigation dealt with by the Tudor and Stuart Privy Councils was concerned with aid to debtors.” The Elizabethan Council established Commissions for Poor Prisoners, in order to secure the release of insolvent debtors. The first commission, established in 1576 and staffed by the Chief Justices of Queen’s Bench

“Critics of the law of imprisonment for debt pointed out that it was paradoxical to confine a debtor who lacked assets for the ostensible purpose of compelling him to pay his debts.”
and Common Pleas, the Master of the Rolls, and other high royal officials, sat at Queen's Bench prison. The commission had the power to examine the debtor and his creditors for the purpose of arranging a composition which resulted in the imprisoned debtor's release. Creditors routinely acceded to the proposed settlement, and those who did not could be summoned before the commission or Council to give reasons for their refusal.

The commission's mediation could result in the discharge of the debtor's liability. This was the most interesting aspect of the commission's work since, as we have seen, bankruptcy did not discharge the insolvent trader until the early eighteenth century, nearly a century after these commissions ceased to function. Indeed, such discharge would not be available to a non-trading debtor until the mid-nineteenth century.

The commission came into existence to relieve the prisons of a growing contingent of insolvent debtors who had become "a national problem which political agencies could not ignore." The commission ceased to be active after the 1590s, and Dawson, "in the absence of direct evidence," attributes its demise to the "doubtful legality of the commission's powers, which created great difficulty in protecting it against attacks in the common law courts." The commission represented the most lenient policy towards the insolvent debtor for several centuries to come.

In 1649 the Interregnum Parliament passed the first statute providing for the release of the imprisoned insolvent debtor. The act became a model of parliamentary attempts at debtors' relief for the following century. The statute provided for an imprisoned debtor's release upon his oath that his assets did not exceed five pounds (exempting some basic necessities), and that he had not transferred any part of his estate in trust for his own benefit. The liberated debtor did not, however, receive a discharge from his debts; a creditor could sue out a new execution against goods and chattels the debtor might acquire after his release.

A statute passed in 1670 also provided for the liberation of imprisoned debtors. One provision of the 1670 act underscored the essentially coercive nature of imprisonment for debt: a creditor could insist on the continued detention of a debtor even if the creditor could not dispute the veracity of his debtor's oath, so long as the creditor paid a weekly fee for the debtor's subsistence.

The 1670 statute applied only retrospectively to prisoners already confined. The first statute applicable prospectively to debtors imprisoned subsequently was enacted in 1759, although many retrospective acts had been passed in the interval. The 1759 act, commonly referred to as the Lord's Act, established essentially the same procedure for the prisoner's release as did the acts of 1649 and 1670. After taking an oath alleging that he had not conveyed or entrusted his assets, the debtor assigned his assets to the creditors who held judgments against him. If the debtor's assets did not satisfy his debts, each creditor received a proportional share of the available proceeds while retaining the right to sue out a future writ of execution to recover the balance. As under the earlier statutes, any creditor could insist upon continuing a debtor's imprisonment so long as the creditor paid a weekly subsistence allowance.

The Lord's Act in contrast to earlier statutes contained a "compulsory clause" which gave a creditor the option of forcing his imprisoned debtor to prepare a schedule of his assets. The clause was aimed at the debtor who would "rather spend (his) subsistence in prison than discover and deliver up the same towards satisfying (his) creditors just debts." If the debtor complied with the creditor's request he would be released, but if he refused he could be transported to America for a term of several years. A debtor who falsified his schedule of assets would be punished for perjury.

The Lord's Act was the result of over a century of parliamentary efforts to provide relief for insolvent debtors, but it did relieve the essentially coercive character of the imprisonment itself. In one sense the statute significantly increased creditors' power over debtors, since the compulsory clause enabled creditors to insist upon payment from solvent debtors who had previously retained the option of accepting imprisonment rather than tendering payment. Although the Act obviously benefited debtors, it was also designed to compel repayment of debts, since gainfully employed debtors could repay creditors sooner than imprisoned ones. Parliament had come to resist the futility of imprisoning truly insolvent debtors in order to coerce them to pay their debts.

The procedures prescribed by the Lord's Act did not significantly differ from those of contemporary bankruptcy legislation for so-called traders. A debtor-trader seeking discharge in bankruptcy could be examined concerning the extent of his assets, and required to transfer his assets to his creditors. If his estate proved to be inadequate to satisfy his entire debt the creditors received a pro rata share of available proceeds.

The critical difference between the bankruptcy and insolvency schemes, however, was that while the bankrupt's surrender of his available assets discharged his liability to creditors, the insolvent nontrader remained obliged to pay the balance of his judgment debt after his release. The remainder of this paper will examine the reasons underlying the differing statutory treatment of the trading and non-trading debtor.

IV. The Distinction between the Liability of the Trading and Non-Trading Insolvent

Two basic reasons can be put forth for the failure of the Lord's Act and other insolvency statutes of the late eighteenth and early nineteenth centuries to extend discharge of debts from bankruptcy to the law of insolvency, or differently expressed, for the retention in bankruptcy of the limitations to traders. First, contemporary perceptions of the nature of trade, credit, and mercantile risk were felt to justify discharging the bankrupt trader, but not the insolvent non-trader. Second, 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 liabil-
ity, which needed to be restricted to the true entrepreneur.

The law of bankruptcy provided unconditioned discharge of existing liability, but only for traders. Accordingly the question of who could be considered a trader was litigated throughout the eighteenth and early nineteenth centuries.\(^6\) The common law courts and the Chancellor gradually expanded the definition of a trader throughout this period to include occupations not obviously falling within the category of individuals seeking their living by buying and selling, such as butchers, ships' carpenters, master tailors, and brickmakers.\(^6\) By contrast, innkeepers, tailors, and common labourers were excluded.\(^6\)

The cases deciding the scope of the definition of a trader did not address the underlying question of why bankruptcy should be restricted to the trader and exclude the non-trader. Contemporary commentators\(^9\) and modern authorities\(^10\) have assumed that the correct answer was supplied by Blackstone:

But [the laws] are cautious of encouraging prodigality and extravagance by this indulgence to debtors; and therefore they allow the benefit of the laws of bankruptcy to none but actual traders; since that set of men are, generally speaking, the only persons liable to accidental losses, and to an inability of paying their debts, without any fault of their own. If persons in other situations of life run in debt without the power of payment, they must take the consequences of their own indiscretion, even though they meet with sudden accidents that may reduce their fortunes: for the law holds it to be an unjustifiable practice, for any person but a trader to encumber himself with debts of any considerable value. If a gentleman, or one in a liberal profession, at the time of contracting his debts, has a sufficient fund to pay them, the delay of payment is a species of dishonesty, and a temporary injustice to his creditor: and if, at such time, he has no sufficient fund, the dishonesty and injustice is the greater. He cannot therefore murmur, if he suffers the punishment which he has voluntarily drawn upon himself. But in mercantile transactions the case is far otherwise. Trade cannot be carried on without mutual credit on both sides: the contracting of debts is therefore here not only justifiable but necessary. And if by accidental calamities, as by loss of a ship in a tempest, the failure of brother traders, or by the nonpayment of persons out of trade, a merchant or trader becomes incapable of discharging his own debts, it is his misfortune and not his fault.\(^7\)

Blackstone's restrictive view of credit appears to have been widely held in the eighteenth century. Only traders faced an enterprise risk which justified limited liability, hence non-traders should be excluded from discharge in bankruptcy. As Crompton stated in his eighteenth-century treatise on practice and procedure, "If persons in other stations of life (non-traders) will run into debt without the power of judgment, the legislature has wisely left them to take consequences of their own indiscretion.\(^7\) Parliament had restricted discharge to traders in order to be "cautious of encouraging prodigality and extravagance" on the part on non-traders.

Blackstone also observed the commercial advantages conferred upon traders by bankruptcy. He recognized the need to grant limited liability to traders, since trade could not "be carried on without mutual credit on both sides." Traders by necessity contracted debts and could become incapable of fulfilling their obligations because of "accidental calamities . . . , the failure of brother traders, or by the non-payment of persons out of trade."\(^7\) Therefore traders should be discharged of existing liability so that "by the assistance of . . . allowance and industry, (they) may become . . . useful member(s) of the Commonwealth."\(^7\) It was in the general interest of commerce to make this form of limited liability available to persons undertaking mercantile endeavors.

Limited liability is a concept that modern lawyers associate with incorporation,\(^7\) but in the eighteenth and early nineteenth centuries bankruptcy provided the only generally available means for a merchant to limit his personal liability. General incorporation of commercial enterprises was not allowed in England until the middle of the nineteenth century.\(^7\) Although joint stock companies, the earliest corporate form, could be traced back to the seventeenth century, they were not numerous and depended upon a royal charter or private act of Parliament for their existence.\(^7\) Incorporation had been a disfavored form of commercial association at least from the time of the so-called Bubble Act of 1725,\(^7\) which remained in effect for more than a century.

The disinterest in using the corporate form can also be attributed to the failure among contemporaries to appreciate that incorporation could effectively shield the corporation's members from personal liability. Blackstone's description of the "powers, rights, capacities, and incapacities" of the corporation included perpetual succession and the right to sue and be sued, but did not include limited liability.\(^8\) The leading modern treatise on English company law observes that "(r)ather
corporation statute bankruptcy provided the trader with a means of achieving limited liability for his commercial affairs. Bankruptcy served as a surrogate for the modern corporate form; it had the effect of restricting discharge for debtors who had borne enterprise risk. This function of bankruptcy underlies Blackstone’s justification for restricting discharge to traders. Although Blackstone did not know the corporate alternative, he discussed bankruptcy in terms that remind modern readers of the customary justifications for general incorporation—to facilitate mutual credit and to encourage the taking of enterprise risks. Non-traders, on the other hand, encumbered themselves without taking commercial risks that might justify limited liability.9

V. The Later History of Imprisonment for Debt

The distinction between traders and non-traders was maintained in the bankruptcy law until the middle of the nineteenth century. Insolvent traders continued to be discharged of liability whereas insolvent non-traders were remanded to imprisonment for debt or possible relief through the insolvent law. However, two developments of the late eighteenth and early nineteenth centuries lessened the distinction in some cases. The courts gradually developed a more expansive definition of traders that made greater numbers of debtors eligible for discharge in bankruptcy. At the same time philanthropic organizations attempted to discharge the liability of insolvent non-traders.

The courts broadened their definition of trading in the late eighteenth and early nineteenth centuries to include a greater number of activities and occupations.98 Blackstone had declared that only an “industrious”99 trader would be eligible for bankruptcy and therefore “one single act of buying and selling will not make a man a trader; but a repeated practice (of buying and selling) and profit by it.”100 But in Ex parte Moule (1808),101 Lord Eldon stated that infrequent acts of trading would suffice to qualify the insolvent as a bankrupt if he demonstrated an intent to deal more generally.102 Other cases held that the extent of the bankrupt’s profits could not determine his status as a trader.103 Thus, writing less than fifty years after Blackstone, a leading authority on bankruptcy could conclude that in order to qualify as a trader an individual need only have “bought once and sold once, with an intention to buy and sell again like other traders in that line of business. I should think that the singular act of buying and selling would have the effect of ten thousand such acts.”104

Although only a trader could obtain a discharge in bankruptcy, some non-traders obtained not only release from imprisonment, but discharge as well because of the activities of the Society for the Discharge and Relief of Persons Imprisoned for Small Debts.95 Founded in 1772, the Society, commonly referred to as the Thatched House Society, attempted to secure the liberty of petty-sum debtors who could become productive upon their release. Although the Society would expend no more than £10 to obtain the release of a debtor, it was able to liberate more than 15,000 debtors in the last quarter of the eighteenth century.105 Moreover, by arranging composition with a debtor’s creditors, the Society obtained not only the debtor’s release but his discharge from existing liability as well.106 Imprisonment for debt remained the characteristic remedy against an insolvent debtor despite the more liberal definition of a trader and the philanthropic activities of the Thatched House Society. In 1792 the Sheriff of Middlesex testified before a Parliamentary Committee established to “enquire into the Practice and Effects of Imprisonment for Debt”107 that over nine hundred debtors were sent to prison each year in his county, exclusive of London, for failure to pay their creditors.108

The insolvency laws of the first half of the nineteenth century perpetuated the distinction between the discharged bankrupt and the discharged insolvent. An act of 1808109 enabled an imprisoned debtor who owed less than £20 and had been confined for one year to obtain his immediate release, but subject to continued liability upon his debt.110 In 1813 Parliament enacted a new scheme111 that established a Court of Relief of Insolvent Debtors to hear prisoners’ petitions for release.112 The procedure of the court closely resembled bankruptcy procedure, calling for transfer of the debtor’s property to an assignee who had responsibility for the prorata payment of creditors. However, the debtor, unlike the bankrupt, remained liable for his unsatisfied obligations. A statute of 1844113 abolished imprisonment for judgments of less than £20, but the law retained the creditor’s right to execute a new writ of execution against the debtor’s future assets.

In 1861 Parliament finally merged bankruptcy and insolvency.114 By statute it authorized bankruptcy proceedings for the non-trader as well as the trader. The legislation abolished the Court for Relief of Insolvent Debtors and transferred its jurisdiction to the Court of Bankruptcy.115

The Debtors Act of 1869116 abolished imprisonment for debt and released the remaining imprisoned debtors. The statute retained civil imprisonment only for temporary confinement of petty debtors who were able to discharge their debts but refused to do so.117 The statute also provided punishment for fraudulent debtors.118 A companion Bankruptcy Act of 1880119 ended all distinctions between trading and non-trading debtors. After the promulgation of these statutes all insolvents who had contracted debts by non-fraudulent means could discharge their liability through personal bankruptcy.

Imprisonment for debt persisted for nearly three decades after a Parliamentary Commission’s “strongest recommendation” that it be abolished (along with the distinction
between trading and non-trading insolvents).111 Imprisonment for debt's resiliency can be traced to the eighteenth-century justifications for the practice that we have examined in some detail.112 Creditors were predictably reluctant to abandon the remedy. Even in 1869 a member of the House of Commons continued to argue for the retention of civil imprisonment in the same manner as centuries before.113 Perceptions of trade, credit, and risk of default gradually changed over the course of the nineteenth century and rendered obsolete Blackstone's sentiment that it was "an unjustifiable practice for any person but a trader to encumber himself with debts of any considerable value."114 Moreover, it was not until the acceptance of general incorporation with limited liability had taken place that the most compelling argument for ending the distinction between the bankrupt trader and the insolvent non-trader could be made.


2C. Dickens, Little Dorrit (1857); The Posthumous Papers of the Pickwick Club (1837); see other works cited in Louchheim, supra note 1 at 25-27.

3This is a term of art which was introduced in the Elizabethan bankruptcy statute of 1570, 13 Eliz., c.7.

4At one time there was some historical debate as to the scope of civil imprisonment. See Fox, "Process of Imprisonment at Common Law," 39 Law. Q. Rev. 46 (1923).


6See G. Crompton, Practice common-placed: or, the Rules and Cases of Practice in the Courts of King's Bench and Common Pleas, lvii (3rd ed. 1786) [hereinafter cited as Crompton].

752 Hen. 3, c.23 (1267).

81 or 13 Edw. 1 (1283, or 1285).

9Id. § 3.

10Id. § 14.

1113 Edw. 1, stat. 3 (1285).

1213 Edw. 1, stat. 1, c.11 (1285).

1325 Edw. 3, stat. 5, c.17 (1350).

1419 Hen. 7, c.9 (1503).

15The writ of annuity was invented in the late thirteenth century to collect rents which did not issue out of a particular piece of land. See Holdsworth, supra vol. 3, note 1 at 151-152.

1623 Hen. 8, c.14 (1531).

1711 or 13 Edw. 1, §14 (1283, or 1285).


19Langbein, supra note 19 at 38.

20See J. Nield, An Account of the Rise, Progress and Present State of the Society for the Discharge and Relief of Persons Imprisoned for Small Debts Through England and Wales 16 (1802), who stated that: "When one person causes another to be arrested, it is generally for the purpose of obtaining the debt: his demand therefore is of course expected to be satisfied, either by immediate payment, or by good security." [hereinafter cited as Nield].

21See Treiman, Escaping the Creditors in the Middle Ages, 43 Law Q. Rev. 230 (1927) [hereinafter cited as Treiman].

22Sanctuary, an institution with roots in Anglo-Saxon law, enabled an individual to take refuge without fear of arrest or criminal sanction. See 3 Holdsworth, supra note 1 at 303-307.

23Treiman, supra note 24 at 236.

24Id. at 233.

25The preamble to the bankruptcy act of 1542 stated: Where divers and sundry persons, craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any their creditors their duties, but at their own wills and pleasures consume debts and the substances obtained by credit of other men, for their own pleasure and delicate living, against all reason, equity, and good conscience. 34 & 35 Hen. 8, cap.4.


2734 & 35 Hen. 8, cap.4 (1542).


29Id. at 11-17.

3013 Eliz., cap.7.

31Id. The statute also reclassified the range of cognizable acts of bankruptcy.

32An explanation for the initial distinction between the trader and non-trader in bankruptcy has been suggested by Levinthal who stated that the distinction arose because "merchants were regarded as having peculiar facilities for delaying and defrauding creditors. The landed gentry of England were not subject to the law which was essentially punitive in nature." Levinthal, "The Early History of English Bankruptcy," 67 U. Pa. L. Rev. 1, 16 (1919).

Although Levinthal's explanation is presented as a bare conclusion, it does find support in the preamble to the bankruptcy statute of 1604: For that frauds and deceits, as new diseases, daily increase amongst such as live by buying and selling, to the hindrance of traffic and mutual commerce and to the general hurt of the realm by such as wickedly and willfully become bankrupts. 1 Jac. 1, c.15.

33Subsequent statutes enacted during the reign of James I altered the law but did not change its fundamentally punitive character. The act of 1604, 1 Jac. c.15, explicitly granted power to the bankruptcy commissioners to summon the bankrupt and examine him concerning his assets to determine if he was guilty of fraud. The statute of 1623, 21 Jac. 1, c.19, provided that if the debtor fraudulently concealed or conveyed his property to disrupt the bankruptcy proceedings, or if he could not prove that his bankruptcy arose solely because of commercial misfortune, he would "be set upon the pillory in some public place for the space of two hours and have one of his or her ears nailed to the pillory and cut off."

34Co. Rep. 25b (1584).

35Id. & 5 Anne, c.17 (1705).

36Id. § 7.

37Another temporary act was passed in 1718, 5 Geo. 1, c.24. The act of 1732, 5 Geo. 2, c.30, which was not temporary, provided for the bankrupt's discharge, but only with the consent of four-fifths of his creditors. A modern commentator has speculated that the approval clause was added because "people deliberately 'brought on' their own bankruptcies for the sake of getting rid of their liabilities." Levinthal, supra note 33 at 19, n.67.

381 Holdsworth, supra note 1 at 445.

391 Atk. 255 (Ch. 1744).

40Id.

41This was the title of the 1705 act, 4 & 5 Anne, c.17.

42Id.

435 Geo. 1, c.24 (1718).

445 Geo. 2, c.30 (1732).

45A Petition to the Kings Most Excellent Majesty, the Lords Spiritual and Temporal and Commons of the Parliament Now Assembled, Wherein is Declared the Mischiefs and inconveniences arising to the King and Commonwealth by the Imprisoning of mens bodies for Debt 11 (London, 1622).

Dawson I, supra note 51 at 410.


Dawson I, supra note 51 at 415-416 (text and footnotes).

Dawson believed that the commission's ability to secure compositions was due to the support given to it by the Council. Id. at 414. See note 54 supra.

Dawson I, supra note 51 at 415.

Id. at 416.


Id. at 241.

12 & 23 Car. 2, c.20 (1670).

This suggests that one of the primary motivations for the enactment of the statute was to insure decent prison conditions.

For a list of these statutes see R. Bevan, Observations on the Law of Arrest and Imprisonment for Debt 30-31 (London, 1781).

32 Geo. 2, c.28 (1759).

The creditor was forbidden, however, to bring a new action on the original debt, thereby causing the debtor to be arrested upon the same obligation. Id.

Id. §16.

Id.

Id. §17.

For a digest of the cases deciding who could be considered a trader, see E. Christian, The Origin, Progress and Present Practice of the Bankrupt Law, vol. 2, 5-45 (London, 1814) [hereafter cited as Christian]. A Succinct Digest of the Law Relating to Bankrupts 13-20 (Dublin, 1791) [hereafter cited as Succinct Digest].

The definition of a trader can be found in the Elizabethan bankruptcy statute, 13 Eliz. c.7 (1570).

These cases are abstracted in Christian, supra note 73 at 7-11.

Id.

Crompton, supra note 6 at kix-kxx; Succinct Digest, supra note 72 at 2.


Blackstone, supra, vol. 2, note 5 at *473-474 (emphasis original).

Crompton, supra note 6 at kix; see also Succinct Digest, supra note 73 at 2.

Blackstone, vol. 2, supra note 5 at *473.

Id. at *474.

Id. at *484.


| 96 Geo. 1, c.18 (1720). |

| 1 | Blackstone, supra note 5 at *463. |

Id. at 89-94."

For a list of these examples of the Warrley Company in 1788, and the Albion Flour Mill Company in 1784.

Note, supra note 89 at 81.

Cooke, supra note 88 at 92 concludes that "[t]he attitude of England towards formal joint stock towards the end of the eighteenth century may therefore be described as a reliance on charters and private Acts of Parliament." As to the disadvantages of the unincorporated association, see Gower, supra note 86 at 35-37.

78 & 9 Vict., c.110 (1844).

See Gower, supra note 86 at 40-45. Limited liability did not become a firmly established principle of English company law until 1855, and even then only after vigorous debate. 18 & 19 Vict., c.133 (1855). For the debate, see Gower at 44-50; Hunt, supra note 87 at 116-144.

Therefore only the trader could be liable to accidental loss; justified discharge. 2 Blackstone, supra note 74 at 474.

"To gain some insight into the increasingly expansive definition of a trader, compare the cases digested in E. Chitty, Chitty's Index to All the Reported Cases Decided in the Several Courts of Equity in England, vol. 1, 231-241 (4th ed. 1883) and R. A. Fisher, A Digest of the Reported Cases, vol. 1, 658-659 (1879) with Christian, supra note 73 at *545-S and Succinct Digest, supra note 73 at 13-20.

Blackstone, supra, vol. 2, note 5 at *476.

"Id. at *476.

14 Ves. 603 (Ch. 1800).

"Accord, Ex parte Bryan, 1 Ves. & B 211 (Ch. 1812) (Eldon, L.C.); Ex parte Megennis, 1 Rose 94 (Ch. 1811) (Eldon, L.C.)."

"Newland v. Bell, Holt 221, (1816)."

"Christian, supra note 73 at 41-42.

"See the comments about the Society in the 1792 Parliamentary Committee's report on imprisonment for debt at 47 H. C. Jour. 648 (1792). See also Nield, supra note 21 at 1-27.

"This estimate is based on the 12,590 prison-