

BANKRUPTCY, INSOLVENCY AND CORPORATE RESCUE

SOME NEWS AND VIEWS FROM UK ACADEMIA AND PRACTICE ON THE LAW, POLICY AND PRACTICE OF INSOLVENCY

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Credit: a brief history - without it there is no insolvency law!!

We have discussed various aspects of insolvency law and policy on this blog over the last two years. One area has however received scant attention. Without the area there would be no insolvency law as there would be no need to have a mechanism for the breakdown in the two party relationship between debtor and creditor. It is of course the area of credit that has been neglected. It is a necessary corollary of a society that bases much of its commercial



and personal financial transactions on credit that a system must exist to administer the casualties of that credit system.[\[1\]](#) It is only because of the use of credit that we find a need to develop a system of rules that deals with the consequences of a breakdown in the credit relationship.[\[2\]](#) Credit is not, however, inherently mischievous. Some would argue that it is not because of credit availability *per se* that we need insolvency laws, but because of the abuse of credit that we need mechanisms to administer insolvent estates, or perhaps more rightly to preclude such miscreant, abusive behaviour. As one eighteenth century commentator has observed, "...it is through the destructive practice of credit that all these baneful evils arise."[\[3\]](#) If a system exists to preclude abuse of credit perhaps abuses will be minimised. This credit relationship is a private

contractual relationship, but one that can have widespread consequences for individuals other than the original contracting parties.[\[4\]](#) This blog entry considers the rise in credit usage against the backdrop of the systems introduced to deal with credit failure over the course of English and Welsh legal history.[\[5\]](#)

It is not by dint of luck, but by legislative design, that many of the early bankruptcy statutes were enacted in the same Parliamentary session as statutes against usury, that is, lending at excessive rates of interest.[\[6\]](#) The two issues are inextricably linked throughout our commercial history.[\[7\]](#) This dual treatment of commerce, through the regulation of lending activity and regulating the outcome of failed lending relationships can only take place if credit is available. Credit availability was not, of course, always forthcoming, especially in a non-commercial setting.

Early society was based on barter, the simple exchange of goods between citizens. Credit did not exist, as we now know it.[\[8\]](#) As Levinthal has opined, "Credit is an institution that lives by virtue of man's confidence in his fellow-man's good faith."[\[9\]](#) Good faith is therefore a key ingredient in the credit relationship and because as Maine has observed early society and good faith were strangers,[\[10\]](#) we find little evidence of credit and systems to deal with its casualties. It has been observed that commercial credit was not in use at the time of *magna carta*,[\[11\]](#) or before; "Private credit, that bane of society, did not at that period exist, nor even some time after the conquest, exist in this country."[\[12\]](#) As Freedman observed, "Life then [1269] was primitive, trade undeveloped, and confidence was extended within the narrow compass of close intimacy and kinship."[\[13\]](#) Consequently, with this undeveloped market in credit, very early responses to debt default were largely non-existent until the thirteenth century. Saxon laws, we are told, had no mechanisms for dealing with debtors because contracts for credit were non-existent.[\[14\]](#) When the use of credit does start to become more widespread we see early jurisdictions taking an approach to failure based around the contention that if the creditor was misguided enough to lend to someone who would not repay, then he has to bear that loss due to his own carelessness.

It is not until the early modern period that we begin to see patterns of credit usage that we might recognise today. With agrarian society based on subsistence farming it is unsurprising to note that it is not really until the Tudor period that credit misuse becomes an issue that the legislature had to contend with. Even then this was only in the context of traders. As

Muldrew has observed, “following the population growth of the sixteenth century, increasingly complex networks of credit transactions were created...”^[15] As the Stuart period commences we begin to see greater expansion of trade and use of credit. It has been noted by Brooks that borrowing, lending and the use of credit was widespread during the early modern period, but there were “no centralised credit facilities such as banks.”^[16] International trade^[17] in the early years of James I’s reign had been buoyed by the activities of the Levant company and the East India company,^[18] and we are told that the effect of the Thirty Years’ War was to cause an increase in English commercial activity,^[19] although Ogilvie has opined that foreign wars brought both prosperity and, “were responsible for many bankruptcies.”^[20] The Protectorate apparently had the support of traders,^[21] and Charles II observed that, “The thing which is nearest the heart of the nation is trade and all that belongs to it.”^[22] Commerce was indeed, “the idol of Great Britain’s worship.”^[23] A natural corollary of trade, is credit, and of credit, is default upon the same. In a later age the importance of this relationship was highlighted by Dicey when he opined, “The welfare... of a mercantile community is dependent on the existence of a fair and effective law of bankruptcy.”^[24] The City of London was a great seat of trade during the seventeenth century and it exhibited vast political influence.^[25] The City’s lobbying activity in the field of commerce is also of note.^[26] The character of trade perhaps expectedly changed throughout the course of the seventeenth century. The European economies of the seventeenth century where trade occurred were “overwhelmingly agricultural”,^[27] but over time overseas expansion brought about changes in the pattern of credit use. Overseas trade facilitated a lengthening in credit extension periods.^[28] As a consequence, credit failure was also extant and more enhanced systems were needed to protect the debtor and provide recovery for the creditor.

There are both contemporary^[29] and modern^[30] sources on economic history and primary source material on seventeenth century life generally^[31] that enable a discussion of trade, debt and credit usage, and economic trends, covering both national and regional trends^[32] although one commentator has noted as late as 1996 that “Jacobean finance remains *terra incognita*.”^[33] There is some material, however, which is capable of examination and the “volatile commercial and agricultural economies of Stuart England”^[34] can be seen to form the backdrop of debt creation during the period under discussion. By determining how credit was used we can see how debt was created and then examine the responses to that over indebtedness. The facilitation of trade is perhaps one of the key drivers behind the reform of insolvency laws in a modern context and this may have historical antecedence.^[35] It might also have been a driver behind historical approaches to reform. If

traders were hampered in their objects they may be disgruntled and seek alternative forums in which to undertake their business activities.^[36] We are told that one trader, Richard Chambers noted in 1628, “merchants are in no part of the world so screwed and wrung as in England.”^[37] It is interesting to mull on the extent to which insolvency regulation contributed to feelings such as this, and how, if at all the legislature attempted to placate such sentiment. Contemporary texts such as Sir Josiah Child’s *New Discourse on Trade, inter alia*, are eminently useful in determining the contemporary opinions of traders. It has been noted by Brooks that borrowing, lending and the use of credit was widespread during the early modern period, but that there were “no centralised credit facilities such as banks.”^[38] It is a broad truism however, that in the seventeenth century, credit extension for reasons other than trade was frowned upon. This is borne out by the direction in which the bankruptcy and imprisonment for debt laws developed, but also by contemporary opinion. One commentator’s position on this sort of inter-personal lending can be seen in the 1636 writing of Powel. He observed, “...I descend lower to that practice of mutation, whereby we accommodate one another for our present necessity in money and other requisites.”^[39] By the mid-nineteenth century, attitudes to credit availability had perhaps not changed hugely, as is demonstrated by one editorial which was critical that a government committee could hold the view:

“that “credit” is absolutely necessary to all classes – to the Government and to the artisan, to the rich merchant, and to the tradesman- to the nobleman, and to the private gentleman.”^[40]

^[1] On the outcome of business failure in the eighteenth century see: Hoppit, J. *Risk and Failure in English Business: 1700-1800*. CUP, Cambridge. 1987. See also: Hoppit, J. *Attitudes to Credit in Britain 1680-1790* (1990) *The Historical Journal*, 33, 2, pp.305-322.

^[2] On credit use in the eighteenth and nineteenth centuries see: Finn, MC. *The Character of Credit: Personal Debt in English Culture, 1740-1914*. CUP, Cambridge, 2003.

^[3] *Refutation*, page 38.

^[4] As observed in *Cork* at paragraph 198.

^[5] In relation to credit use in the seventeenth century specifically see: Muldrew, C. *The Economy of Obligations: The Culture of Credit and Social Relations in Early Modern England*. Basingstoke, 1998. See also:

Muldrew Interpreting.

[6] For an exposition of moves to preclude such activities in the late medieval period see: Seabourne, G. *Controlling Commercial Morality in Late Medieval London: The Usury Trials of 1421* (1998) *Legal History*, vol.19, no.2 (August), pp.116-142.

[7] For the rise of credit use in the 18th and 19th century within the context of 'buoyant commercialism' see: Cornish, W.R & Clark, GN. *Law and Society in England 1750-1950*. Sweet & Maxwell, London. 1989, pages 226 and 227.

[8] For a discussion of the growth of credit (and its absence in early societies) see: *Fletcher Insolvency 2nd* pages 3 and 4.

[9] *Levinthal Early*, page 228.

[10] Maine, HS. *Ancient law: its connection with the early history of society and its relation to modern ideas*. 14th ed. John Murray, London, 1891, page 303. Referred to in *Levinthal Early*.

[11] June 15, 1215. See: *Refutation* at preface and page 7.

[12] *Ibid* page 7.

[13] Freedman, AL. *Imprisonment for Debt* (1928) *Temple Law Quarterly* 2, 330-365, page 331.

[14] *Ibid* page 8.

[15] *Muldrew Interpreting*, page 169. See also: Muldrew, C. *The Culture of Reconciliation: Community and the Settlement of Economic Disputes in Early Modern England* (1996) *The Historical Journal*, 39, 4, pp.915-942, page 937 that, "lawyers were often used by creditors to threaten debtors with suits." This contention is not supported by authority, but it is interesting to note the balance between creditors and debtors interests in this early modern setting as viewed by Muldrew.

[16] *Brooks*, page 95. See also: Powell, T. *The Mystery and Misery of Lending and Borrowing*, in: Scott, W (Ed). *A Collection of Scarce and Valuable Tracts*. 2nd Edition. 1812

[17] See: Child, J. *Brief Observations concerning Trade, and Interest of Money, A Tract against Usurie, etc.* For E.Calvert & H. Mortlock:

London, 1668; R.H. *The Brief Observations of JC concerning trade and interes of money briefly examined by HR*. London, 1668; Brewster, F. *Essays on Trade and Navigation, in five parts*. For Thomas Cockerill: London, 1695; Brewster, F. *New Essays on Trade*. H. Walwyn, London, 1702. See also: King, C. *The British Merchant; or, Commerce preserv'd: in answer to the Mercator, or Commerce Retriev'd*. 3 vols, London, 1721.

[18] *Tanner*, page 8.

[19] *Ibid*.

[20] *Ogilvie*, page 116.

[21] *Tanner*, page 190.

[22] Cartwright, J. *Madame*. 1894, page 272 (cited in *Tanner* page 288). See also: Glaisyer, NAF. *The Culture of Commerce in England, 1660-1720*. Unpublished Ph.D. thesis. University of Cambridge, 1999.

[23] *Ibid* page 332.

[24] Dicey, AV. *Lectures on the Relation between Law & Public Opinion in England during the Nineteenth Century*. Macmillan and Co Ltd, London, 1930, page 122.

[25] *Tanner* page 288. See also: Emerson, T. *Courts of Law of the City of London*. 1794.

[26] Dean, D. *Pressure Groups and Lobbies in the Elizabethan and Early Jacobean Parliaments* (1991) PER, XI, 139-152.

[27] Davis, R. *English Overseas Trade 1500-1700*. Macmillan, London, 1973, page 8.

[28] *Ibid* page 10.

[29] Roberts, L. *The Merchants Mapped of Commerce; wherein the Universal Manner and Matter of Trade, is compendiously handled, etc*. 3 parts, RO for R. Mabbll London, 1638; Vivant de Mezague. *Bilan général et raisonné de l'Angleterre, depuis 1600 jusqu'à la fin de 1761. (A general view of England: respecting its policy, trade, commerce, taxes, debts, produce of lands, colonies, manners, etc., etc. : argumentatively stated from the year 1600 to 1762 in a letter to A.M.L.C.D. [i.e. M.L.C.D.] / by M.V.D.M, London : Printed for J. Robson, 1766. See also:*

One who hath been an exporter and importer above forty years and is now considerably interested both in trade and land. A brief history of trade in England : containing the manner of its birth, growth, and declension, and the several occasions thereof : with some proper remedies to recover it from its present languishing condition to its former flourishing estate. London: Printed and sold by E. Baldwin, 1702.

[30] See for example: Grassby, R. *The business community of seventeenth-century England*. CUP, Cambridge, 1995; Rich, EE & Wilson, CH (eds). *The Cambridge economic history of Europe. Vol.4, The economy of expanding Europe in the sixteenth and seventeenth centuries*. CUP, 1967; Ashworth, W. *Customs and excise : trade, production and consumption in England 1640-1845*. OUP, 2003. Hewins, WAS. *English trade and finance chiefly in the seventeenth century*. London: Methuen & company, 1892; Fisher, FJ (Ed). *Essays in the economic and social history of Tudor and Stuart England in honour of R.H. Tawney*. CUP, 1961; Coates, B. *The impact of the English Civil War on the economy of London, 1642-50*. Aldershot, Hampshire: Ashgate, 2004; Marescoe, C. *Markets and merchants in the late seventeenth century: the Marescoe-David letters, 1668-1680*. Published for the British Academy by the OUP, 1987; Appleby, JO. *Economic thought and ideology in seventeenth-century England*. Guildford: Princeton University Press, 1978; Coleman, DC. *The Economy of England 1450-1750*. Oxford, 1977.

[31] Fiennes, C. *Journeys*.

[32] *Muldrew Interpreting*; Muldrew, C. *The Culture of Reconciliation: Community and the Settlement of Economic Disputes in Early Modern England* (1996) 4, *The Historical Journal*, 39, pp.915-942; Muldrew, C. 'Hard Food for Midas': *Cash and its social value in early modern England* (2001) *Past and Present*, vol.70, 78-120; Muldrew, C. *Rural Credit, Market Areas and Legal Institutions in the Countryside in England, 1550-1700*, in: Brooks, C & Lobban, M (Eds). *Communities and Courts in Britain 1150-1900*. The Hambledon Press, London, 1997; Chalklin, CW. *Seventeenth-century Kent : a social and economic history*. John Hallewell Publications, 1978. See also: Holderness, BA. *Credit in English Rural Society before the Nineteenth Century with Special Reference to the Period 1650-1720* (1975) *Agricultural History Review*, 24, pages 97-109.

[33] Kishlansky, M. *A Monarchy Transformed: Britain 1603-1714*. Allen Lane, London, 1996, page 351.

[34] *Hart*, page 24.

[35] For an example of a piece of writing that seeks to reform to bolster trade in a bankruptcy context see: *An honest scheme, for improving the trade and credit of the nation: for punishing the fraudulent, and relieving the unfortunate bankrupts: for increasing profits of the Bank of England: and for paying the publick debts of the nation.* J. Roberts, London, 1727.

[36] For an exposition of a business career during this period, see: Tawney, RH. *Business and Politics under James I: Lionel Cranfield as Merchant and Minister.* CUP, Cambridge, 1958.

[37] Cited in: *Hart*, page 133.

[38] *Brooks*, page 95. See also: Powell, T. *The Mistery and Misery of Lending and Borrowing*, in: Scott, W (Ed). *A Collection of Scarce and Valuable Tracts.* 2nd Edition. 1812.

[39] *Powel*, page 209. Powel took such a strong view against debtors that he even accused them of “Obscurity of walking.” (page 222.)

[40] Editorial. *Bankruptcy Law Reform.* Bankers Magazine and Journal of the Money Market, vol. 9, 1849, pp.322-326, page 324.
