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# THE NATURE OF BANKRUPTCY AND INSOLVENCY IN A CONSTITUTIONAL PERSPECTIVE

By JOHN HONSBERGER, Q.C.\*

## I

Historically, the distinction between bankruptcy and insolvency was significant. The distinction no longer has its former importance but by reason of the constitutional grant of power in Canada and in other countries with a federal constitution there is a continuing constitutional importance in being able to define with some precision the meaning of the words "bankruptcy" and "insolvency".

What is generally considered to be the first *Bankruptcy Act* in England was enacted in 1542 during the reign of Henry VIII.<sup>1</sup> It was directed at the fraudulent debtor. However, the *Bankruptcy Acts* from 1571<sup>2</sup> until the middle of the last century were restricted to those debtors who were engaged in trade. It was not until 1861 that the bankruptcy law in England was made applicable to all debtors whether or not they were traders.<sup>3</sup> In the early 19th century when the *Bankruptcy Acts* were confined to traders, a number of statutes known as *Insolvency Acts* were enacted for the relief of insolvent debtors who were not engaged in trade and therefore could not be made bankrupt. At first, the *Insolvency Acts* provided only for the release from imprisonment of the debtor who had been imprisoned for his debts. He was not, however, released of his debts and remained liable for their repayment. Later legislation provided for the discharge of persons who were imprisoned for their debts if they surrendered all of their property for the benefit of their creditors. The insolvency laws were administered by a separate court of record known as the Court for Relief of Insolvent Debtors. This court eventually was abolished by the *Bankruptcy Act* of 1861<sup>4</sup> and its jurisdiction transferred to the Court of Bankruptcy when persons other than traders first became subject to the bankruptcy law. In 1869, by the *Bankruptcy Repeal and Insolvent Court Act*<sup>5</sup> all insolvency statutes existing in England at that time were repealed.

An historical coincidence of some importance is that while the distinction between bankruptcy and insolvency legislation was disappearing in England, in Canada the resolutions leading to the enactment of the *British North America*

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<sup>1</sup> 34 and 35, Henry VIII, C. 4.

<sup>2</sup> 13 Eliz. 1, C. 7.

<sup>3</sup> 24 and 25 Vic. C. 135.

<sup>4</sup> See note 3, *supra*.

<sup>5</sup> 32 and 33 Vic., C. 83.

*Act, 1867*<sup>6</sup> were being drafted. It can be assumed that the draftsmen in addition to being aware of the legislative history of bankruptcy and insolvency in England were also well aware of the American experience.

The United States constitution was drafted in 1787. Under it Congress was granted the legislative authority to pass "uniform laws on the subject of bankruptcies throughout the United States". From the time of its ratification until the drafting of the *British North America Act, 1867* there had been more or less a continuous debate in and out of the courts of the United States as to whether the bankruptcy grant of power either permitted Congress or prevented the States from enacting insolvency legislation. For example, in *Sturges v. Crowninshield*<sup>7</sup> an elaborate argument was founded on the distinction between bankruptcy and insolvency. However, Chief Justice Marshall did not commit himself to the distinctions which had been made, namely, that laws which liberate the person are insolvent laws and those which discharge the contract are bankrupt laws and that insolvent laws operate at the instance of the debtor, while bankrupt laws, operate at the instance of the creditor.

It would seem that a deliberate effort was made in Canada to forestall a similar debate over the bankruptcy power that had taken place in the United States. Section 91 of the *British North America Act, 1867* gave to the Parliament of Canada the authority "to make laws for the Peace, Order and good Government of Canada in relation to all matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces". "For greater certainty", it enumerated certain classes of subjects over which the Parliament of Canada was to have the exclusive legislative authority. One of these classes of subjects is "Bankruptcy and Insolvency".

## II

"Insolvency" is derived from the latin *in*, "not" and *solvere*, "to loosen or pay". The word, however, has two principal uses representing two different concepts each of which is incorporated into the present *Bankruptcy Act*.<sup>8</sup>

The first and ordinary meaning of insolvency and the concept most readily identified is the state or condition of being unable to pay one's debts as they mature.<sup>9</sup> This concept is variously known as ordinary,<sup>10</sup> common law,<sup>11</sup>

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<sup>6</sup> 30 and 31 Vic. C. 62.

<sup>7</sup> (1819), 4 Wheat. 122 and see also *Ogden v. Saunders* (1827), 12 Wheat. 213.

<sup>8</sup> R.S.C. 1970 c. B-3.

<sup>9</sup> Murray, *New English Dictionary* (Oxford: Clarendon Press, 1883). See *In re Assignments and Preferences Act* (1893), 20 O.A.R. 489 (C.A.) reversed by [1894] A.C. 187 (P.C.). See also *A.-G. for B.C. v. A.-G. Can. et al.* [1937] A.C. 391, [1937] 1 D.L.R. 695, 18 C.B.R. 212, [1937] 1 W.W.R. 320 per Lord Thankerton and *Ladore v. Bennett* [1939] A.C. 468, 21 C.B.R. 1 (P.C.) in which it was said "Insolvency is the inability to pay debts in the ordinary course as they become due."

<sup>10</sup> J. A. MacLauchlan, *Bankruptcy* (St. Paul, Minn.: West Publishing Co., 1956) at 10.

<sup>11</sup> Garrard Glen, *Creditors Rights and Remedies*, 1915 s. 370.

equity<sup>12</sup> or commercial<sup>13</sup> insolvency. One writer has suggested that it perhaps could be best described as inability insolvency.<sup>14</sup> Traditionally, the stoppage of payments or the inability to pay debts as they mature was a concept peculiar to commercial law and not to be confused with insolvency which was originally regarded as the second of the two concepts we now have of insolvency.

The inability concept of insolvency depends upon the debtor's inability to pay debts precisely as they mature. It does not allow any period of grace to the debtor who while unable to pay on the due date could pay in a reasonable time. While this aspect may be regarded as being unduly harsh in respect of the debtor, it is balanced in his favour to some extent by the fact that it does not and may not take into account the prospective inability of the debtor to pay debts that have not matured.

Inability insolvency under the Canadian *Bankruptcy Act* is described in the definition of an insolvent person which reads in part as

"... a person ...

- (i) who is for any reason unable to meet his obligations as they generally become due, or
- (ii) who has ceased paying his current obligations in the ordinary course of business as they generally become due."<sup>15</sup>

Similar language also is found in the act of bankruptcy of a debtor who ceases "to meet his liabilities generally as they become due."<sup>16</sup>

The second concept of insolvency which is also contained in the *Bankruptcy Act* as an alternative definition to the inability concept is where the aggregate of a person's property is not at a fair valuation sufficient, or, if disposed of at a fairly conducted sale under legal process, "would not be sufficient to enable payment of all his obligations due and accruing due".<sup>17</sup> This is known as balance sheet insolvency or insolvency in the bankruptcy sense. It might be called balance insolvency to distinguish it from inability insolvency.<sup>18</sup> This concept of insolvency describes an internal condition, the

<sup>12</sup> J. A. MacLauchlan, *supra*, note 9 at 12. "Ordinary insolvency is frequently called insolvency 'in the equity sense' to differentiate it from insolvency in the bankruptcy sense".

<sup>13</sup> "There are decisions as to the meaning of the word 'insolvent'. They all state that 'insolvency' means commercial insolvency, that is to say inability to pay debts as they become due." *London and Counties Assets Ltd. v. Brighton Grand Concert Hall & Picture Palace Ltd.*, [1915] 2 K.B. 493 (C.A.) per Buckley L.J. at 501, 503.

<sup>14</sup> S. Joslin, *Insolvency in Bankruptcy: a synthesis* (1962), 38 *Indiana Law Journal* 23.

<sup>15</sup> R.S.C. 970 c. B-3, s. 2.

<sup>16</sup> Section 24(j) and see *Winding Up Act* R.S.C. 1972 C.W.-10, s. 3(a).

<sup>17</sup> *Bankruptcy Act* R.S.C. 1970, c. B-3, s. 1, compare with the definition of insolvency contained in the United States *Bankruptcy Act*, s. 1(19). "A person shall be deemed insolvent within the provisions of the Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts."

<sup>18</sup> S. Joslin, *supra*, note 14.

existence of which can be legally ascertained only through a comprehensive examination of the debtor's entire financial condition.<sup>19</sup>

A debtor may be solvent by the balance sheet test but the general stoppage of payments on his part usually creates a situation requiring either the liquidation of his property or the making of some arrangement with his creditors. In the business world people lose their credit if they cannot pay their debts. The businessman has little inclination to argue about the value of assets shown on a balance sheet. Moreover, a debtor seldom makes available to the person he hopes will extend him credit the kind of evidence he will usually adduce to prove that he was not insolvent in a subsequent bankruptcy proceedings.<sup>20</sup>

Sometimes insolvency is the result of some sudden disaster such as fire, flood or theft by an employee. More often it is the result of a gradual deterioration in a debtor's ability to pay his debts. The usual order of events is that a debtor stops payments or is unable to pay his debts as they mature. Through the resulting loss of credit from his cessation of payments he must live off his assets which in turn makes him insolvent in the sense of balance insolvency. Thus, actual or apparent insolvency on the part of a debtor which is generally in the form of stoppage of payments is the beginning of the road that usually leads to bankruptcy.

Perhaps the essence of insolvency legislation as compared with bankruptcy is that insolvency contemplates measures of dealing with the property of debtors unable to pay their debts other than by liquidation through bankruptcy. The composition and voluntary assignment, for example, are devices which, in appropriate circumstances, avoid technical bankruptcy. These means of salvage from the ravages of misfortune, while of the essence of insolvency, are now incorporated in the *Bankruptcy Act*.<sup>21</sup>

Insolvency in its widest sense is now used under the Canadian and American bankruptcy systems as the principal test to determine who shall or shall not be subjected to the peculiar effects of the bankruptcy process. Thus, it has been frequently observed that our modern law of bankruptcy is essentially a law of insolvency.<sup>22</sup>

### III

Bankruptcy has a more restricted or narrower meaning than insolvency. The word bankrupt is derived from the Italian "*banca rotta*" which is literally "bank broken" or "bench broken". The allusion is said to be to the custom of

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<sup>19</sup> See Bonbright and Pickett, *Valuation to Determine Solvency under the Bankruptcy Act* (1929), 29 Col. L. Rev. 582.

<sup>20</sup> MacLauchlan, *supra*, note 10 at 56.

<sup>21</sup> *Canadian Bankers Association et al. v. A.-G. of Saskatchewan*, [1950] S.C.R. 31; [1954] 4 D.L.R. 599; (1955), 35 C.B.R. 135.

<sup>22</sup> *Continental Illinois Nat'l Bank v. Chicago R. 1 & P. Ry.* (1935), 294 U.S. 648 at 668 per Sutherland J.

breaking the table or counter of a defaulting tradesman. This became the symbol of a trader's failure.<sup>23</sup>

Over the years bankruptcy has undergone a series of transfers of sense as the legislation has been repeatedly amended. The need for frequent changes in the legislation has resulted from changing social and commercial conditions that upset the legislative balance between the conflicting interests arising out of a financial failure. Percerou's explanation of the long history of legislative tinkering with bankruptcy legislation is,

D'abord, étant donné le nombre et la complexité des intérêts auxquels touche l'institution il est presque impossible qu'elle ne soit pas imparfaite sur certains points et plus impossible encore qu'au bout de peu de temps, quelqu'un des intérêts engagés dans le problème ayant évolué, une modification correspondante de la loi ne devienne nécessaire. A cette considération s'en ajoute un autre d'ordre moral: tout le monde perd dans la faillite et par un sentiment bien humain, encore que peu justifié, on s'en prend au législateur des pertes que l'on subit, alors qu'elles tiennent en réalité à la situation de fait . . . Ainsi s'explique la fréquence des changements à la législation des faillites si nombreux dans tous les pays.<sup>24</sup>

The courts also have frequently referred to the changing concept of bankruptcy. The Judicial Committee of the Privy Council, in an appeal from the Supreme Court of Canada, said:

In a normal community it is certain that these conditions (which bring the bankruptcy law into operation) will require revision from time to time. Their lordships are unable to hold that the conditions of insolvency which enabled a creditor or the debtor to invoke the aid of the bankruptcy laws, or the classes to which these laws applied, were intended to be stereotyped under head 21 of section 91 of the *British North America Act* so as to confine the jurisdiction of the Parliament of Canada to the legislative provisions then existing as regards to these matters.<sup>25</sup>

Much the same observation was made by the Supreme Court of the United States a year later when it said:

The subject of bankruptcies is incapable of final definition. The concept changes. It has been recognized that it is not limited to the connotation of the phrase in England or in the United States at the time of the formulation of the Constitution.<sup>26</sup>

While the underlying principles and character of bankruptcy have changed over the years, there has been a remarkable consistency in how the courts and legal writers have described the objects and purposes of bankruptcy legislation. Some of these definitions (the country of the person who propounded the definition and the year in which it was written are in brackets at the end of each definition) are:

Les biens due débiteur sont le gage commun de ses créanciers.<sup>27</sup> (France 1804).

Perhaps, as satisfactory a description of a bankruptcy law as can be framed is that it is a law for the benefit and relief of creditors and their debtors in cases in which the latter are unable or unwilling to pay their debts. And a law on the subject of

<sup>23</sup> Murray, *The New English Dictionary* (Oxford Clarendon Press, 1883); *Nouveau Petit Larousse* 1968 under "banqueroute"; J. Percerou, *Des faillites et banqueroutes et des liquidations judiciaires*, (2nd ed.) 1935, Vol. 1, at 14, n. 1.

<sup>24</sup> Percerou, *Id.* Vol. 1, at 37.

<sup>25</sup> *A.-G. for British Columbia v. A.-G. of Canada (Re Farmers Creditors Arrangement Act, 1934)* [1937] A.C. 391, [1937] 1 D.L.R. 695, [1937] 1 W.W.R. 320, 18 C.B.R. 217.

<sup>26</sup> *Wright v. Union Central Insurance Co.* (1938), 304 U.S. 502 at 513.

<sup>27</sup> *Code Civil* (le Code Napoleon) Art. 2093 (104).

bankruptcies in the sense of the constitution is a law making provisions for cases of persons who fail to pay their debts.<sup>28</sup> (United States, 1833).

Congress has general jurisdiction; and the true inquiry is to what limits is that jurisdiction restricted? I hold it extends to all cases where the law causes to be distributed the property of the debtor among his creditors; this is its least limits. Its greatest is a discharge of the debtor from his contract and all intermediate legislation, affecting substance and form but tending to further the great end of the subject . . . distribution and discharge are in the competency and discretion of Congress.<sup>29</sup> (United States, 1843).

"Bankruptcy" is the condition of a trader who has discontinued his payments.<sup>30</sup> (Canada, 1866).

Bankruptcy is the National execution against the assets of an insolvent debtor.<sup>31</sup> (United States, 1872).

The object of the bankruptcy laws was merely to regulate the distribution of the bankrupt's assets between his creditors and to relieve the bankrupt and his estate from future liability to his creditors.<sup>32</sup> (England, 1881).

It is not necessary in their Lordships' opinion, nor would it be expedient to attempt to define what is covered by the words "bankruptcy" and "insolvency" in section 91 of the B.N.A. Act. But it would seem that it is a feature common to all the systems of bankruptcy and insolvency to which reference has been made, that the enactments are designed to secure that in the case of an insolvent person his assets shall be rateably distributed amongst his creditors whether he is willing that they shall be so distributed or not. Although provision may be made for a voluntary assignment as an alternative, it is only as an alternative. In reply to a question put by their Lordships, the learned counsel for the respondent were unable to point to any scheme of bankruptcy or insolvency which did not involve some power of compulsion by process of law to secure to the creditors distribution amongst them of the insolvent's estate.<sup>33</sup> (England, 1894).

Equality between creditors is necessarily the ultimate aim of the bankrupt law.<sup>34</sup> (United States, 1913).

. . . a main purpose of the act intends to aid the unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain character, after the bankruptcy has been administered for the benefit of the creditors.<sup>35</sup> (United States, 1917).

The broad purpose of a bankruptcy act is the bringing about of an equitable distribution of a bankrupt's estate among creditors holding just demands based upon adequate consideration.<sup>36</sup> (United States, 1930).

An adjudication in bankruptcy is not essential to the jurisdiction. The subject of bankruptcy is nothing less than "the subject of the relations between an insolvent or non-paying or fraudulent debtor and his creditors extending to his and their relief".<sup>37</sup> (United States, 1938).

The purpose and object of the Bankruptcy Act is to equitably distribute the assets of the debtor and to permit his rehabilitation as a citizen, unfettered by past debts.<sup>38</sup> (Canada, 1952).

<sup>28</sup> Story, *Commentaries on the Constitution of the United States*, s. 113, n. 2.

<sup>29</sup> *In re Klein* (1843), 1 How. 277 (U.S. Sup. Ct.).

<sup>30</sup> *Civil Code of Quebec*, Art 17 (23).

<sup>31</sup> Francis Wharton, *A Treatise on the Conflict of Laws*, 1872.

<sup>32</sup> *Ex. p. Walton, In re Levy* (1881), 17 Ch. D. 746 at 755 (C.A.).

<sup>33</sup> *A.-G. (Ont.) v. A.-G. (Can.) (Voluntary Assignments Case)* [1894] A.C. 189; 63 L.J. P.C. 59.

<sup>34</sup> *Clark v. Rogers* (1913), 228 U.S. 534, 548.

<sup>35</sup> *Stellwagen v. Clum* (1917), 245 U.S. 605 at 617 per Day J.

<sup>36</sup> *Kolhe v. R. C. Taylor Trust* (Mass.) (1930), 50 S. Ct. 142 at 143, 28 U.S. 224.

<sup>37</sup> *Wright v. Union Central Insurance Co.* (1938), 304 U.S. 502 at 513.

<sup>38</sup> *I.A.C. and T. Eaton Co. v. Lalonde et al.* (1952) 2 S.C.R. 109; [1952] 3 D.L.R. 348; 3 C.B.R. 192.

The purpose of a bankruptcy act has been defined as providing for the orderly distribution of the property of a bankrupt among his creditors on a *pari pasu* basis subject to the privileged claims and to permit a bankrupt to receive eventually a complete discharge of his debts in order that he may be able to integrate himself into the business life of the country as a useful citizen free from the crushing burden of debt.<sup>39</sup> (Canada, 1954).

Bankruptcy is a well understood procedure by which an insolvent debtor's property is coercively brought under a judicial administration in the interests primarily of the creditors. To this proceeding not only a personal stigma may attach but restrictions on freedom in future business activity may result. The relief to the debtor consists in the cancellation of debts which, otherwise, might effectually prevent him from rehabilitating himself economically and socially.<sup>40</sup> (Canada, 1955).

According to one distinguished author:

All bankruptcy law . . . no matter when or where devised and enacted has at least two general objects in view. It aims first to secure an equitable division of the insolvent debtor's property among all his creditors and, in the second place, to prevent on the part of the insolvent debtor conduct detrimental to the interests of his creditors. In other words, bankruptcy law seeks to protect the creditors, first from one another and, secondly, from debtor. A third object, the protection of the honest debtor from his creditors, by means of the discharge is sought to be attained in some of the systems of bankruptcy but this is by no means a fundamental feature of the law.<sup>41</sup>

These definitions of the objects and purposes of bankruptcy if they do not with precision indicate the nature or essence of bankruptcy, at least indicate its complexity. Bankruptcy is a highly procedural branch of the law and very closely related to the law of contracts and execution, administrative law, criminal law and equity. It has dimensions that are both private and public, national and international. It has its collective aspects as well as a concern for the individual. It can be both preventative and remedial. It can punish and it can rehabilitate. It is designed to protect creditors, their debtors and business confidence in the credit system. While bankruptcy must be severe enough to discourage fraud, it must not be so severe that it will discourage the debtor and destroy his initiative. What then is essential to bankruptcy and what is only incidental?

Max Radin in a penetrating analysis on the nature of bankruptcy<sup>42</sup> suggests that the way to approach what "bankruptcy" means is to look at bankruptcy as a legal process meant to perform an important commercial function.

What function? Mr. Justice Rand in the *Canadian Bankers Association Case*<sup>43</sup> said that the function was to coercively bring an insolvent debtor's property under a judicial administration in the interests primarily of the

<sup>39</sup> *Markis v. Soccio & Corso Restaurants Inc.*, [1954] Que. S.C. 457; (1954), 35 C.B.R. 1 at 5 (Que.) per Collins J.

<sup>40</sup> *Canadian Bankers Association et al. v. A.-G. of Saskatchewan* [1956] S.C.R. 31; [1954] 4 D.L.R. 599; (1955), 35 C.B.R. 135 per Rand J.

<sup>41</sup> Levinthal, *The Early History of Bankruptcy Law* (1918), 66 U. of Pa. L. Rev. 223 at 225.

<sup>42</sup> Max Radin, *The Nature of Bankruptcy* (1940), 89 U. of Pa. L. Rev. 1.

<sup>43</sup> *Id.*



creditors. Similarly, in the *Voluntary Assignments Case*<sup>44</sup> it was said that the common feature of all systems of bankruptcy and insolvency was some power of compulsion by process of law to secure to the creditors distribution amongst them of the insolvent's estate. Bankruptcy, however, must mean more than this as this function of compulsion upon the debtor is already performed through the ordinary writs of execution and the other writs and procedures in aid of execution.

It also has been said that the function of the *Bankruptcy Act* is to permit the rehabilitation of a debtor as a citizen, unfettered by past debts.<sup>45</sup> It is obvious that bankruptcy must amount to something more than this for the same result could be achieved by the general cancellation of debts somewhat in the nature of the Biblical Jubilee.<sup>46</sup> Similar relief on a temporary basis also could be achieved by a limited or general moratorium.

Garrard Glenn in an article on the essentials of bankruptcy found that a careful study of bankruptcy indicated two well worn propositions. First, he said, "there is always the fraudulent debtor; and never yet, so far as human experience goes, has it been proper to legislate in bankruptcy matters without providing for his case. Next, the idea of bankruptcy includes the concept of a debtor who is in the control of the court". Glenn's concept of a controllable debtor was that the bankrupt must do two things. He must give full discovery of his estate and his doings and in order to do this he must surrender to the court not only his estate but himself. Such, said Glenn, is the method by which fraud can be detected and creditors will get their due. While these propositions are almost always found in any bankruptcy legislation and in fact are very important elements they are not essential elements. The normal execution process with the right to examine a judgment debtor contains most of the elements of the "controllable debtor" and the criminal law effectively can deal with the fraudulent debtor.

Max Radin in his analysis of the nature of bankruptcy examines these functions and others in his search for the essence of bankruptcy. He rejects the concept of compulsion upon the debtor as enunciated in such cases as the *Voluntary Assignments Case*<sup>47</sup> and the *Canadian Bankers Association*<sup>48</sup> case and suggests that the true test is the concept of compulsion upon the creditors. He said:

Whatever purposes bankruptcy attempts to carry out, it does by working on the creditors primarily by compelling them to re-organize their relations to the debtor's property. No extension of the bankruptcy power has, in fact, attempted anything else, whatever the words used may have been . . .<sup>49</sup>

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<sup>44</sup> *A.G. (Ont.) v. A.G. (Can.) (Voluntary Assignments Case)*, [1894] A.C. 189, 63 L.J. P.C. 59.

<sup>45</sup> See for example *I.A.C. and T. Eaton Co. v. Lalonde et al.*, [1952] S.C.R. 109; [1952] 3 D.L.R. 348; 32 C.B.R. 192 (Can.).

<sup>46</sup> Deuteronomy C. 15.

<sup>47</sup> *A.-G. (Ont.) v. A.-G. (Can.) (Voluntary Assignments Case)*, [1894] A.C. 189, 63 L.J. P.C. 59.

<sup>48</sup> *Canadian Bankers Association et al. v. A.-G. of Saskatchewan*, [1956] S.C.R. 31; [1954] 4 D.L.R. 599; (1955), 35 C.B.R. 135.

<sup>49</sup> Radin, see, *supra*, note 42.

Everything else is clearly incidental. The bankrupt might be stripped of all his property and thrown into prison. He might be allowed certain exemptions. He might be relieved of his debts or have them scaled down or postponed. All these stages of increasing humanity toward an unsuccessful member of the commercial community. He might even be helped to reconstruct and carry on his business and this, with a view to maintaining an economic unit that involved a great many persons who are not properly creditors.

But whatever happens to the debtor; in every case the creditors have been assembled in some formal way, their claims examined and classified, and assigned for satisfaction in definite proportions to an existing or prospective fund. The extent of the participation of the creditors in the final disposition is also irrelevant. Whoever initiates the process and however it is done, the important thing is that the bankruptcy court or commission rounds up the creditors and compels them to adjust or discharge their claims in a particular way.<sup>50</sup>

Thus, whatever else a bankruptcy statute purports to do, there is always some method provided to compel all of the creditors to accept some arrangement or disposition of their claims against the debtor whether all of them agree or not. Adopting this test of the essential nature of bankruptcy, a statute regulating voluntary arrangements by a debtor with creditors willing to participate in the arrangement could not be regarded as bankruptcy legislation. The *Creditors Relief Act*<sup>51</sup> provides for the money that a sheriff levies under an execution against the property of a debtor to be rateably distributed among all execution creditors. It may be regarded as insolvency legislation and thus *ultra vires* the province but it cannot be regarded as bankruptcy legislation. While the creditors must share on a pro rata basis in the money levied they are not required to release or otherwise adjust their claims against the debtor. On the other hand, straight bankruptcy, whether voluntary or involuntary, proposals, and wage earner's plans under Part X of the *Bankruptcy Act* are all clearly matters of bankruptcy for in each case all of the creditors whether they all agree or not are compelled to accept some arrangement or disposition of their claims.

Chief Justice Waite of the Supreme Court of the United States once said that bankruptcy is an example in which the general welfare of the community is achieved by mutual sacrifices of various groups in it.<sup>52</sup> While the debtor usually and the creditors almost always are required to make sacrifices in a bankruptcy, the essence of bankruptcy is not in any voluntary sacrifices that the creditors may be called upon to make but in the compulsory or involuntary sacrifices required on the part of the creditors whether or not there is any sacrifice on the part of the debtor.<sup>53</sup> Everything else that is included in the constitutional grant of power in respect of bankruptcy is incidental or ancillary to this essential function.

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<sup>50</sup> See, *supra*, note 42 at 4.

<sup>51</sup> R.S.C. 1970 c. 97.

<sup>52</sup> *Canada Southern R.R. v. Gebbard* (1883), 109 U.S. 527 at 536.

<sup>53</sup> The debtor may not have any property that will vest in his trustee on his bankruptcy. The only sacrifice he is called upon to make, in these circumstances, is his reputation for financial integrity which, in most cases, he has already lost before he is adjudged a bankrupt.

