LAW, ORDER AND THE BANKRUPTCY COMMISSIONS
OF EARLY NINETEENTH CENTURY ENGLAND

by

STEPHEN C. HICKS and CLAY RAMSAY (Boston, Mass.)*

I. - Introduction: Social Order

Bankruptcy has not received much attention outside the major historical sur-
veys. The most recent studies have focused upon, on the one hand, the limited
economic scope of bankruptcy at the turn of the nineteenth century 1, and on
the other its political and legislative origins in the early sixteenth century 2. In
both we see the development of the idea of modern bankruptcy and the rationale
for the distinction between traders who could avail themselves of the privilege of
bankruptcy and non-traders who remained mere insolvents. But little has been
said of the significance of the actual process of bankruptcy, whether at the begin-
ning or end of this historical period, nor has the process been described from the
point of view of the social relationships of the persons involved. We would com-
bine these issues by asking what it meant to be subject to the common law system
in the early nineteenth century as the 'classical' if contradictory way of maintain-
order in society was rationalized and the bankruptcy commissions were
replaced by a formal legal process centered around the courts. The underlying
theme of our historical picture is that the commissions of bankruptcy were part
of a social system in which law was a part of the 'way of life', rather than the
very form of political society. Thus law not only treated persons as subjects and
objects of its rules, norms and systems, or as citizens with rights to liberty and
equality; law was also part of the fabric of social order through which, rather
than within which, one's relationship to the whole of society was made manifest.
This is law as a way of being. Of course it is not meant to be all that law is but
it is claimed that this is a valid point of view with useful insights derived from
its perspective. The field of study of our description of bankruptcy commissions
is that period of change in the first quarter of the nineteenth century against the
background of their entire history from the early sixteenth century, in the light
of what the commissions' power, process and attitudes suggest of the experience
of law.

As the existing surveys have shown, the bankruptcy commissions were certainly
riddled with abuses, and their role was indeed ambiguous. But there was also
a positive significance to their work. This has been overlooked because the story

* Stephen Hicks, M.A. LL.B. (Downing College, Cambridge), LL.M. (University of
Virginia), Professor of Law, Suffolk University Law School, Boston, Massachusetts; G.C.
Ramsay, M.A. (Stanford University).
2. Jones, The Foundations of English Bankruptcy, Statutes and Commissions in the
of this aspect of bankruptcy law has been written from the point of view of its modernization. The commissions were an extrajudicial, informal, ad hoc and discretionary process doing what we would think of as the law's work today. This was their value even though by the early nineteenth century they were inadequate to the task. Our thesis is that the process of bankruptcy was fully social, rather than being either political, i.e. used to maximize the well-being of the country, or legal, i.e. adjudicated by consistent and rational means. As a social process of the maintenance of order, it partook of many of the qualities of its social milieu. Therefore, we shall show the significance of social attitudes towards bankruptcy and commerce as well as discussing the history of the commissioners' powers until they were incorporated into the court system. For example, substantive law did not recognize the differences between merchants and the new financial entrepreneurs and industrial manufacturers. From the point of view of the law they were in the same class — that is, other to the landed gentry. Nor did social reformers really see the differences for they wavered between mercantilism and laissez-faire individualism. However, this ambiguity in law and society must be distinguished from the actual process of bankruptcy. The commissions did not manipulate or interpret rules; they searched out facts and then let the parties do the work. They often knew the parties and had to know trade, business and merchants. In fact the composition of a commission with members experienced in trade is what was hailed as its exemplary quality at the institution's very beginning. Moreover, the procedures and practices of a bankruptcy commission were far from being controlled by law, though the structure was statutory and the process judicial. Commissions clearly and explicitly occupied an intermediate place in social order which met the needs of institutional formality as well as personal flexibility. In fact commissions gave expression to the freedom of action of all participants, which was a kind of experience or involvement in law at a social level that nineteenth century jurisprudence was to reduce virtually out of existence.

3. In 1831, 1, 2 Will. IV c. 56, a Court of Bankruptcy was set up, with a chief and three puisne judges and a staff of six commissioners acting under fiat of the court rather than the Lord Chancellor. This ended their independence. Jenks has little doubt the old system was thoroughly bad but also doubts the new was much better. See, E. Jenks, A Short History of English Law, 385 (1938). The commissioners and creditors' assignees were assisted by a staff of up to 30 official assignees. In 1842 the system was extended to the countryside under the aegis of District Courts, later the Country Courts. This early bureaucratization, however, was followed by real laissez-faire statutes, by way of which a voluntary 'liquidation by arrangement' was introduced, court procedures in effect could be dispensed with, as well as a composition by the creditors effected without further process. See Jenks, ibid., 387. In the same statute, 24, 25 Vict. c. 134 (1869) the distinction between bankruptcy and insolvency was abolished. Also under 32, 33 Vict. c. 71 (1869) the Court's official assignees were replaced by a creditors' trustee supervised by a creditors' committee of inspection. In 1883, 46, 47 Vict. c. 52, an official receiver was created to supervise the process until the trustee was chosen. Moreover, this finalized the history of the commissions for in 1861 and 1869 the control of the creditors' assignees, direction of their meetings, examination of witnesses, were all conducted by the receiver, supervised by the Registrar of the Bankruptcy Court. See infra footnote 11 also.

4. Note, Frauds under the Bankruptcy Law, 5 Law Rev. 77 at 81 (1846).

5. See W. Holdsworth, vol. V A History of English Law, 149-151 (1965) for contemporary comments to this effect.