



# *A Reformatory Approach to State Regulation of Insolvency Law in South Africa*

## **PART I**

### **INTRODUCTION**

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## CHAPTER 1: GENERAL INTRODUCTION

### 1.1 INTRODUCTION

If one considers what need people have of an external regulation to constrain and steady them, how compulsion, slavery in a higher sense, is the sole and final condition under which the person of weaker will can prosper; then one understands the nature of conviction, “faith”.<sup>1</sup>

The regulation<sup>2</sup> of an insolvency system is essential to assure the competence of office holders and other participants, to ensure the efficiency and effectiveness of the system, and to maintain the integrity of, and public confidence in, the system.<sup>3</sup> This thesis follows a reformatory approach to state regulation of South African insolvency law within the context of global norms and standards, and our unique domestic social and economic environment. This study aims not only ultimately to propose a general framework within which law reform in the field of insolvency regulation can best be attained, but also to underscore the critical importance of a policy-based reform process. As such, through examining the general character of insolvency regulation, this study wants to provide a fresh approach to the field of regulation in our insolvency law – one that would constitute a more accurate reflection of the legal, socio-political and economic environment in South Africa.<sup>4</sup>

After a long period of prosperity and steady economic growth, the world’s leading economies are now in crisis, and although there are numerous debates about its origin, the scale and seriousness are in no doubt.<sup>5</sup> The current global crisis has shown that after more than two decades of economic and legal disciplines being stuck in a deregulatory<sup>6</sup> mindset, the

<sup>1</sup> Friedrich Nietzsche (1844-1900).

<sup>2</sup> “Regulation” in the *Oxford English Dictionary* means: “a rule or directive made and maintained by an authority; noun – the action or process of regulating or being regulated.” See *The Oxford Dictionary of English* (revised edition) (2005).

<sup>3</sup> Uttamchandani *The Case for a Strong Regulatory Framework: The World Bank Principles in Asia* (2006) unpublished paper presented at the Forum on Asian Insolvency Reform V, China (hereafter referred to as Uttamchandani) on file with the author.

<sup>4</sup> Although it is classified as an emerging market economy, South Africa has a fairly sophisticated and evolved credit market. South Africa might be more correctly seen as having a two-tier economy – an advanced economy of sophisticated consumers and firms that are investing all over the world, and a rural economy, with only the most basic infrastructure. The South African credit economy is complex, however, with credit extended in obvious ways to a large number of sophisticated lenders and corporate entities. In contrast, a large portion of the economy is represented by the informal sector, not yet drawn into the credit environment (Werker “Foreign Direct Investment and South Africa” (2007) *Harvard Business School Case* 707-019).

<sup>5</sup> Niemi “Introduction” in Niemi *et al. Consumer Credit, Debt and Bankruptcy* (2009) (hereafter referred to as Niemi *Consumer Credit, Debt and Bankruptcy*).

<sup>6</sup> Deregulation means setting an activity or an industry free of the legislative controls and constrains previously attached to it, or at least loosening the regulatory controls. See Hoexter *Administrative Law in South Africa* (2006) (hereafter referred to as Hoexter).



pendulum has apparently begun to swing back towards government regulation.<sup>7</sup> From all parts of the world, calls for effective government action, long subdued, have grown louder and more numerous. The prevailing academic view in respect of the concept of regulation embraces the notion that vigorous regulatory governance, when well conceived and implemented, can effectively redress various shortcomings on an economic as well as on a broader societal level.<sup>8</sup> The following statement underscores the significance of financial regulation within a global context:

So the question is, what do we do now? We did not choose how this crisis began, but we do have a choice in the legacy this crisis leaves behind. So today, my administration is proposing a sweeping overhaul of the financial regulatory system, a transformation on a scale not seen since the reforms that followed the Great Depression.<sup>9</sup>

The question may be asked how the concept of regulation in general fits in with our perception of a modern insolvency law system. The key factors that influence a country's insolvency system on an economic, social and political level join forces to create the so-called "cornerstones" or "building blocks" identified as essential to an effective insolvency system. These cornerstones consist of the legal framework, which represents the various areas of law impacting on the system,<sup>10</sup> the institutional cornerstone, which is generally thought to be the courts, and the regulatory cornerstone, which consists of both the establishment and implementation of a regulatory body that has oversight and responsibility for implementing the regulatory procedures as well as the content of the regulations applicable to office holders responsible for the administration of the insolvent estate. The entire insolvency system rests on the proper functioning of all three cornerstones.<sup>11</sup>

The nation of South Africa has since 1994 undergone a dramatic political transformation. The dismantling of apartheid, the adoption of a new and modern constitution by a multi-racial parliament and the reform of the national political structure have had far-reaching economic and social effects.<sup>12</sup> Foreign investment has risen steadily and, as one observer notes, South

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<sup>7</sup> For a more detailed discussion of this topic see generally: Moss *New Perspectives on Regulation* (2009).

<sup>8</sup> Balleisen "Introduction" in Balleisen *Government and Markets: Towards a New Theory of Regulation* (2009) 1-3 (hereafter referred to as Balleisen).

<sup>9</sup> Statement by Barack Obama "Remarks by the President on 21<sup>st</sup> Century Financial Regulatory Reform" (2009-06-17).

<sup>10</sup> *Inter alia* insolvency law, corporate law, tax law and labour law.

<sup>11</sup> Uttamchandani 1.

<sup>12</sup> See generally: Hoexter 26; Burns *Administrative Law under the 1996 Constitution* (2003) 1 (hereafter referred to as Burns).

Africa “offers the sophistication of an established market and the growth potential of an emerging market”.<sup>13</sup> From an economic perspective it is clearly in the interests of society that the insolvency system works efficiently.<sup>14</sup> The social and economic landscape has evolved during the past decade to such a degree that a fresh approach to insolvency law reform has become essential in South Africa’s quest to become an investment destination of choice.<sup>15</sup>

With the recognition of the Constitution<sup>16</sup> as the supreme law of the land, the legal community in South Africa have had to adapt from the old concept of parliamentary sovereignty to a new model of constitutional democracy.<sup>17</sup> In *Holomisa v Argus Newspaper Ltd*<sup>18</sup> Cameron J summarised this principle very well: “The Constitution has changed the ‘context’ of all legal thought and decision-making in South Africa”.<sup>19</sup> The foundation of constitutionalism is that the power of the state is defined and circumscribed by law to protect the interests of society.<sup>20</sup> The aim and purpose of any state regulation in South Africa should thus be to ensure compliance with the underlying values of the Constitution, which include the protection of societal interests and of individual rights and freedoms.

The thesis will not attempt to deal with the philosophical and economic principles with regard to the ongoing globalisation and financial regulation of capital and financial markets in general, but will instead aim to identify the parameters of an effective regulatory model within the South African insolvency law. While the primary focus of the reform process of insolvency law and institutions should be on how best to serve the needs and interests of society, it is unrealistic to ignore the wider global context in which trade and commerce take place. The significance of a modern insolvency system as a key foundation of sustainable economic development has also been widely acknowledged and documented by international

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<sup>13</sup> See Wiggins “Rethinking the Structure of Insolvency Law in South Africa” (1997) *New York Law School Journal of International and Comparative Law* 509 (hereafter referred to as Wiggins).

<sup>14</sup> Milman *Personal Insolvency Law, Regulation and Policy* (2005) 5 (hereafter referred to as Milman).

<sup>15</sup> Wiggins 509.

<sup>16</sup> Constitution of South Africa, 1996. Hereafter referred to as the Constitution. In terms of s 1(2) of the Citation of Constitutional Laws Act 5 of 2005 which came into operation on 2005-06-27 all references to the Constitution of the Republic of South Africa Act 108 of 1996, have been replaced by the Constitution of South Africa, 1996.

<sup>17</sup> Hoexter “‘Administrative Action’ in the Courts” (2006) *Acta Juridica* 303 (hereafter referred to as Hoexter “‘Administrative Action’ in the Courts”).

<sup>18</sup> 1996 6 BCLR 836 (W) at 836J.

<sup>19</sup> Botha “Administrative Justice and Interpretation of Statutes: A Practical Guide” in Lange *The Right to Know* (2004) 14 (hereafter referred to as Lange *The Right to Know*).

<sup>20</sup> Burns 28.

institutions such as the World Bank<sup>21</sup> and the United Nations Commission on International Trade Law.<sup>22</sup> Wood has argued cogently that insolvency law is the most crucial indicator of attitudes of a legal system and arguably the most important of all legal disciplines.<sup>23</sup> The clear message sent by the international community is that insolvency laws and systems are increasingly being recognised as a fundamental institution, essential for the development of credit markets and entrepreneurship in developing countries, and, in turn, those insolvency systems depend on the existence of sound and transparent institutional and regulatory frameworks and of individuals with the required competence, independence, impartiality and integrity working within those frameworks.<sup>24</sup>

In many international jurisdictions the last three decades have witnessed a continuing cycle of procedural reforms with the aim of addressing consumer over-indebtedness as well as insolvency in the corporate sector.<sup>25</sup> The system of insolvency law has an impact on parties and interests at every level of society. In developed and developing societies, the legal device of incorporation acts as a conduit for a substantial proportion of business activity through which the wealth of the national economy is generated.<sup>26</sup> Economies worldwide experienced a significant and unprecedented slowdown in economic activity during late 2008 and early 2009 as credit tightened and international trade declined.<sup>27</sup> Due to *inter alia* the global financial meltdown personal insolvency also experienced an explosive growth and consumer

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<sup>21</sup> See World Bank *Principles for Effective Insolvency and Creditor Rights System* (2001) (also referred to as *Principles*) available at [http://www.worldbank.org/ifa/ipg\\_eng.pdf](http://www.worldbank.org/ifa/ipg_eng.pdf) (last visited at 09-11-30).

<sup>22</sup> Hereafter referred to as “UNCITRAL”. See in general Wessels *Cross-Border Insolvency Law – International Instruments and Commentary* (2007) (hereafter referred to as Wessels *Cross-Border Insolvency Law*). See eg, UNCITRAL *Legislative Guide on Insolvency Law* (2005) 10 (hereafter referred to as “UNCITRAL *Legislative Guide*” or “*Legislative Guide*”) available at [http://www.uncitral.org/pdf/english/texts/insolven/05-80722\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf) (last visited at 09-11-30).

<sup>23</sup> Wood *Law and Practice of International Finance: Principles of International Insolvency* (1995) 1.

<sup>24</sup> Joyce *The Role of Insolvency Regulators in the Past and in the Future* 4 (2003) unpublished paper delivered at the International Insolvency Conference, Singapore, (hereafter referred to as Joyce “The Role of Insolvency Regulators in the Past and in the Future”) on file with the author. Cf Mistelis “Regulatory Aspects: Globalization, Harmonization, Legal Transplants and Law Reform—Some Fundamental Observations” (2000) *The International Lawyer* 1055 at 1057. See World Bank *Principles for Effective Insolvency and Creditor Rights System* (2001) (also referred to as *Principles*) Available at [http://www.worldbank.org/ifa/ipg\\_eng.pdf](http://www.worldbank.org/ifa/ipg_eng.pdf) (last visited at 09-30-11).

<sup>25</sup> Ramsay “Comparative Consumer Bankruptcy” (2007) *University of Illinois LR* 241 (hereafter referred to as Ramsay “Comparative Consumer Bankruptcy”); Ziegel “The Challenges of Comparative Consumer Insolvencies” (2005) *Pennsylvania State International LR* 639; Ziegel “Facts on the Ground and Reconciliation of Divergent Consumer Insolvency Philosophies” (2006) *Theoretical Inquiries in Law* 299 (hereafter referred to as Ziegel “Facts on the Ground”).

<sup>26</sup> Johnson “Toward International Standards on Insolvency: The Catalytic Role of The World Bank” (2000) *Law in Transition* 71 (hereafter referred to as Johnson).

<sup>27</sup> See generally: Culp *et al. Corporate Aftershock: The Public Policy Lessons from the Collapse of Enron* (2003); *World Economic Outlook* (International Monetary Fund (hereafter referred to as “IMF”)) April (2009).

bankruptcy filings surged to record highs.<sup>28</sup> It is submitted that the overall objective of a well-designed and effective regulatory system should be to operate from a coherent and consistent set of principles in order to manage the risk with regard to both corporate and consumer bankruptcy, while at the same time keeping in touch with the wider social goals of the legal system as a whole.<sup>29</sup>

“As society itself is dynamic and constantly evolving, so insolvency law, as part of the wider legal context of by which society is regulated, cannot be static in nature”.<sup>30</sup> With reference to insolvency law reform, the modification of the United States<sup>31</sup> bankruptcy system in the mid-seventies and the reform of the English insolvency system in the eighties can virtually be set down as the advent of modern bankruptcy law reform.<sup>32</sup> Since its core insolvency legislation hails from 1936, policy-makers as far back as 1987 embarked on an extensive study of South African insolvency law with the view to substituting the Insolvency Act of 1936<sup>33</sup> and have been suggesting a unified Insolvency Act incorporating the winding-up provisions of companies and close corporations.<sup>34</sup> The primary function, however, was to revise and consolidate the law rather than to deal excessively with the consideration of policy matters.<sup>35</sup>

<sup>28</sup> Seager “Explosion in Number of Bankrupts” *The Guardian* (United Kingdom (hereafter referred to as “UK”)) (2004-08-07); The Insolvency Service figures showed bankruptcies up 23.4% in the first quarter of 2009 on the same period last year and 0.5% higher than in the last quarter of 2008. See Osborne “Bankruptcies Rise to Record High” *The Guardian* (UK) (2009-05-01). “Consumer Bankruptcy Filings up Nearly 37% through first half of 2009” press statement by American Bankruptcy Institute (hereafter referred to as “ABI”) (2009-06-02) available at <http://www.abiworld.org> (last visited at 09-30-11).

<sup>29</sup> Johnson 71.

<sup>30</sup> Johnson 71.

<sup>31</sup> Hereafter referred to as the “US”.

<sup>32</sup> See Report of the Review Committee *Insolvency Law and Practice* (Report of the Review Committee Insolvency Law and Practice Cmnd 8558 (1982) (hereafter referred to as the *Cork Report*), in the UK and the *Report of the Commission on the Bankruptcy Laws in the United States* HR Doc no 93-137 (1973) 71 in the US. See Ramsay “Functionalism and Political Economy in the Comparative Study of Consumer Insolvency: An Unfinished Story from England and Wales” (2006) *Theoretical Inquiries in Law* 625 at 659 (hereafter referred to as Ramsay “Functionalism and Political Economy”); Fletcher *The Law of Insolvency* (2009) 6-7 (hereafter referred to as Fletcher).

<sup>33</sup> Act 24 of 1936. Hereafter refer to as the Insolvency Act or Insolvency Act of 1936. While it primarily deals with the sequestration of individuals, partnerships and other entities that cannot be wound up under the provisions of the Companies Act 61 of 1973 (hereafter referred to as the Companies Act), it applies *mutatis mutandis* to insolvent companies and close corporations by virtue of s 339 of the Companies Act and s 66 of the Close Corporations Act 69 of 1984 (hereafter referred to as the Close Corporations Act) respectively.

<sup>34</sup> For a general discussion see: Burdette *Framework for Corporate Insolvency Law Reform in South Africa* (2002) LLD dissertation University of Pretoria ch 3 (hereafter referred to as Burdette); Key “To Unify or not to Unify Insolvency Legislation: International Experience and the Latest South African Proposals” (1999) *DJ* 62-79; Boraine “The Draft Insolvency Bill – an Exploration (Part 1)” (1998) *TSAR* 621, where reference is made to this uniformity. See also Havenga “Simplification and Unification in Corporate and Insolvency Law – Are we Making any Progress?” (2001) *SA Merc LJ* 408 (hereafter referred to as Havenga); Loubser “An International Perspective on the Regulation of Insolvency Practitioners” (2007) *SA Merc LJ* 123 (hereafter referred to as Loubser).

<sup>35</sup> Evans *A Critical Analysis of Problem Areas in respect of Assets of Insolvent Estates of Individuals* (2009) LLD dissertation University of Pretoria 430 (hereafter referred to as Evans).





The recurring theme of this study is that having good domestic insolvency laws means little if they cannot be enforced efficiently. Insolvency reforms must therefore encompass not only the substantive laws, but also the institutional arrangements needed to ensure that the laws are applied effectively.<sup>36</sup> Finally, it is submitted that although the current legal and political climate is conducive to change in the field of South African insolvency regulation, the importance of a policy-driven approach, based on lessons learned and insights gained from research conducted into the historical context, global norms and standards as well as the pre-existing local conditions surrounding this field of law, cannot be over-emphasised.

## 1.2 RESEARCH STATEMENT

The broad problem statement of this thesis is to investigate certain aspects of state regulation in the South African insolvency law with the view ultimately to proposing a framework within which the legislator could pursue legal reform based on comprehensive policy objectives in this field of law.

## 1.3 RESEARCH OBJECTIVES

In order to delimit and define the scope of this study in view of the area of research envisaged in the previous paragraphs, the following research objectives have been formulated:

- 1 An insolvency system profoundly reflects the historical, legal, and cultural context of the country within which it operates.<sup>37</sup> In exploring the historical roots of regulation in South African insolvency law, this study endeavours to establish a pattern of state regulation in our law and in the process attempts to explain the unique regulatory system presently in place.
- 2 There is at present general international recognition that sound, transparent and predictable insolvency and creditor rights systems are an essential part of national and international financial architectures. By studying the regulatory methodology within the English, American and Dutch bankruptcy systems as well as the principles and guidelines issued by

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<sup>36</sup> Hockey, Minister for Financial Service and Regulation, Australia, (1999) unpublished paper presented at Insolvency Systems in Asia: An Efficiency Perspective Conference, Sydney, on file with the author.

<sup>37</sup> Martin "The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation" (2005) *Boston College International and Comparative LR* 3.



- international organisations, this study seeks to establish whether the global norms identified as such could provide domestic policy and law-makers with persuasive and digestible solutions and policy considerations.
- 3 The supreme law of the land, the Constitution, has changed the face of our law dramatically in that legislation may now be tested by the courts in order to establish its constitutionality.<sup>38</sup> This study argues that it should be contemplated whether the values reflected in the Constitution are mirrored within our insolvency system, and if not, the positive challenge lies in absorbing the general Constitutional ethos, and specifically the right to administrative justice entrenched in the Constitution, into the legislative and institutional reform envisaged.
  - 4 In order to determine whether it is attainable, or even desirable, to bring about law reform in regard to the regulatory discipline within our insolvency law, it is necessary to examine the present provisions in our insolvency law as they relate to the regulation of insolvency, and to identify problem areas within the system. The problems and pitfalls within the regulatory system in our insolvency law cannot be fully understood without an appreciation of the legal regimes that govern the regulatory structures. In order to justify a change in law, it is necessary as a starting point to have a clear understanding of the present legal environment and subsequent reform recommendations by the South African Law Reform Commission. Then an effort must be made to identify possible limitations within the system and consider potential legal and strategic outcomes and solutions.
  - 5 The theme that underlies all topics relating to regulation is the need to instil trust and confidence in an insolvency law system, in order for insolvency law to act as a pillar for both fiscal and social policy considerations.<sup>39</sup> It is submitted that a critical and policy-driven approach is essential on the grounds that it is impossible to evaluate areas of the law, suggest reforms or develop the law with a sense of purpose, unless there is clarity concerning the objectives and values sought to be furthered.<sup>40</sup> The final phase of this study would be to move beyond an appraisal of current laws and processes and to consider a

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<sup>38</sup> Dlamini “The Right to Administrative Justice in South Africa” (2000) *TSAR* 697 at 701 (hereafter referred to as Dlamini).

<sup>39</sup> “Insolvency Law Reform: Promoting Trust and Confidence” *New Zealand Law Commission Study Paper* 11 Wellington (2001) 33-35 (hereafter referred to as *New Zealand Law Commission Study Paper*).

<sup>40</sup> Finch *Corporate Insolvency Law* (2002) 1 (hereafter referred to as Finch).





fresh approach to regulatory procedures and institutions.<sup>41</sup> The broad research field of this thesis has to do with the fact that the current Insolvency Act hails from 1936 and that in view of current local reform initiatives a rethink of the role of the Master relating to insolvency matters is also required – especially since no thorough investigation has been carried out in this regard. This study will argue the importance of integrating our insolvency law into the broader legal, socio-political and commercial context of our country, while at the same time attempt to make recommendations for a regulatory framework in the South African insolvency law which would foster international and local confidence in our insolvency law system.

#### 1.4 OVERVIEW OF CHAPTERS

- 1 Part I sketches the background to the study and outlines the problem statement and research objectives to be addressed in the chapters that follow.
- 2 In Part II a historical overview of the development of South African insolvency law, with particular reference to the regulatory aspects of our insolvency law, is included. This firstly entails an overview of Roman-Dutch law; Roman law and English law, and, secondly, a discussion of the development of state regulation within the context of the South African insolvency law.
- 3 Part III entails a comparative study of certain jurisdictions which may serve as a valuable benchmark. The common law jurisdictions of England and Wales, the US as well as the civil law jurisdiction of the Netherlands will be included. The study will follow the historical development of the regulatory features in each jurisdiction and will include an outline of the substantive law as well as the philosophy underpinning the regulatory procedures within each system. In addition, the regulatory and institutional components of the insolvency systems within each jurisdiction will briefly be explained. Finally, the insolvency initiatives by the World Bank and UNCITRAL containing the key elements of an effective insolvency law system also form part of the discussion, with the aim of shedding light on international best practice to be used as a guideline for creating a sound regulatory regime.

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<sup>41</sup> Finch 2.



- 4 The new political dispensation has changed the face of South African law dramatically. Given the prominent role of the South African Constitution, and subsequently the administrative law, in all legal disciplines, part IV considers the impact of constitutional and administrative law on the regulatory aspects of our insolvency system, and in particular to ascertain its impact on the role of the Master of the High Court<sup>42</sup> as an “organ of state”.<sup>43</sup>
- 5 Part V is concerned with the status of the existing South African insolvency law in relation to the regulatory procedures within our system, and in particular the role and function of the Master. The aim of this part of the study is twofold. The first aim is to provide a broad outline of the legal, regulatory and institutional frameworks within the South African insolvency law system, with the emphasis on the powers and duties of the Master *via* the Insolvency Act of 1936. The second aim is to examine the 2000 insolvency law reform proposals envisaged by the South African Law Reform Commission, in an effort to assess whether the proposals provide any policy-based solutions to the problems and pitfalls identified in our regulatory system.
- 6 The formulation of proposals for a new regulatory framework in South African insolvency law suggests a change in the philosophy underpinning the traditional role of the state in the regulatory regime. In order to remain on the path of sound law reform, part VI considers whether an existing policy on state regulation is in place, and explores certain aspects related to the regulation of insolvency law which should be considered in determining the parameters of a comprehensive policy in this area of insolvency law.
- 7 Finally, Part VII contains some concluding remarks and recommendations for a regulatory framework that would provide a conceptual foundation for future research on law reform in an attempt to eradicate problem areas in this area of our insolvency law. It is argued that this elusive goal could be reached by incorporating the principles that have crystallised in the research undertaken in this thesis, challenging the assumptions that underpin the present insolvency regime, and changing and adopting new perspectives with regard to insolvency law reform in general.

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<sup>42</sup> Hereafter referred to as the Master.

<sup>43</sup> S 239 of the Constitution.



## 1.5 SCOPE OF RESEARCH

Throughout the thesis the Insolvency Act of 1936, as primary source of our insolvency law, will form the platform for discussion, and although *ad hoc* reference to various provisions relating to the winding-up of companies will be incorporated, preference is given to principles as they relate to the insolvent individual. Burdette states that: “despite the piecemeal development of winding-up law, it developed very much in the same way as South African insolvency law did. The parallel development of winding-up and company law with insolvency law is striking, as is the fact that, historically, these separate branches of the law developed along similar lines, following English law developments until late in the twentieth century.”<sup>44</sup>

During the late 80s the South African Law Reform Commission embarked on a reform programme which has as its aim the complete reform of South African insolvency law.<sup>45</sup> Where relevant, the suggested reform proposals as envisaged in the 2000 draft Insolvency Bill will form part of this study. The process of reforming South African corporate law has materialised in new legislation and literature, notably the King III Report<sup>46</sup> and the new Companies Act 2008.<sup>47</sup> Due to the constraints involved in publishing a thesis of such magnitude, the reform of South African company law will not be included in the scope of this study. While it is not part of the scope of the thesis, mention will nevertheless be made of certain particular aspects with regard to the reform process.

## 1.6 TERMINOLOGY

For the purposes of this study the following concepts, frequently used in this study, are briefly clarified:

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<sup>44</sup> Burdette 63.

<sup>45</sup> South African Law Commission (as it was then known) *Review of the Law of Insolvency* Project 63 (2000) Report, vol I Explanatory Memorandum, and vol II Draft Bill (hereafter referred to as 2000 draft Insolvency Bill or draft Insolvency Bill). See also Evans 431.

<sup>46</sup> The revised *King Code of Governance for South Africa 2009* (“King III”) was launched on 2009-09-01. It will come into effect and replace the existing *King II Code and Report on Corporate Governance* (“King II”) on 2010-03-01.

<sup>47</sup> Companies Bill 61 of 2008 has been signed by the President as Act 71 of 2008 published in GG no 32121 (2009-04-07).

### 1.6.1 “INSOLVENCY” AND “BANKRUPTCY”

Worldwide, the word “insolvency” is the more common term for such proceedings where a business debtor is involved, while “bankruptcy” would refer to the procedures to be applied to individuals.<sup>48</sup> Rajak states that in England and Wales the terms “insolvency” and “bankruptcy” both describe the same condition – the inability to pay the debts owing in full – but each has become closely associated with a different type of debtor.<sup>49</sup> In the US the term “bankruptcy” refers to the legal procedure for dealing with debt-related problems of individuals and businesses, and in particular any case filed under the chapters of title 11 of the US Code.<sup>50</sup> In South Africa, in common parlance the word “insolvency” refers to both individuals and corporate entities.<sup>51</sup> In this study the terms “insolvency” and “bankruptcy” are used interchangeably when referring to the general principles arising from a particular jurisdiction.

### 1.6.2 “INSOLVENCY PRACTITIONER” AND “OFFICE HOLDER”

“Insolvency practitioner” is the generic term used in this study to denote the appointment of both trustees<sup>52</sup> and liquidators.<sup>53</sup> Internationally the term “office holder” means a person who is appointed to administer an insolvency estate, and includes a trustee, liquidator, administrator, reorganiser and so forth. The term is increasingly being employed in international literature, following the practice of international organisations such as the World Bank.

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<sup>48</sup> Fletcher (2009) 3.

<sup>49</sup> See also Rajak “Creditors and Debtors – The Background to the Insolvency legislation of 1986” (1990-1991) *King’s College LJ* 17 (hereafter referred to as Rajak).

<sup>50</sup> Also referred to as the Bankruptcy Code; Code; 1978 Act or Bankruptcy Reform Act of 1978. (Pub l no 95-598, 92 Stat 2549 (1978) 11 USC par 101 *et seq* which was signed into law on 1978-11-06 and became effective on 1979-10-01)

<sup>51</sup> The terms winding-up and liquidation generally indicate the provisions relating to the liquidation of a company and close corporation.

<sup>52</sup> Appointed in an individual debtor sequestrated in terms of the Insolvency Act.

<sup>53</sup> Appointed in estate of corporate entities liquidated in terms of the Company Act or Close Corporations Act.



### 1.6.3 “GOVERNMENT” AND “STATE”

The terms “government” and “state” are used interchangeably in this study. “State” is generally a more neutral, abstract term, while “government” refers to a political entity.<sup>54</sup>

## 1.7 REFERENCE TECHNIQUES

- 1 For the sake of convenience I use the masculine form throughout this thesis to refer to a natural person.
- 2 When I refer to court judgments, the full citation appears in the footnotes as well as in the table of cases. Books are referred to in the footnotes by way of short title, while I supply the full title in the bibliography. Only the first author of a journal article is cited in the footnotes, while the complete list of authors will appear in the bibliography. In the case of a source drawn from the internet the website and date it was last accessed is given in the footnote and the bibliography.
- 3 The law as stated in this thesis reflects the position as on 31 August 2009. However, reference will be made to certain statements in address made by the Deputy Minister for the Department of Justice and Constitutional Development, at a recent International Association of Insolvency Regulators Conference.<sup>55</sup>

## 1.8 LIMITATIONS ON THE STUDY

The general field of insolvency law is far too comprehensive to address in one thesis. For this reason, certain limits have been placed upon the scope of the research undertaken. Although the Insolvency Act of 1936, as primary source of our insolvency law, provides the conceptual foundation for the study’s research, the final recommendations and conclusions are intended to have equal effectiveness in matters of individual as well as corporate insolvency law.

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<sup>54</sup> Hoexter 5.

<sup>55</sup> Keynote address by Deputy Minister of Justice and Constitutional Development, Mr A Nel, MP, at the International Association of Insolvency Regulators (“IAIR”) annual general meeting and conference, Sandton, 2009-10-12. Available at [http://www.justice.gov.za/m\\_speeches/sp2009.html](http://www.justice.gov.za/m_speeches/sp2009.html) (last visited at 09-11-30).

*A Reformatory Approach to State Regulation of Insolvency Law in  
South Africa*

**PART II**

**A HISTORICAL OVERVIEW**

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**SUMMARY**

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## CHAPTER 1: HISTORICAL OVERVIEW OF STATE REGULATION OF SOUTH AFRICAN INSOLVENCY LAW

### 1.1 INTRODUCTION

You ask what is the good of knowledge of the ancient law? What is the use of studying an ancient jurisprudence dead and buried? Why disturb its ashes and waste the precious hours? Forsooth, these are questions asked by those who are ignorant of the fragments of the ancient jurisconsults, and who know not how to draw from the fountains of clear water, but who resort to the turbid pools of the commentaries of the so called doctors.<sup>1</sup>

South African insolvency law is neither pure Roman-Dutch law, nor pure English law, its legal tradition having been shaped both in substance and methodology by a fusion of influences deriving from periods of Dutch and British colonial domination in the Cape of Good Hope.<sup>2</sup> When endeavouring to make suggestions on law reform with the aim of eradicating certain problems areas in respect of our regulatory procedures, it is necessary to return to the early foundations of our insolvency law. In an effort to explain the distinctive features of our present system, the historical roots of regulation in South African insolvency law have to be unearthed. This is undertaken in an attempt to establish a pattern of regulation in our insolvency law. As aptly recognised by the Cork Committee<sup>3</sup>: “the roots of insolvency law are embedded deep in our legal, social and economic history.”<sup>4</sup>

The chapter is divided into two parts. The subject of the first is a brief discussion of the history of insolvency law in general followed by a historical survey of the evolution of state regulation in the Roman, Roman-Dutch and English law. The latter is of particular importance in the context of this study, as South African insolvency legislation is deeply rooted in English law, resulting in South African and English laws reflecting to a certain extent similar legal philosophies and principles.<sup>5</sup> The remainder of the chapter explores the

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<sup>1</sup> The answer given by Bijnkershoek when questioned by students as to the reason why they should concern themselves with the study of Roman law. Cornelius Bijnkershoek (1673-1743) was one of the most eminent Dutch jurists of the eighteenth century. He was the President of the Supreme Court of Holland, Zeeland and West-Friesland from 1724 until his death. See Wessels *History of the Roman-Dutch Law* (1908) 661 (hereafter referred to as Wessels).

<sup>2</sup> Hereafter referred to as the Cape or Cape of Good Hope. Lubbe *Three Aspects of South African law* (2007) unpublished paper presented at IALS Conference, China, on file with the author.

<sup>3</sup> The full title of this committee’s work is *Cork Report of the Review Committee Insolvency Law and Practice* Cmnd 8558 (1982) (hereafter referred to as the *Cork Report*).

<sup>4</sup> Martin “The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation” (2005) *Boston College International & Comparative LR* 1 (hereafter referred to as Martin “The Role of History and Culture”).

<sup>5</sup> See generally: Wessels 661; Smith *Insolvency Law* (1988) 5 (hereafter referred to as Smith); Bertelsmann *et al Mars, The Law of Insolvency in South Africa* (2008) 1-2 (hereafter referred to as Mars); Sharrock *et al*



development of state regulation in South African insolvency law and the subsequent insolvency statutes that found application.

It falls beyond the scope of this study to include a detailed discussion of each aspect of the historical development of our insolvency law, and emphasis will repeatedly be laid upon the development of the basic principles underlying the regulation of insolvency law. It is anticipated that a brief glance at the historical roots of our legal system would ensure that certain practices are not taken for granted and enterprises are not sustained long after their reason for existing has disappeared.<sup>6</sup>

## 1.2 HISTORICAL OVERVIEW OF INSOLVENCY LAW IN GENERAL

Although we find that general works on the history of law and procedure make scant mention of the history of bankruptcy, it has a very long history – being known in the Middle Eastern and Roman worlds as long as there has been a recorded history of commerce and trade.<sup>7</sup> Credit sales and indebtedness were practically unknown and in early primitive societies there were no laws protecting creditors or regulating the distribution of a debtor's estate.<sup>8</sup> Payment was seldom delayed and creditors who performed their part of a transaction had little cause to fear default on the part of the debtor. Sanctions varied from being religious in character to a severe form of the primitive procedure of execution.<sup>9</sup> It is interesting to note that in ancient Egypt payment of debt was for example often forced by a spiritual sanction. In the event of default by the debtor, it was almost a universal custom for the debtor to pledge the body of

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*Hockly's Insolvency Law* (2006) 11 (hereafter referred to as Hockly); Evans *A Critical Analysis of Problem Areas in respect of Assets of Insolvent Estates of Individuals* (2009) LLD dissertation University of Pretoria (hereafter referred to as Evans); Stander *Die Invloed van Sekwestrasie op Onuitgevoerde Kontrakte* (1994) 8-16 LLD dissertation Potchefstroom University for Christian Higher Education (hereafter referred to as Stander); Dalhuisen *Dalhuisen on International Insolvency and Bankruptcy* vol 1 (1986) 1-1-1-17 (hereafter referred to as Dalhuisen); Visser "Romeinsregtelike Aanknopingspunte van die Sekwestrasieproses in die Suid-Afrikaanse Insolvensiereg" (1980) *DeJure* 42 (hereafter referred to as Visser); Stander "Geskiedenis van die Insolvensiereg" (1996) *TSAR* 371 (hereafter referred to as Stander "Geskiedenis van die Insolvensiereg"); Levinthal "The Early History of Bankruptcy Law" (1918) *University of Pennsylvania LR* 223-250 (hereafter referred to as Levinthal); Burdette *Framework for Corporate Insolvency Law Reform in South Africa* (2002) LLD dissertation University of Pretoria (hereafter referred to as Burdette); Roestoff 'n *Kritiese Evaluasie van Skuldverligtingsmaatreëls vir die Individu in die Suid Afrikaanse Insolvensiereg* (2002) LLD dissertation University of Pretoria.

<sup>6</sup> Duns *Insolvency Law and Practice* (2002) 25 (hereafter referred to as Duns).

<sup>7</sup> Omar *European Insolvency Law* (2004) 4 (hereafter referred to as Omar).

<sup>8</sup> See Omar 6; Levinthal 223.

<sup>9</sup> Levinthal 229.

his nearest deceased relative, especially that of his father, and the creditor was given the right to remove the mummy.<sup>10</sup>

Much of the medieval laws of European insolvency<sup>11</sup> arose from the customs of the Italian cities which enacted laws and developed rules to govern the conduct of trade by citizens and foreigners and to deal with the absconding debtor's assets.<sup>12</sup> This phenomenon probably arose as a result of the absence of sufficient procedures in early Roman law to deal the more sophisticated commercial climate. The etymology of the word bankruptcy is said to be *banca rota* (broken bench) and was derived from the ceremony whereby an insolvent trader was punished by being forced to break his bench, thereby denying him the ability to continue trading.<sup>13</sup> Certain writers hold the view that the word "bankruptcy" is derived from the French words *banque* (bank) and *route* (road or path) or the Italian word *bancorupto*.<sup>14</sup> Then again, Blackstone preferred the Italian lineage: "The word itself is derived from the word *bancus* or *banque*, which signifies the table or counter of a tradesman and *ruptus*, broken; denoting thereby one whose shop or place of trade is broken and gone ..."<sup>15</sup>

Principles of modern bankruptcy law in both common and civil law countries matured from a uniform origin.<sup>16</sup> The "Law Merchant"<sup>17</sup> was a distinct body of law developed by a network of medieval courts scattered across Europe which would exercise their jurisdiction in the locations where they resided over the dealings of merchants and commercial issues in general. The Law Merchant became a body of common European usage, drawing extensively

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<sup>10</sup> Levinthal 229.

<sup>11</sup> The word "insolvency" derives from the Latin "in" (against) and "solvere" (dissolve or release) and therefore indicated that the insolvent was a person not released from debt. See Omar 5.

<sup>12</sup> Omar 6.

<sup>13</sup> Jackson *The Logic and Limits of Bankruptcy Law* (1986) 2 (hereafter referred to as Jackson). For an alternative derivation see Levinthal "The Early History of English Bankruptcy" (1919) *University of Pennsylvania LR* 67 (hereafter referred to as Levinthal on English Law). See also Rajak "The Culture of Bankruptcy" 4 (hereafter referred to as Rajak "The Culture of Bankruptcy") in Omar *International Insolvency Law: Themes and Perspectives* (2008); Omar 4.

<sup>14</sup> Latin: *Bancus Ruptus*.

<sup>15</sup> Blackstone *Commentaries on the Laws of England*, (1765-1769); Herbermann *et al The Catholic Encyclopedia, volume II, Civil Aspect of Bankruptcy* (1907).

<sup>16</sup> See Rajak "The Culture of Bankruptcy" 5; Levinthal 229.

<sup>17</sup> See Baker "The Law Merchant and the Common Law before 1700" (1979) *Cambridge LJ* 295 (hereafter referred to as Baker); in *Jacobson v Nitch* (1889-1890) 7 SC at 174 De Villiers J mentioned:

There is no doubt a danger against which English or Scotch judges, administering the law of this Colony, have to be constantly on their guard; the danger, I mean, of adopting decisions or statements of the text writers, as laying down general principles of the Roman-Dutch law, which on a closer examination may prove to be merely decisions or statements as to the customs of particular districts or as to the law merchant as interpreted by particular Courts, and to constitute deviations from rather than illustrations of the general law of the Netherlands.



upon the customs and practices which had become established among merchants in their dealings with one another but based principally upon the mercantile law of Italy, which itself was derived from Roman law.<sup>18</sup>

With regard to the regulation of early bankruptcy law, it is not apparent how far the general law of the day took any notice of trading disputes, and it seems probable that for the most part the supervisory function was left to special local tribunals in towns and markets across Europe.<sup>19</sup> With the improved conditions of the eleventh century, trade and commerce in England revived, and, after the Norman Conquest, the guild merchant made his appearance. This development not only widened the horizons of trade in England, but the new transactions of merchants also progressed beyond the scope of the old folk-law in the market. The Law Merchant gradually became more influential across Europe and especially in England as undoubtedly a body of cosmopolitan law akin in status to civil or canon law.<sup>20</sup> Although a parallel cannot be drawn between the institution of the Law Merchant and modern insolvency regulators, the former most certainly did represent a crystallisation of principles previously left to the general knowledge and common sense of jurists and as such could be regarded as one of the earliest regulatory sources in mercantile law.

### 1.3 ROMAN LAW

Roman law itself evolved together with the Roman civilisation over a period of more than a thousand years. The earliest documented evidence of Roman civilisation and Roman law appears to date back to approximately 450 BC.<sup>21</sup> The fall of the Western Roman Empire in 476 AD led to the general decline in the influence of Roman law in Western Europe, although it did not disappear completely. Some regions in Italy,<sup>22</sup> France<sup>23</sup> and Spain<sup>24</sup> that took over from the Romans permitted the Romans and Gallic-Romans to continue the maintenance and codification of Roman law.<sup>25</sup> With the rediscovery of the *Digests of Justinian*<sup>26</sup> in the

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<sup>18</sup> Fletcher *The Law of Insolvency* (2009) 8 (hereafter referred to as Fletcher).

<sup>19</sup> Baker 296.

<sup>20</sup> Levinthal on English Law 67.

<sup>21</sup> See Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* (1977) 1 (hereafter referred to as Van Zyl); Evans 17.

<sup>22</sup> Lombards in Northern Italy.

<sup>23</sup> Frankish tribes in France.

<sup>24</sup> The Visigoths in Spain.

<sup>25</sup> Dalhuizen par 2.01 [1] 1-20.

<sup>26</sup> Studied by Irenus at the University of Bologna. See Dalhuisen par 2.01 [2] 1-21.



eleventh century in Pisa, a new era of development of law followed and with it the eventual revival of insolvency laws.<sup>27</sup>

Most writers<sup>28</sup> seem to agree that the origin of South African insolvency law is to be found in Table III of the Twelve Tables, which dealt with the execution of judgments.<sup>29</sup> In the law of Rome as set forth in the Twelve Tables<sup>30</sup> the borrower was said to have pledged himself as *nexus*<sup>31</sup> to his creditor – that is, he pledged his own person for the repayment of the loan.<sup>32</sup> The law not only made provision for the imprisonment of the debtor, but also provided that the debtor could be sentenced to death or sold as a slave in a foreign country (*manus injectio*).<sup>33</sup> This mode of execution was performed directly and with relentless rigidity against the person of the debtor.<sup>34</sup>

In terms of Table III of the Twelve Tables, which applied from approximately 451 BC, a creditor could enforce his judgment with the process known as *legis actio per manus injectionem*.<sup>35</sup> This was a form of private force whereby the debtor was given a period of grace of 30 days within which to comply with a judgment and failure to do so resulted in the debtor being brought before the *Praetor*.<sup>36</sup> The judicial process commenced with the creditor placing his hand upon the debtor while reciting the prescribed *formula*.<sup>37</sup> The placing of his hand on the debtor served as a primarily symbolic seizure by force.<sup>38</sup> Although provision was made for a *vindex* to intervene in these proceedings, this was done at great risk and was not a general occurrence, as he could have been awarded double payment if he lost the proceedings.<sup>39</sup> Where no successful intervention by a *vindex* was present, and the debt remained outstanding, the debtor was adjudged to the creditor as debtor-slave.<sup>40</sup>

<sup>27</sup> Dalhuisen par 2.01 [2] 1-21.

<sup>28</sup> See, eg, Mars 6, Stander 8; Stander “Geschiedenis van die Insolvensiereg” 371; Dalhuisen par 1.02 [1] 1-4-1-5.

<sup>29</sup> See Evans 9; Mars 6; Stander 8; Stander “Geschiedenis van die Insolvensiereg” 371.

<sup>30</sup> 451-450 BC. *Lex XII Tabularum*, a set of laws dating from about 450 BC and was the first known codification of Roman law. See Dalhuisen par 1.02 [1] 1-4.

<sup>31</sup> Literally “fettters”. See Dalhuisen par 1.02 [1] 1-4-1-5.

<sup>32</sup> See Wenger *Institutes of the Roman Law of Civil Procedure* (1940) 230 (hereafter referred to as Wenger); Stander “Geschiedenis van die Insolvensiereg” 371; Levinthal 251.

<sup>33</sup> See Stander 8; Stander “Geschiedenis van die Insolvensiereg” 371; Wenger 230.

<sup>34</sup> Smith 5.

<sup>35</sup> See Visser 41; Mars 1; Wenger 230; Dalhuisen par 1.02 [1] 1-4-1-5

<sup>36</sup> See Visser 41; Burdette 5.

<sup>37</sup> Burdette 5.

<sup>38</sup> Wenger 223.

<sup>39</sup> See Wenger 227; Burdette 5.

<sup>40</sup> See Visser 43; Wenger 227.

The creditor could now detain the debtor in prison for sixty days.<sup>41</sup> During this time it was possible for the debtor to enter into an arrangement with the creditor.<sup>42</sup> The debtor also remained a free man and owner of his property.<sup>43</sup> On three consecutive market days the creditor had to bring the debtor before the *Praetor*, to announce in public the outstanding amount for which the debtor was liable.<sup>44</sup> In instances where the two parties were unable to reach an agreement with the creditor, and the debt remained outstanding, the creditor could, on the third market day, either take the debtor's life or sell him into slavery.<sup>45</sup> This was also the case when there was more than one creditor in this final stage and each creditor had a right to a portion of the debtor's body.<sup>46</sup>

Between 326 BC and 313 BC the right to sell or sentence a debtor to death was repealed by the *Lex Poetelia*, which prohibited the sale of the debtor into slavery in execution of a judgment debt and in the later Republic it became clear that imprisonment had taken the place of sale into slavery as a punishment for a debtor's inability to pay his debts.<sup>47</sup> In 320 AD even such imprisonment was abolished save in the case of debtor who continuously refused to pay.<sup>48</sup> During early Roman law the right to execution was mainly aimed at the person of the debtor and the right to execute against the property of a debtor was very limited.<sup>49</sup> As a result the development of insolvency procedures did not receive much attention and moreover no particular mention is made of any form of state regulation during the insolvency process.

In roughly 104 BC a *Praetor* named Publius Rutilius<sup>50</sup> introduced a process of general execution against the property of a debtor, known as the *bonorum emptio* or the *bonorum venditio*.<sup>51</sup> The *bonorum venditio*<sup>52</sup> afforded the creditors the opportunity to receive

<sup>41</sup> Visser 43.

<sup>42</sup> Visser 43.

<sup>43</sup> Visser 43.

<sup>44</sup> See Burdette 29; Visser at 43 also points out that this practice had a dual purpose: firstly it was intended to persuade the debtor's friends to pay the debt in sympathy with the degradation that the debtor was suffering, and in the second place it was intended to allow the debtor's other creditors to state their claims. See also Stander "Geschiedenis van die Insolvensiereg" 371.

<sup>45</sup> See Ledlie *Sohm's Institutes of Roman Law* (1907) 286 (hereafter referred to as Ledlie); Burdette 30; Visser 44; Stander "Geschiedenis van die Insolvensiereg" 371.

<sup>46</sup> According to Milman *Personal Insolvency Law, Regulation and Policy* (2005) 148 (hereafter referred to as Milman), this scenario may have been the inspiration for Shakespeare's *The Merchant of Venice* (1596).

<sup>47</sup> See Stander 8; Mars 6.

<sup>48</sup> Mars 6.

<sup>49</sup> Stander "Geschiedenis van die Insolvensiereg" 371.

<sup>50</sup> *Praetor* in 118 BC.

<sup>51</sup> See Buckland *A Manual of Roman Private Law* (1947) 387 (hereafter referred to as Buckland); Dalhuizen par 1.02 [2] 1-4; Wegner 235; Visser 45; Mars 2; Stander "Geschiedenis van die Insolvensiereg" 371-372.





possession of the debtor's estate (*missio in possessionem*)<sup>53</sup> and the procedure entailed that the *Praetor* had to issue three decrees, each marking a distinct stage in the proceedings. The first publicly advertised the sale of assets and gave notice to the non-petitioning creditors to put in their claims. One or more of the creditors of the debtor were authorised to take possession of the debtor's property *rei servandae causa*.<sup>54</sup> If the debtor remained unwilling to pay, a judgment was rendered against him within thirty days for double the money and the money was subsequently recovered by means of a sale (*venditio bonorum*).<sup>55</sup>

The second decree empowered creditors to call a meeting and choose from their number a manager or *Magister bonorum*,<sup>56</sup> the equivalent of a trustee, to supervise the sale of the assets.<sup>57</sup> The *Magister* was thus one of the creditors and represented the creditors by whom he was selected. The task of the *Magister* was to sell the property of the debtor *en bloc* on a public auction to the person offering the largest dividend to creditors.<sup>58</sup> The *Magister* was also responsible for compiling a *lex bonorum vendendorum*,<sup>59</sup> which represented an account with details relating to the sale of the assets. Included in the account was a list of assets sold, a list of preferences which existed as well as the amount of the sale.<sup>60</sup> The *Magister* was thus one of the creditors and acted merely as an agent to those who elected him. He did not become owner of the estate and was in no sense a public officer entrusted by the *Praetor* with the conduct of the bankrupt's affairs. The responsibility of the elected *Magister* was primarily to sell the assets *en bloc* at a public action.<sup>61</sup> The second decree is of particular interest to this study as it may represent the first encounter during early Roman law with the phenomenon of "stewardship" in regard to the management or administration of the property of others.

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See also Levinthal at 232-233 for a discussion of the historical development regarding execution against the debtor's person, and execution against the debtor's property.

<sup>52</sup> Ankum *De Geschiedenis de "Actio Pauliana"* (1962) 29 (hereafter referred to as Ankum) is of the opinion that the *bonorum venditio* should not be credited to the *Praetor* Rutilius, that the development was more gradual and that one should rather revisit the time of Augustus to find the fundamental development of this legal figure. See also Boraine *Die Leerstuk van Vernietigbare Regshandelinge in die Insolvensiereg* (1994) 115 LLD dissertation University of Pretoria.

<sup>53</sup> *Missio in possessionem* is similar to the English "receiving order".

<sup>54</sup> Visser 45. According to Dalhuizen the debtor could remain in possession of his estate though supervised by the creditor or if there were more than one creditor a *curator bonorum* was appointed. He acted as a trustee but with limited powers of preservation.

<sup>55</sup> Dalhuizen par 1.02 [2] 1-7.

<sup>56</sup> See Stander 9; Visser 45.

<sup>57</sup> Stander "Geschiedenis van die Insolvensiereg" 372.

<sup>58</sup> *Bonorum emptor*.

<sup>59</sup> *Een programma van de verkoop*.

<sup>60</sup> See Ankum 29; Stander 9.

<sup>61</sup> Levinthal 240.

The third decree authorised the sale a few days later and the complete estate or *universitas iuris* was sold and transferred *en bloc* to the person who offered creditors the largest dividend on their claim.<sup>62</sup> This process was known as the *bonorum emptio*.<sup>63</sup> The buyer (*bonorum emptor*) became the legal successor<sup>64</sup> of the debtor and accepted all his assets and his liabilities.<sup>65</sup> The procedures as discussed were primarily aimed at protecting the creditors, and no provision was made for a debtor to avoid the strict consequences of not being able to pay his debt. This apparent shortcoming was addressed by the *lex Iulia de bonis cedendis* of 17 AD, and allowed a debtor to renounce his rights to his property in favour of his creditors instead of incurring an execution against his person.<sup>66</sup> This procedure was known as *cessio bonorum* and thereafter the procedure was similar to the *bonorum emptio*.<sup>67</sup>

The *modus* of sale of *bonorum emptio* was gradually replaced by the *bonorum distractio* which provided that instead of selling the estate *en bloc* a *curator bonorum* was appointed, disposing of the assets piecemeal, with creditors receiving *pro rata* payments from the proceeds.<sup>68</sup> Any property acquired by the debtor under the *cessio bonorum* was also liable to be sold in order to pay for his debts.<sup>69</sup> Under the *bonorum distractio* the *Praetor* committed the management of the debtor's estate to a *curator*, whose duty it was to dispose of the estate in separate lots and distribute payment to creditors. The estate was thus not sold by a *Magister* chosen by the creditors, but by a *curator* chosen by the *Praetor*. As a result it could be debated that at this point the state to a certain degree became involved in the regulatory process. Under this system the bankrupt was not dispossessed of his whole property. The creditors were paid by the debtor himself through the medium of the *curator*. We could probably refer to the appearance of the *curator* as administrator of the insolvent estate as the next phase in the development of the principle of stewardship during the Roman period.

The old *Magister* was never anything more than a creditor acting in the selfish interests of himself and his electors, whereas the *curator*, appointed by the *Praetor*, represented to a limited extent the principle of the public interest which requires that bankruptcy proceedings

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<sup>62</sup> Hockly 10.

<sup>63</sup> See Stander 10; Smith 5.

<sup>64</sup> Analogy can be made with *bonorum possessor successor*.

<sup>65</sup> Dalhuisen par 1.02 [2] 1-8.

<sup>66</sup> See Visser 46; Mars 7; Dalhuisen par 1.03 1-13; Stander "Geschiedenis van die Insolvensiereg" 372.

<sup>67</sup> See Stander "Geschiedenis van die Insolvensiereg" 373; Mars 7; Smith 5.

<sup>68</sup> A different procedure was invoked where the debtor was a person of high standing or rank (*clarae personae*). See also Stander 11.

<sup>69</sup> Mars 7.



shall be conducted on a uniform plan and that all the creditors shall obtain an equitable satisfaction of their claims.<sup>70</sup> It seems, however, as if the Romans never developed this principle to its full potential because, as pointed out, the *curator* never attained the position of a public officer charged with the conduct of a state-regulated procedure in bankruptcy and consequently we still do not see any outright state regulation taking place.<sup>71</sup>

There is no doubt that in the development of creditor's remedies Roman law was conscious of, and responsive to, the need to leave the debtor with the necessities of life. This emerges under the earlier harsher regime laid down by the Twelve Tables regarding the treatment of a debtor committed in person to the creditor. But it appears that the idea of a discharge from unpaid debt never became part of the Roman law.<sup>72</sup> Rajak is of the opinion that this should not surprise us, as the permanent discharge was a comparatively novel idea even in nineteenth-century England. He also remarks that it might be suggested that the failure of the Roman society to develop a form of relief for unfortunate and oppressed debtors may at least be excused by the fact that the society did not have the example of the limited liability company which perforce provides a full and permanent discharge from personal debt.<sup>73</sup>

The *bonorum emptio* and *distractio* constituted the Roman system of bankruptcy, a system that is in fact viewed by many to be the origin and source of all bankruptcy systems.<sup>74</sup> Swart<sup>75</sup> is of the opinion that the *bonorum distractio* also represents the origin of the South African insolvency system, as it signifies the first signs of a collective debt-collecting system.<sup>76</sup>

#### 1.4 ROMAN-DUTCH LAW

The common law of South Africa – the old Roman Dutch law – is like some stately cathedral or like some beautiful continental hotel *de ville* or town hall: every part of the structure has been made to harmonise with every other part and the whole inspires one with reverence: whereas the statute law is often like some botched building raised in a hurry with inadequate materials by an amateur who thought himself a Michael Angelo or a Christopher Wren...<sup>77</sup>

<sup>70</sup> See Levinthal 241; Stander 12.

<sup>71</sup> As cited by Ledlie 304. See also Levinthal 241; Visser 374; Stander 12.

<sup>72</sup> Rajak "The Culture of Bankruptcy" 11.

<sup>73</sup> Rajak "The Culture of Bankruptcy" 11.

<sup>74</sup> Levinthal 236.

<sup>75</sup> Swart *Die Rol van 'n Concursus Creditorum in Suid Afrikaanse Insolvensiereg* (1990) 281 LLD dissertation University of Pretoria.

<sup>76</sup> As opposed to an individual debt collecting procedure. See Stander 12.

<sup>77</sup> Wessels "The Future of Roman-Dutch Law in South Africa" (1920) *South African LJ* 265 (hereafter referred to as Wessels "The Future of Roman-Dutch Law in South Africa").

The broad basic layer of modern South African law remains the Roman-Dutch law as was introduced in the southern part of Africa approximately four centuries ago.<sup>78</sup> The amalgamation of the Roman and Dutch systems resulted in what was then styled the *Rooms-Hollands-Recht*, a phrase first used by Van Leeuwen.<sup>79</sup> Roman-Dutch law is a system of customary law and as the name indicates has been largely influenced by Roman law.<sup>80</sup> It was a combination of what was best in each system and where there was a definite established rule in the Netherlands, which conflicted with the Roman law, the former prevailed.<sup>81</sup>

Already between 1245 and 1412 *Handvesten* given by the Dutch counts to their towns provided that if the debtor was unable to pay his creditors he should be handed over to the latter until such time as the debt was paid.<sup>82</sup> The first legislation in Holland dealing with bankruptcy was enacted in 1531 by Charles V of Spain.<sup>83</sup> The legislation mentioned the great stimulus trade had received, and debtors had to be compelled to pay their debts and be prevented from evading their liabilities.<sup>84</sup> Until the introduction of the *cessio bonorum*<sup>85</sup> the law of Holland apparently only knew of attachment of the person of the debtor in satisfaction of debt and to obtain such an action was a difficult and costly procedure.<sup>86</sup>

By all accounts it appears that the Roman law procedure of *cessio bonorum* was in its main features introduced into Holland in approximately the last part of the fifteenth century.<sup>87</sup> A petition had to be presented to court together with a list of his property and accounts of creditors. The list and petition was then referred to the governing authority of the debtor's place of domicile

<sup>78</sup> It should be noted that Roman-Dutch law is not the only system applied in South Africa. In certain fields indigenous African law is to be applied under certain circumstances to certain persons. See Van Warmelo "The Function of Roman-Law in South African Law" (1958-1959) *Tulane LR* 565 (hereafter referred to as Van Warmelo). See, eg, *Fairlee v Raubenheimer* 1935 AD at 136; *Swadif (Pty) Ltd v Dyke* 1978 1 SA 928 (A) 938; *Millman v Twiggs* 1995 3 SA 674 (A) 679 at 680.

<sup>79</sup> Van Leeuwen employed it as the sub-title of his work entitled *Paratitla Juris Novissimi* (1652) published for as part of his work *Het Rooms-Hollandsde Recht: Paratitla Juris Novissimi* (1664); See also Wille's *Principles of South African Law* (1991) 22 (hereafter referred to as Wille's).

<sup>80</sup> Van Warmelo 565.

<sup>81</sup> Roman-Dutch law is derived from two sources: Germanic custom and Roman law. See Lee *An Introduction to Roman-Dutch Law* (1953) 3 (hereafter referred to as Lee).

<sup>82</sup> See Wessels 218; Levinthal 245.

<sup>83</sup> Wessels 664. See Levinthal 246.

<sup>84</sup> Levinthal 246.

<sup>85</sup> *Boedelafstand*. See also Stander 12.

<sup>86</sup> Wessels 664.

<sup>87</sup> See Burton *Observations on Insolvent Law of the Colony* (1829) 6 (hereafter referred to as Burton); Roestoff "Skuldverligtingsmaatreëls vir Individue in die Suid Afrikaanse Insolvensiereg: 'n Historiese Ondersoek" (Deel II) 2005 *Fundamina: A Journal of Legal History* 78 (hereafter referred to as Roestoff "Skuldverligtingsmaatreëls vir individue in die Suid Afrikaanse Insolvensiereg"); Dalhuisen par 2.02[5] 1-35; Wessels 664; Mars 8; Stander "Geskiedenis van die Insolvensiereg" 374.



in order for them to compile a report. The court upon receipt of the report granted a *rule nisi* calling upon persons interested to show cause before the judge why a *writ of cessio bonorum* provisionally issued should not be made final. The writ of *cessio* did not discharge the insolvent from his debts. The only benefit it conferred upon the insolvent was to free him from personal arrest and the concern of being sued.<sup>88</sup> The effect of granting the rule was to free the petitioner from future arrest whilst the effect of its confirmation was to stay all execution and to place his property in the hands of a *curator*.<sup>89</sup> It seems that the *curator* under Roman-Dutch law did not become owner of the insolvent estate but only took over the control of the estate. Van der Linden states that with the grant of the *cessio*: “word door het Gerecht met te decerneeren eene *Curateele in des Cessionants boedel, voor de bewaarding der goederen gezorgt*”.<sup>90</sup>

The benefit of *cessio* was virtually a voluntary surrender by an insolvent of all his estate for benefit of creditors.<sup>91</sup> The action was also exclusively granted to the insolvent who became insolvent due to misfortune.<sup>92</sup> The *cessio bonorum* or voluntary surrender was not a pleasant experience and some writers<sup>93</sup> even refer to a rule in Rotterdam and Leyden to the effect that the debtor had to stand for an hour on three consecutive days before the town house “in his undermost clothes”.<sup>94</sup>

During the seventeenth century the insolvent estates of deceased persons were administered by commissioners under the supervision *schout* and *schepenen*.<sup>95</sup> As chambers for abandoned estates were gradually established in the various towns, the insolvency commissioners were subsequently chosen from the members of these bodies. Besides the insolvent estates of deceased persons these chambers with time in many towns came to be charged with the administration of the estates of persons who had obtained *cessio bonorum*, so that instead of appointing a private person to administer the estate of the insolvent, it became a custom during the eighteenth century to place all insolvent estates under the administration of boards called *Desolate Boedelkamers*.<sup>96</sup>

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<sup>88</sup> Wessels 665.

<sup>89</sup> Stander “Geschiedenis van die Insolvensiereg” 374-375.

<sup>90</sup> Estate is placed under the control of the *Curator*. See Van der Linden *Verhandeling over de Judicieele Practijcq* (Leiden 1744) 399 as cited in Stander at 13.

<sup>91</sup> Wessels 665.

<sup>92</sup> Wessels 667.

<sup>93</sup> See Burton 6; Smith 6.

<sup>94</sup> See Wessels 665; Roestoff “Skuldverligtingsmaatreëls vir Individue in die Suid Afrikaanse Insolvensiereg: ’n Historiese Ondersoek” 78.

<sup>95</sup> Mars 8.

<sup>96</sup> Wessels 668.



Subsequently the *Desolate Boedelkamers* were also entrusted with the administration of, among other things, the insolvent estates of so-called *bankroeters* or *bankbreekers* (bankrupts). Unlike debtors who became insolvent through misfortune and basically voluntary handed over their estates, bankrupts were debtors who fled the country to escape their creditors or who acted fraudulently and were considered akin to thieves.<sup>97</sup> The estates of such persons were originally handed over to a *curator* appointed by the court, but later they were placed in the hands of the commissioners of the *Desolate Boedelkamers*.<sup>98</sup>

During the eighteenth century there appears to have been a large number of local ordinances, but that of Amsterdam passed in 1777<sup>99</sup> is of great importance, for it has to a large extent been the foundation of much of the subsequent South African law of insolvency and has also been widely accepted as the origin of the South African insolvency law.<sup>100</sup> The passing of this ordinance is an important milestone in South African insolvency law, as it was also the source of the insolvency practice of the Cape of Good Hope at the time of annexation.<sup>101</sup> The main principles of the ordinance were introduced into the various colonial ordinances, and still form the basis of our bankruptcy practice.<sup>102</sup>

According to the Ordinance of 1777 the insolvent or any of his creditors could apply to the commissioners of the *Desolate Boedelkamers* to take over control of the debtor's estate.<sup>103</sup> The commissioners first attempted to make an arrangement with the creditors but if the latter refused the commissioners proceeded to make an inventory of assets and to examine the insolvent.<sup>104</sup> The following step in the proceedings was to call a meeting of creditors and to appoint a provisional *sequestrator*. The debtor was given a month to enter into a composition with his creditors and if not successful was then adjudged to be insolvent. The *sequestrator* was then appointed as the official *curator* of the estate. It is unclear whether the *curator* received ownership of the estate and a noteworthy fact was that the estate was administered according to the resolutions of creditors. After the creditors were allowed the opportunity to prove their claims the *curator* had to

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<sup>97</sup> Evans 44.

<sup>98</sup> Wessels 667.

<sup>99</sup> Ordinance 1777 (Amsterdam) *Nederlandsche Jaarboeken* 291.

<sup>100</sup> See, eg, *Fairlee v Raubenheimer* (n 78) at 146. Mars 9; Stander "Geschiedenis van die Insolvensiereg" 376; Smith 5. See also Hockly 11.

<sup>101</sup> Wessels 668.

<sup>102</sup> See *Fairlee v Raubenheimer* (n 78) at 146; De Villiers 19.

<sup>103</sup> See Stander "Geschiedenis van die Insolvensiereg" 367; Wessels 668.

<sup>104</sup> Wessels 669.



proceed to liquidate the estate and distribute the proceeds of the estate to the creditors.<sup>105</sup> In cases where it was pronounced that the insolvent acted honestly, a percentage of the proceeds were paid to him.<sup>106</sup> Upon receipt of a certificate the insolvent could obtain a discharge from all debts due prior to his insolvency.<sup>107</sup> In the context of this study a significant detail of the 1777 Ordinance was that it recognised the principle that the administration of the insolvent estate should be the responsibility of a trustee under the directions of creditors.<sup>108</sup>

In summary, the development of insolvency law in the Netherlands appears to have progressed somewhat slowly from the relatively late period of the fifteenth century.<sup>109</sup> The establishment of the *Desolate Boedelkamers* was a significant development in the historical evolution of state regulation in insolvency law, as it represents the logical need in a new age to institutionalise. As will be shown later, it is also a pioneering institution that served as a precursor to the Master of the High Court.<sup>110</sup>

## 1.5 ENGLISH LAW

### 1.5.1 Early History of Insolvency Law in England

The word “bankrupt” first appeared in the English language in the early part of the sixteenth century, and has been a distinctive feature of the English law and society for centuries since then.<sup>111</sup> Bankruptcy in England should however not be perceived to have attracted legal attention only in the sixteenth century, as there are numerous recorded instances dating back to medieval England.<sup>112</sup>

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<sup>105</sup> Stander “Geschiedenis van die Insolvensiereg” 376.

<sup>106</sup> Stander “Geschiedenis van die Insolvensiereg” 376.

<sup>107</sup> Wessels 669.

<sup>108</sup> It will also be noticed from the nature of the estates committed to the administration of this Chamber that a debtor could obtain the sequestration of the estate either by obtaining *cessio bonorum* or by stopping payment, a dual form of relief, which subsequently existed in the early South African law. See Mars 9; Wessels 672.

<sup>109</sup> Evans 47.

<sup>110</sup> Hereafter referred to as the Master or Master’s office.

<sup>111</sup> The *Oxford English Dictionary* identified its initial usage in 1533 and it first featured in statutory language in 1542. See Tabb “The History of Bankruptcy Laws in the United States” (1995) *American Bankruptcy Institute LR 5* (hereafter referred to as Tabb); Milman 1.

<sup>112</sup> Earlier public figures to have fallen foul of bankruptcy are Johann Gutenberg, who invented the printing press in the 1450s, and Daniel Defoe, famous author of *Robinson Crusoe* (declared bankrupt in 1692). Incidentally, William Shakespeare’s father was also a bankrupt. See Milman 2-6.



The common law of England in the twelfth and thirteenth centuries was not as severe as the earlier Anglo-Saxon law had been.<sup>113</sup> There was no imprisonment for debt, and, as one writer observes: “it is not a little remarkable that the common law knew no process whereby a man could pledge his body or liberty for payment of a debt.”<sup>114</sup> It is interesting to note that in early common law there was an initial reluctance to allow creditors remedies against the person of the debtor – in contrast to early Roman law, which allowed creditors to imprison the debtor if he did not pay (Roman law also provided for him to be killed or sold into slavery).<sup>115</sup> It was only at the end of the thirteenth century that proceedings for arresting and imprisonment of debtors were introduced into English law and gradually extended. By the end of the thirteenth century the legal position of the debtor was worsening and procedures for arresting and imprisoning judgment debtors had been introduced.<sup>116</sup>

The first Act that introduced attachment of the person and that had civil imprisonment as a result was the Statute of Marlbridge of 1267.<sup>117</sup> Various other statutes were introduced which eventually resulted in a creditor being entitled to imprison the debtor for nearly all cases of the non-payment of debt.<sup>118</sup> Imprisonment for the non-payment of debt was abolished only in 1869 by the Debtors Act, subject to certain exceptions contained in section 4 of that Act. As a result, debtors designed all sorts of means to avoid civil imprisonment.<sup>119</sup>

One of the first recorded pieces of legislation which allowed for the attachment of a debtor’s property is to be found in the Statute of Westminster II of 1285.<sup>120</sup> The common law writs of *capias* authorised “body execution” – that is, seizure of the debtor, to be held until payment of debt.<sup>121</sup> From the fourteenth century onwards the centralised jurisdiction exercised by the ordinary common law courts progressively superseded that of the courts Merchant and a lengthy process followed whereby a considerable part of the Law Merchant was absorbed into the

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<sup>113</sup> Rose *Lewis’ Australian Bankruptcy Law* (1967) 7 (hereafter referred to as Rose).

<sup>114</sup> Rose 7.

<sup>115</sup> Smith 5.

<sup>116</sup> Dickens’s father had in the early 1820s been imprisoned for debt. For an example of the treatment of debtors in early England see Dickens’s *Little Dorrit* (1857), a story concerning a father and his family living in the Swansea debtor’s prison. See Rose 8; Milman 6-8.

<sup>117</sup> Boraïne 230.

<sup>118</sup> See Boraïne at 230 where the Act of Burnell of 1283 or 1285 and the Statute of Merchants of 1285 are referred to. See also Burdette 27.

<sup>119</sup> For a discussion of some of these methods, see Boraïne 231; Burdette 28.

<sup>120</sup> See Dalhuisen par 2.02[8] 1-39; Boraïne 229.

<sup>121</sup> Tabb 7.

common law on the premise that it was “part of the laws of realm”,<sup>122</sup> until by the close of the seventeenth century the courts were regularly taking judicial notice of the mercantile custom.<sup>123</sup>

Writers who deal with the history of English bankruptcy<sup>124</sup> almost unanimously regard the Act of Parliament by Henry VIII in 1542<sup>125</sup> as the earliest legislation on the subject. It was entitled “An act against such persons as do make bankrupts”,<sup>126</sup> and the preamble to the Act was as follows:

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 of their creditors their debts and duties, but at their own will and pleasure consume the substance obtained by credit of other men, for their own pleasure and delicate living, against all reason, equity and good conscience ... the Lord Chancellor ... shall have power and authority by virtue of this Act to take ... imprisonment of their bodies or otherwise, as also with their [real and personal property however held] and to make sale of said [real and personal property however held] for true satisfaction and payment of the said creditors, that is to say; to every of the said *creditors a portion, rate and rate like, according to the quantity of their debt* (emphasis added).<sup>127</sup>

This first Bankruptcy Act of 1542 contained a form of compulsory sequestration, designed to apply to a dishonest and absconding debtor.<sup>128</sup> This statute viewed debtors as quasi-criminals (also called “offenders”), and placed additional remedies in the hands of creditors.<sup>129</sup> The 1542 Act also provided for the appointment of a body of commissioners to whom it gave wide powers to proceed with action on receipt of application by a creditor against a trading debtor who fled from country, barricaded himself in his house, neglected to pay his debts or otherwise defrauded his debtors.<sup>130</sup> Of particular importance for the purposes of this study is the fact that even at this early stage we encounter the fundamental principle of stewardship, which over the centuries became a constant feature of English bankruptcy law.<sup>131</sup>

The fundamental principle of the Act of Henry VIII was that in the case of the fraudulent debtor there should be a compulsory administration and distribution on the basis of a equality amongst all the creditors and thus in this Act we encounter the two fundamental principles on

<sup>122</sup> Goode *Commercial Law* (2004) 8 (hereafter referred to as Goode). See also Fletcher 8.

<sup>123</sup> Fletcher 8.

<sup>124</sup> It is interesting to note that the first time the word was used in English legislation it did not apply to a person but to an act or a thing. See Levinthal on English Law 104; Burdette 9.

<sup>125</sup> (34 and 35 Hen VIII, c. 4)

<sup>126</sup> See Levinthal on English Law 104; Tabb 7.

<sup>127</sup> *Pari passu* principle. See Goode 8.

<sup>128</sup> See Burdette 9; Dalhuisen par 2.02[8] 1-41-1-42; Boraine at 231 and the authority cited by him in (n 18).

<sup>129</sup> Tabb 7.

<sup>130</sup> Such acts were called “acts of bankruptcy”. See Rose 13.

<sup>131</sup> Milman 80.

which modern English insolvency laws are based: collectivity of participations of creditors and *pari passu* distribution among them.<sup>132</sup> The provisions of the Act dealing with the administration and distribution of the assets of the debtor were quite adequate and provided for a quorum of high officials to administer the estate and to distribute the proceeds amongst creditors.<sup>133</sup> The first feature of the Act, namely the realisation of the assets, was however mostly undefined, especially whose responsibility it was to execute this part of the Act.<sup>134</sup> It is possibly for this reason that the influence of this Act on English Law is not as noticeable as one would imagine.<sup>135</sup>

English law followed more or less the same pattern as that followed on the continent, in the sense that individual debt collection procedures preceded the development of formal insolvency law.<sup>136</sup> A more comprehensive bankruptcy law was passed in 1570 during the reign of Queen Elizabeth I and was known as the Act of Elizabeth.<sup>137</sup> This was also the first law to be designed as a true bankruptcy statute rather than as a fraud prevention law.<sup>138</sup> The Act filled out the basic parameters of the English bankruptcy system by also providing additional acts of bankruptcy, lacking only the discharge provisions that were only introduced in the early part of the eighteenth century.<sup>139</sup>

Of significance was that the provisions in this 1570 Act also transferred jurisdiction of the supervision of the estate from the previously mentioned commissioners introduced under the Bankruptcy Act of 1542 to the Lord Chancellor. On application of the creditor the Lord Chancellor had the power to order the seizure of the assets of an absconding trader and subsequently provided for the distribution of the proceeds of sale amongst the creditors.<sup>140</sup> The Act also made provision for the erection of the tribunal of commissioners of bankrupts for carrying into execution the several statutes of bankruptcy.<sup>141</sup> The ground for commencing a bankruptcy proceeding by the creditor was the commission of an “act of bankruptcy” by the

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<sup>132</sup> See Fletcher 7; Levinthal on English Law 107.

<sup>133</sup> Levinthal on English Law 108.

<sup>134</sup> Levinthal on English Law 108.

<sup>135</sup> See Martin “Common Law Bankruptcy Systems: Similarities and Differences” (2003) *American Bankruptcy Institute LR* 368-371 (hereafter referred to as Martin “Common Law Bankruptcy Systems”); Tabb 5.

<sup>136</sup> Dalhuisen par 2.02[8] 1-39.

<sup>137</sup> Act of Elizabeth (13 Eliz 1 c 7); See also Burdette 10; Fletcher 7-8.

<sup>138</sup> Lewis “Can’t Pay Your Debt Mate? A Comparison of the Australian and American Personal Bankruptcy Systems” (2001-2002) *Bankruptcy Development Journal* 297 at 299 (hereafter referred to as Lewis).

<sup>139</sup> Tabb 8.

<sup>140</sup> See Cork *Report* 16.

<sup>141</sup> Burton 14.



debtor.<sup>142</sup> Upon the occurrence of an act of bankruptcy creditors could petition the Lord Chancellor to convene a bankruptcy meeting.<sup>143</sup> The Chancellor would then appoint bankruptcy commissioners to supervise the process.<sup>144</sup> The commissioners had substantial powers originally somewhat similar to those of a bankruptcy judge.<sup>145</sup>

The commissioners examined the debtor about his or her dealings and property, and he or she was obligated to transfer his or her property to the commissioners.<sup>146</sup> They also had the power to summon persons to appear before them and could also commit people to prison.<sup>147</sup> Although appointed by the Chancellor, commissioners were not subject to his jurisdiction; recourse was to the common law courts. By the eighteenth century, however, the Chancellor had largely taken over direct jurisdiction of bankruptcy matters.<sup>148</sup> For the purposes of this study it is important to note that this was an early manifestation of the principle of regulation of insolvency law akin to the role of the present-day official receiver.

An important development in the history of bankruptcy law came *via* the Statute of Ann 1705.<sup>149</sup> It is said that the modern period of English law begun with the advent of the facility of discharge *via* the 1705 Act.<sup>150</sup> The discharge was not an automatic entitlement and the commissioners had to confirm that the debtor had “conformed” and had cooperated during the proceedings.<sup>151</sup> Most of the principles introduced by these acts have remained part of modern bankruptcy.<sup>152</sup> During the next few decades, having introduced a formal bankruptcy system by legislation, the institution quickly fell under the control of courts of equity, with the formal transfer of jurisdiction to the Lord Chancellor being affected by the 1732 Act.<sup>153</sup>

Since the enactment of the Elizabethan Statute in the late sixteenth century, the actual management of the bankrupt estates was in the hands of commissioners appointed by the

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<sup>142</sup> An act of bankruptcy was a form of conduct that indicated that the debtor was attempting to prevent creditors from recovering debts. See Tabb 8.

<sup>143</sup> Tabb 9.

<sup>144</sup> Rose 13.

<sup>145</sup> Tabb 9.

<sup>146</sup> Plank “The Constitutional Limits of Bankruptcy” (1995-1996) *Tennessee LR* 487 (hereafter referred to as Plank).

<sup>147</sup> Tabb 9.

<sup>148</sup> Tabb 9.

<sup>149</sup> Statutes of Anne, c. 17 (1705), and 10 Anne, c. 15 (1711).

<sup>150</sup> Levinthal on English Law 108. Milman 6.

<sup>151</sup> Tabb 11.

<sup>152</sup> See Duffy “English Bankrupts, 1571-1861” (1980) *American Journal of Legal History* 283 (hereafter referred to as Duffy); Rose 13.

<sup>153</sup> Act 5 George II of 1732. See Milman 7.

Lord Chancellor from lists submitted by creditors. To prevent the appointment of unsuitable characters, Lord Harcourt, who became the Lord Chancellor in 1731, abolished this practice and replaced it with a list of commissioners he chose himself.<sup>154</sup> This 1732 Act consolidated the law and also introduced the institution of the “assignee” appointed by the commissioners at first and later by the creditors.<sup>155</sup> Thus began the process of delegating day-to-day stewardship from public bodies (in the form of commissioners) to assignees.<sup>156</sup> The reason for this was that it was possible for the assignee to give closer attention to the affairs of the bankrupt than was possible for the commissioners.<sup>157</sup>

### 1.5.2 The Introduction of “Officialism” during 1831-1856

The government had to some extent been involved in the supervision and administration of insolvent estates since the introduction of the concept of bankruptcy in England in the sixteenth century. The rationale for this was that the creditors needed an impartial umpire to referee the equitable distribution of insolvent estates.<sup>158</sup> The turning point came with a relatively unknown statute, Lord Brougham’s<sup>159</sup> Act of 1831.<sup>160</sup> The dominant role of creditors in the administration of insolvent estates was reduced by the introduction of officers known as “Official Assignees”,<sup>161</sup> who were attached to the London Bankruptcy Court. With the creation of the office of the Official Assignee *via* the Act of 1831, the virtually complete control enjoyed by creditors over their debtors was thus reduced, signalling the beginning of some form of public control over the fate of the debtor.<sup>162</sup> The Act also introduced strict qualifications, as the “Official Assignees” had to be “Merchants, Brokers, or Accountants, or a person who have been engaged in Trade in the Cities of London or Westminster”.<sup>163</sup>

<sup>154</sup> For a detailed discussion of the history of the English bankruptcy commissions, see Hicks “Law, Order and the Bankruptcy Commissions of the Early Nineteenth Century England (1987) *Tijdschrift voor Rechtsgeschiedenis* at 123. See also Lester *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and the Company Winding-Up in the Nineteenth Century England* (2003) 18 (hereafter referred to as Lester).

<sup>155</sup> Levinthal on English Law 109.

<sup>156</sup> Milman 7.

<sup>157</sup> Rose 16.

<sup>158</sup> Lester 40.

<sup>159</sup> Lord Brougham (1778-1868) not only sponsored this Act but was also responsible for writing many subsequent bankruptcy bills and had an illustrious career in law which ended with his term as Lord Chancellor. See Ellis *Lord Brougham considered as a Lawyer* (1868) for an autobiographical description of his life.

<sup>160</sup> Lester 41.

<sup>161</sup> Also Registrars and Deputy Registrars of Bankruptcy.

<sup>162</sup> Rajak “The Culture of Bankruptcy” 14.

<sup>163</sup> Lester 45.





The structure of the bankruptcy system under the 1831 Act differed drastically from its predecessors and introduced the rationalisation of the system of bankruptcy commissioners. At the centre of the new system were the six permanent full-time commissioners appointed by the Lord Chancellor, although with the same powers as the commissioners under the previous system. They had the power to determine if a debtor was indeed bankrupt, seize assets, accept or reject creditor's claims and otherwise supervise the administration of the estate.<sup>164</sup> Despite the similarity in the profile of the old and new commissioners the fundamental difference came in with the newly appointed commissioners having been full-time employees of the state, paid with a salary rather than a system of fees.<sup>165</sup>

The 1831 statute marked the end of the Chancery Court's 250-year jurisdiction over bankruptcy matters.<sup>166</sup> Under the new dispensation the Court of Bankruptcy was erected with the sole jurisdiction to deal with bankruptcy cases and with the power to give binding decisions on all points of law arising in the course of a bankruptcy.<sup>167</sup> A Chief Judge and three judges were appointed with a staff of Registrars and the Official Assignees. In 1847 jurisdiction of District Bankruptcy Courts were transferred to County Courts and in 1847 the Court of Bankruptcy was abolished and the jurisdiction transferred to a Vice-Chancellor.<sup>168</sup>

### **1.5.3 The History of English Insolvency law, 1856 to the present**

During the 1860s the reform of bankruptcy law shifted significantly from judicial involvement in the administration of estates to the return of a creditor-controlled system of regulation. By the end of the decade, parliament completely dismantled the reform brought about in the 1830s and 1840s and replaced it with a creditor-managed administration.<sup>169</sup> During this period the policy consideration behind both major statutory reform projects, the Bankruptcy Act of 1861 and the Bankruptcy Act of 1869, was to emphasise creditor control and the diminished role of government as well as the judiciary in the administration of the insolvent estate.<sup>170</sup>

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<sup>164</sup> Lester 81.

<sup>165</sup> Lester 82.

<sup>166</sup> Lester 45.

<sup>167</sup> Rose 17.

<sup>168</sup> Rose 17.

<sup>169</sup> Lester 123.

<sup>170</sup> Lester 123.

The concept of some form of official control over insolvent estates was re-examined during the period of 1869 to 1883. This was the consequence of various scandals which were associated with the administration of bankrupt estates during this period.<sup>171</sup> The Bankruptcy Act of 1883 was the direct response to public dissatisfaction with the administration of bankruptcy estates and the realisation that the creditor controlled milieu was open to abuse and mismanagement.<sup>172</sup> In another swing of the pendulum the law reintroduced the concept of “officialism” in a more extreme form by placing “the administration of the insolvent’s estate under the control of the Board of Trade, which it arms with the powers necessary to protect the interests of the creditors and to vindicate public morality”.<sup>173</sup> The system enacted in 1883 was thus an administrative managed system in which the Board of Trade appointed a receiver to conduct most administrative functions in a case, leaving the process free of most judicial interaction. This format is still the defining feature of present-day English bankruptcy law.<sup>174</sup>

A new figure, namely the official receiver, was also introduced in 1883 with the responsibility of administering the debtor’s estate before the beginning of the bankruptcy procedure or of the friendly agreement with creditors. The 1883 Act initiated another important element, a new phase: the so-called “public examination” was added to the bankruptcy procedure, and it later on became a fundamental step in the bankruptcy procedure. During the public examination the creditors and the court could question the debtor on the state of affairs and on the causes of bankruptcy. It is evident that the 1883 law put emphasis on an analysis of debtors’ conducting of affairs and on official supervision of the entire procedure.<sup>175</sup>

An important development on the way to the return to “officialism” in the late part of the nineteenth century had been the appointment of Joseph Chamberlain as president of the Board of Trade in 1881.<sup>176</sup> Chamberlain set forth three principles essential to good bankruptcy law.<sup>177</sup> The first principle held that the assets of the debtor in each insolvency belonged to the creditors and therefore they should have the fullest control subject to the least possible interference. The

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<sup>171</sup> Cork Report 18.

<sup>172</sup> Lester 195. See also Cork Report 18.

<sup>173</sup> Martino *Approaching Disaster: A Comparison between Personal Bankruptcy Legislation in Italy and England (1883-1930)* (2002) unpublished paper presented at the Association of Business Historians Annual Conference, England, (hereafter referred to as Martino) on file with the author. See also Holdsworth *The Bankruptcy Act of 1883 with Introduction and Notes an Appendix Containing the Debtors’ Act, 1869 and an Index* (1884) (hereafter referred to as Holdsworth).

<sup>174</sup> Martin “Common-law Bankruptcy Systems” 367.

<sup>175</sup> Martino 8.

<sup>176</sup> Lester 170.

<sup>177</sup> Heath “Insolvency Law Reform: The Role of the State” (1999) *New Zealand LR* 569 (hereafter referred to as Heath).



underlying principle behind this statement also had a strong political motivation, as the business community still had a strong hold on many areas of the commercial laws in England.<sup>178</sup>

The second principle held that “the trustee should be subject to official supervision and control as regards his pecuniary administration ... and his accounts should in every case be audited by authority”.<sup>179</sup> And finally he called for an independent examination of the debtor’s conduct and circumstances leading to his insolvency.<sup>180</sup> Chamberlain argued that the only way to secure honest administration of bankrupt estates and to improve the general tone of commercial morality was to ensure that there was an independent and impartial examination into the circumstances of each case.<sup>181</sup> For this reason Chamberlain was of the opinion that it was necessary to have a public officer examine the circumstances of each bankruptcy.<sup>182</sup>

Another essential feature of the Act of 1883 was that although insolvency was not necessarily a crime, it indicated a state of affairs which required public inquiry and explanation.<sup>183</sup> The law of 1883 is viewed by certain writers as the foundation of the present system of English bankruptcy law with the aim of the Act being a fair procedure with adequate supervision and means to discourage dishonesty.<sup>184</sup> The machinery for dealing with bankruptcy matters created by the Act of 1883 essentially remains in force in present-day insolvency law.<sup>185</sup>

The basic philosophy and approach of the 1883 English Act was not challenged for most of the twentieth century and it retained its influence right up to the period of the comprehensive review of bankruptcy law under the Cork Committee in 1977. Over the years various committees<sup>186</sup> were established whose main task was to review certain aspects pertaining to English insolvency law.<sup>187</sup> In the early 1970s the UK’s accession to the membership of the EEC demanded that it negotiate with other member states concerning a draft EEC Bankruptcy Convention. In order to advise the Department of Trade and Industry, an

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<sup>178</sup> Lester 194

<sup>179</sup> Lester 194.

<sup>180</sup> Lester 195.

<sup>181</sup> Heath 569.

<sup>182</sup> Heath 569.

<sup>183</sup> *Cork Report* 19.

<sup>184</sup> Dalhuisen par 3.08[2] 1-89.

<sup>185</sup> *Cork Report* 20.

<sup>186</sup> The committees that were formed to look into aspects of individual insolvency law were the MuirMackenzie Committee (1906 Cd 4068); the Hansell Committee (Cmnd 2326, 1925); and the Blagden Committee (Cmnd 221, 1957). See Fletcher 13; Burdett 84.

<sup>187</sup> Fletcher 13. See also Burdette 85-90 for a brief discussion of the *Cork Report*.

advisory committee under the chairmanship of Mr Kenneth Cork, as he then was, was appointed.<sup>188</sup> Cork's resulted first report emphasised that a comprehensive review of the insolvency law<sup>189</sup> was required and in January 1977 the Review Committee on Insolvency Law and Practice, again with Cork as chairman, was established.<sup>190</sup> The *Cork Report* in its final form produced a set of "aims of a good modern insolvency law".<sup>191</sup> The *Report* made out a vigorous case for fundamental reforms regarding the law of insolvency,<sup>192</sup> resulting in many of the recommendations finding their way into the Insolvency Act of 1986.<sup>193</sup>

If we examine the development of state regulation in English bankruptcy law it is clear that there had been a much stronger lead to follow than was the case in early Roman and Roman-Dutch law. Even as far back as the 1880s senior staff members of the Board of Trade in England realised that the conceptual key to bankruptcy legislation is directly related to the state's role in the administration of insolvent estates.<sup>194</sup> The connection between the role of the state in protecting the public interest and the administration of bankruptcy estates is clearly illustrated via the strong administrative features of the English regulatory framework and the institutional support of bankruptcy law in general.<sup>195</sup> Of significance in the context of this study was the presence of Lord Chamberlain, who understood the important role which the state has to play both in protecting the public interests as well as in the administration of smaller insolvent estates in order for such an estate is to be managed in the most cost-effective manner and one that would yield the largest dividend to creditors.<sup>196</sup>

<sup>188</sup> Finch *Corporate Insolvency Law* (2002) 11 (hereafter referred to as Finch).

<sup>189</sup> Similar reviews and reforms were taking place in other European and Commonwealth countries: Austria (1982); Denmark (1977); France (1984 and 1985); Italy (1979). Cf Aminoff "The Development of American and English Bankruptcy Legislation – from a Common Source to a Shared Goal" (1989) *Statute LR* 128 at 129.

<sup>190</sup> For a discussion of the events that led to the appointment of the Cork Committee, see Fletcher 14-15. The Cork Committee was given a very wide brief:

- a To undertake a total review of the law of insolvency, bankruptcy, liquidation and receiverships, and to consider reforms that are necessary or desirable;
- b To examine the possibility of formulating a comprehensive insolvency system, including the possibility of harmonising and integrating procedures;
- c To investigate the possibility of formulating less formal procedures as alternatives to bankruptcy and winding-up; and
- d To make recommendations.

<sup>191</sup> Finch "The Measures of Insolvency Law" (1997) *Oxford Journal of Legal Studies* 227. For a detailed discussion of the Cork recommendations read Fletcher 14-20.

<sup>192</sup> Fletcher 65.

<sup>193</sup> Fletcher 66.

<sup>194</sup> Lester 304.

<sup>195</sup> Milman 80.

<sup>196</sup> Lester 304.



## 1.6 SOUTH AFRICAN LAW

### 1.6.1 Early Cape law

Two renowned trading companies operating in the East and the West, the Dutch East India Company incorporated in 1602 and the Dutch West India Company incorporated in 1621, eventually carried Roman-Dutch law into their settlements.<sup>197</sup> The Cape Colony was founded on a very modest scale in 1652 by Jan van Riebeeck as a halfway refreshment station for the ships of the Dutch East India Company on their way to and from the East Indies, and it is in this way that the Roman-Dutch law was introduced into South Africa.<sup>198</sup> Consequently the Roman-Dutch law was mostly followed in South Africa, which meant that from an early stage the *cessio bonorum* and *missio in possessionem* as dual forms of relief available to the debtor also existed in the Cape, and certainly did so after the year 1803.<sup>199</sup>

As a result of the *Vredestraktaat van Amiens* of 1802, after being under British control for almost seven years the Cape of Good Hope again came under control of Holland.<sup>200</sup> The *Batavian Republic*<sup>201</sup> immediately requested that the *Asiatische Raad* prepare a report making suggestions for the post of Governor-General as well as the eventual management of the Cape with consideration of the new *Volksplanting* in the Cape.<sup>202</sup> The person responsible for compiling this report was a Mr Jacobus Abraham de Mist, who had been a member of the *Asiatische Raad* since 1795. With the enactment of the *Vrede of Amiens* in March 1802 the *Batavian Republic* had its arrangements regarding the governing of the Cape prepared, and the first task was to appoint De Mist as Commissioner-General of the Cape.<sup>203</sup> De Mist had to act according to a formal instruction<sup>204</sup> issued by the *Batavian Republic*, which had as its

<sup>197</sup> The East India Company in England founded in 1599 traded in the East Indies until the Amboyna massacre in 1623. Other examples of chartered trading companies include the Muscovy (later Russia) Company (1565), the Eastland Company (trading in the Baltic) (1579) and the African Royal Company (1672). See Omar 6; Lee 7.

<sup>198</sup> De Vos “Roman-Dutch Law in South Africa at the end of the Century – and Thereafter” (hereafter referred to as De Vos) in Anghie *et al Legal Visions of the 21<sup>st</sup> Century: Essays in Honour of Judge Christopher Weeramantry* (1998).

<sup>199</sup> Stander 16.

<sup>200</sup> De Villiers *Die Ou-Hollandse Insolvensiereg en die Eerste Vaste Insolvensiereg van de Kaap De Goede Hoop* (1923) 77 LLD dissertation University of Leiden (hereafter referred to as De Villiers).

<sup>201</sup> *Batavian Republic* was the name for the Netherlands in the years (1795-1806) following the conquest by the French during the French Revolutionary Wars.

<sup>202</sup> De Villiers 78.

<sup>203</sup> De Villiers 78.

<sup>204</sup> De Mist *Instructie voor den Commissaris General naar de Kaap de Goede Hoop* (1803).

basis the original report compiled by the *Asiatiese Raad* and together with the instruction issued by the Republic formed the basis of the Batavian rule between 1803 and 1806.<sup>205</sup>

After settling in the Cape, De Mist, on 24 March 1803, wrote a letter to the Justice Council<sup>206</sup> in Holland and for the first time his idea of establishing the institution of the *Desolate Boedelkamers* in the Cape was mentioned.<sup>207</sup> Although he had complete authority to act, De Mist compiled a report to the *Asiatiese Raad* setting out the necessity of creating a *Desolate Boedelkamer* in the Cape, and in this report he also mentions the fact that all insolvent estates were at that stage administered by a *Sequester*, who was also the temporary Secretary of Justice. The *Sequester* was responsible for the administration of between 300 and 400 estates, the execution of civil sentences and, as a member of the Justice Council, this office also formed part of the judiciary. As a result it was therefore responsible for both the administration of justice and the enforcement of the law.<sup>208</sup>

De Mist established that one person was unable to administer all the tasks mentioned, and the execution of justice<sup>209</sup> was therefore hampered by this situation.<sup>210</sup> On 30 March 1803 he appointed the first members<sup>211</sup> and secretary<sup>212</sup> of the *Desolate Boedelkamer*. De Mist had the foresight to see that the *Desolate Boedelkamers* should operate according to an official Ordinance. However, with the erection of the *Boedelkamers* the Ordinance was not yet finalised and as a temporary measure on 22 April 1803 De Mist issued a so-called provisional instruction<sup>213</sup> to the members specifying the procedures and jurisdiction of the *Boedelkamers*.<sup>214</sup>

In May 1804 De Mist received a concept of the Ordinance<sup>215</sup> prepared on his request by the Justice Council and soon afterwards the official Ordinance<sup>216</sup> regulating the functions and

<sup>205</sup> De Villiers 80.

<sup>206</sup> Raaden van Justitie.

<sup>207</sup> De Villiers 84.

<sup>208</sup> De Villiers 90.

<sup>209</sup> *Juris effectus in executione consistit.*

<sup>210</sup> De Villiers 90.

<sup>211</sup> Olaf Marthinus Bergh; Abraham de Smit; Watse Sebius van Andringa.

<sup>212</sup> Reiner D'Ozy.

<sup>213</sup> *Instructie voor de Commissarissen van de Desolate Boedels.*

<sup>214</sup> De Villiers 96.

<sup>215</sup> *Die Concept Ordonnantie op de geregtelijke beheering van boedels en op de executie van civiele vonnissen 1804.* See De Villiers 96.

<sup>216</sup> Ordinance known as *Provisionele Instructie voor de Commissarissen van de Desolate Boedelkamer van 1804* (hereafter referred to as *Provisionele Instructie voor de Commissarissen van de Desolate Boedelkamer*). See De Villiers 105.



procedures of the *Desolate Boedelkamer* was published.<sup>217</sup> This Ordinance, known as the *Provisionele Instruksie*, represented the first real and substantial insolvency law in the Cape of Good Hope.<sup>218</sup> The Ordinance<sup>219</sup> issued by De Mist was largely based on the principles found in the 1777 Ordinance of Amsterdam.<sup>220</sup> It is interesting to note, however, that although the instructions of the *Desolate Boedelkamers* were founded on the Amsterdam ordinance, they differed in two important respects: firstly, creditors did not feature in the administration of the insolvent estate; and, secondly, creditors could not apply for the sequestration of the debtor.<sup>221</sup> It should be noted that under the Ordinance the charge of the insolvent estates was granted to *curators* or trustees chosen by the creditors themselves, acting under the supervision of the *Desolate Boedelkamer*.<sup>222</sup>

In 1806 the Cape was again under British power, but this had no immediate effect on the legal developments in the Cape.<sup>223</sup> The Ordinance issued by De Mist stayed unchanged and for the next 14 years it remained the main source of insolvency law in the Cape.<sup>224</sup> This state of affairs continued until 1818, when the *Desolate Boedelkamers* was abolished and a *Sequestrator* was appointed, who was vested with the same jurisdiction and functions formerly exercised by the *Desolate Boedelkamers*.<sup>225</sup> Burton mentions that it was regrettable that the Commissioner-General departed from the Dutch principles and especially by removing the administration of the insolvent estates from the creditor's nominees and to transfer it to a single body.<sup>226</sup> In 1819 instructions were issued to the *Sequestrator* and other functionaries of his department, and an Ordinance<sup>227</sup> was promulgated for the judicial administration of estates. To this department was entrusted all estates that were insolvent, unadministered or placed under curatorship as well as the execution of all civil sentences except those entrusted specially to the boards of *landdrost* and *heemraden*.<sup>228</sup> As was anticipated, the *Sequestrator's* office proved not to be a success, and on 31 December 1827 the office of the *Sequestrator* was abolished. The office of the *Sequestrator* was

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<sup>217</sup> De Villiers 105.

<sup>218</sup> De Villiers 107.

<sup>219</sup> *Provisionele Instructie voor de Commissarissen van de Desolate Boedelkamer*.

<sup>220</sup> *Nederlandse Jaarboeken* (1777) 291.

<sup>221</sup> Burton 8.

<sup>222</sup> Burton 27.

<sup>223</sup> De Villiers 105.

<sup>224</sup> De Villiers 105.

<sup>225</sup> Stander 16.

<sup>226</sup> Burton 27.

<sup>227</sup> GG (1818-12-04). See Proclamation 2 of September 1819. See also Stander 16.

<sup>228</sup> Wessels 669.

replaced by a commissioner whose duty it was to wind up the *Sequestrator's* department and to assess all matters associated with the *Sequestrator's* office.<sup>229</sup>

Another important historical event occurred in 1828, when under the second British occupation in the Cape the Charter of Justice was introduced with the intention of reorganising the judiciary. The Charter resulted in the complete overhaul of the judicial system and made provision for the establishment of an independent “Supreme Court”,<sup>230</sup> consisting of a Chief Justice and three judges.<sup>231</sup> *Inter alia* the Charter also declared that the Supreme Court had to make provision for the post of a “Master of the Supreme Court”.<sup>232</sup> Although the literature confirms the founding of the Master’s office, this study recovered no publication or evidence indicating any preceding research or policy consideration underpinning the decision to incorporate the functions of the Master into the court system. It is submitted that this decisions appeared to have been based on practicality more than any in-depth policy consideration or research undertaking. As a result of the Charter of Justice and the changes introduced there under, the administration of justice in South Africa thus assumed its English characteristics.<sup>233</sup> The changes resulted in the complete separation of the executive and the judicial powers and the introduction of the jury system, but, far more significant in the context of this study, the Charter of Justice established the office of the Master as part of the South African legal establishment.

Another significant event took place with the passing of Ordinance 46 of 1828,<sup>234</sup> where it was mentioned for the first time that in future all insolvent estates had to be administered by an official referred to as the “Master of the Supreme Court”. The Master took over the functions of the official *sequestrator* and also possessed many of the functions of the

<sup>229</sup> Ordinance 88 of 1831 was passed merely to provide for the abolition of the office of the commissioner. See Burton 27; Mars 10.

<sup>230</sup> Currently known as the High Court.

<sup>231</sup> The first Charter of Justice came into operation on 1828-01-01, spurred by the Proclamation of 1822-07-05, which made January 1827 the effective date for the use of English in the courts. The first Charter was subsequently followed by a Second Charter, constituted by letter patent of 1832-05-04, and coming into operation on 1834-02-13, which superseded and modified it in certain aspects. See Theal *Records of the Cape Colony* (1898) (hereafter referred to as Theal); Van der Walt *Geskiedenis van Suid-Afrika* (1961) 167 (hereafter referred to as Van der Walt). See also Kahn *A Review of the Recess System in the High Court* (2003) report prepared for the Department of Justice, Pretoria (hereafter referred to as Kahn) on file with the author.

<sup>232</sup> *Inter alia*, the Charter provided for: circuit courts; trial by jury; the right of appeal to the Privy Council; the sheriff; the registrar; the Master; minor officers in the court; legal practitioners; appointment and financial arrangements. See Kahn ch 2; Van der Walt 167.

<sup>233</sup> Van der Walt 167.

<sup>234</sup> Hereafter referred to as the Ordinance of 1828.

Amsterdam commissioners serving in the *Desolate Boedelkamers* in Holland.<sup>235</sup> These two events, namely the introduction of the Charter of Justice and the passing of the Ordinance of 1828, represent two important milestones in the history of state regulation in South African insolvency law, as it signifies the origin of the Master of the High Court as it is known today.

Subsequently, the Cape Ordinance 64 of 1829<sup>236</sup> followed, representing the first South African Insolvency Act, reflecting certain detailed provisions as they are known today. Although English law formed the basis of this new Ordinance, a substantial number of Dutch principles were woven into the particular legislation and established most of the principles of our present insolvency practice.<sup>237</sup> Of significance was that the principle of transfer of ownership was established by this Ordinance, which stated that subsequent to the granting of the sequestration order the insolvent was divested of his estate, which afterwards vested in the Master and thereafter in the trustee.<sup>238</sup> According to Stander this was the first occasion where it was clearly indicated that in time the trustee became the owner of the estate assets, and this development was probably due to the influence of English law.<sup>239</sup>

The Ordinance recognised the principles that a person could surrender his estate voluntarily and that creditors could obtain an order for sequestration if certain acts of insolvency were committed.<sup>240</sup> As mentioned, the order of sequestration had the effect in law of divesting the insolvent of his estate and vesting this in the Master,<sup>241</sup> and subsequently the Master called a meeting of creditors and a trustee was elected by whom the remainder of the administration was carried out. At the meeting of creditors a trustee was chosen by creditors by voting that took place at the meeting and if no complaint had been lodged within two days of the election then the trustees themselves had to move for a decree of the court confirming the election. It is noteworthy that according to the Ordinance of 1829 the court was thus responsible for the appointment of the trustee.<sup>242</sup>

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<sup>235</sup> Wessels 670.

<sup>236</sup> Hereafter referred to as the Ordinance of 1829. It is interesting to note that the Ordinance of 1829 coincided with a commission of inquiry into the Orphan Chamber. See Master's Office, Pretoria *Report on the Functions of the Office of the Master of the Supreme Court* (1990) on file with the author. *Inventories of the Orphan Chamber Cape Town Archives Repository, South Africa* available at <http://www.tanap.net> (last visited at 09-11-30). See also Burton 30; Mars 11.

<sup>237</sup> See Stander "Geschiedenis van Insolvensiereg" 376; Wessels 673; De Villiers 107.

<sup>238</sup> Stander "Geschiedenis van Insolvensiereg" 376.

<sup>239</sup> Stander "Geschiedenis van Insolvensiereg" 376.

<sup>240</sup> Wessels 670.

<sup>241</sup> Wessels 670.

<sup>242</sup> Section 48 of Ordinance 64 of 1829. See Burton 103.

It is interesting to note that the Ordinance of 1929 coincided with a commission of inquiry into the Orphan Chamber. The Board of the Orphan Masters was established at the Cape circa 1673. The Orphan Chamber (*Weeskamer*) functioned as one of the sections that were introduced into the administrative system employed at the Cape at the time, and had to report to the Council of Policy regarding the execution of its responsibilities. The establishment of the Orphan Chamber at the Cape of Good Hope arose out of the need to provide for the collection and administration of the property of persons who died intestate and left heirs who were absent from the Colony or who were under age. After the devastating effect of the smallpox epidemic of 1713, the Council of Policy empowered the Orphan Chamber to protect the transfer of property of all free individuals at the Cape. According to the provisions of the Ordinances<sup>243</sup> of 1833, the Orphan Chamber was abolished and its duties were transferred to the newly appointed office of Master of the Supreme Court.<sup>244</sup>

The Ordinance of 1929 regulated the administration of insolvent estates until repealed by a new consolidating Ordinance 6 of 1843,<sup>245</sup> which established the bankruptcy procedure for the whole South Africa and may rightly be regarded as a landmark in the South African law of insolvency.<sup>246</sup> Both consolidated and changed the law. From a historical point of view one of the main changes was the abolition of the practice of granting a *cessio bonorum* as well as the right of *surgeance of betaalinge*.<sup>247</sup> Noteworthy for this study is the fact that the responsibility of appointing the provisional trustee and final trustee remained with the court.

The Ordinance of 1843 also served as the foundation of the law of insolvency in South Africa and was also adopted in Natal as Ordinance 24 of 1846, which remained the law of the colony until repealed by law 47.<sup>248</sup> In the Orange Free State the Ordinance was also largely

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<sup>243</sup> Ordinances 104 and 105 of 1833. Hereafter referred to as Ordinance 1833.

<sup>244</sup> See *Report on the Functions of the Office of the Master of the Supreme Court*.

<sup>245</sup> Hereafter referred to as the Ordinance of 1843.

<sup>246</sup> See Stander 16; Mars 11.

<sup>247</sup> Mars 9.

<sup>248</sup> Mars at 11 as well as Stander “Geskiiedenis van die Insolvensiereg” at 377 acknowledges that this Ordinance determined modern South African insolvency law. This point of view cannot be disregarded, especially in light of the fact that it had effect in Natal (the Cape Ordinance was adopted as Ordinance 24 of 1846, and which was repealed in 1884), the Orange Free State (the Cape Ordinance and Amendment Act 15 of 1859 formed the basis of Ordinance 9 of 1878, which ordinance was inserted into chapter 104 of the Statute Law of the Orange Free State) and the Transvaal (the Cape Ordinance as amended by the Cape Act 15 of 1859 was largely built into Transvaal Ordinance 21 of 1880). This latter Ordinance was replaced by Act 13 of 1895, which was an adapted version of the Cape Ordinance of 1843. For a discussion of the position in the Transvaal before 1880, see Kotze 17. See also Buchanan *Buchanan’s Decisions in Insolvency* (1906); Wessels 669; Burdette 33.



taken over as Ordinance 9 of 1878, which was subsequently known as Chapter 104 of the Statute Law of Orange Free State.<sup>249</sup>

In Transvaal the Cape Ordinance was also largely superseded by some amending provisions of the Cape Act 15 of 1895, as Ordinance 21 of 1880. This was in turn repealed by the Transvaal Insolvency Act 13 of 1895. This statute was merely an adaptation of the Cape Ordinance 6 of 1843, and in effect Ordinance 6 was rearranged, abridged and in some instances amended.<sup>250</sup> Although over time some amendments to the procedures of the 1846 Ordinance were introduced, the main principles and details remained the same in all the South African colonies.<sup>251</sup>

## 1.6.2 Union Legislation

A few statutory developments followed the Ordinance of 1828 until the Master was firmly established in its current form by the Insolvency Act of 1916,<sup>252</sup> the predecessor to the current Insolvency Act.<sup>253</sup> The parliament of the Union of South Africa in 1916 repealed all of the existing statutes of the law of insolvency previously in force in the four provinces and substituted these with the Insolvency Act of 1916, which represented a uniform statute and was assigned throughout the (then) Union of South Africa.<sup>254</sup> The Insolvency Act of 1916 was amended by Act 29 of 1926 and Act 58 of 1934.<sup>255</sup>

Under the Insolvency Act of 1916 the appointment of a provisional trustee was done by way of a petition by the Master or a creditor to the court, and was contained in the petition for sequestration of the debtor's estate.<sup>256</sup> The court had a discretion to appoint a provisional trustee, and was not bound to have regard to the wishes of any of the creditors. In fact, in some instances the court disregarded the person nominated by the creditors and appointed a person

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<sup>249</sup> Mars 11.

<sup>250</sup> See, eg, *Kirkland v Romyn* 1815 AD 327 at 330. See also Evans 55; Mars 11.

<sup>251</sup> Wessels 670.

<sup>252</sup> Act 32 of 1916. Hereafter referred to as the 1916 Insolvency Act.

<sup>253</sup> As far as can be determined, it was also during this period that the first reference was made to the Master taking over supervision of companies, which were wound up (*Wet op het Liquideeren van Maatschappijen* (Act 1 of 1894)). The main purpose of this Act was to provide for the supervision of the winding-up of companies by the Master. See Burdette 63.

<sup>254</sup> See Mars 6; Stander "Geschiedenis van die Insolvensiereg" 377.

<sup>255</sup> For a useful commentary on the 1916 Insolvency Act and the impact of the 1926 amendments, see Nathan *South African Insolvency Law* (1928) (hereafter referred to as Nathan).

<sup>256</sup> Section 57 of 1916 Insolvency Act. See Nathan 196.

chosen by itself.<sup>257</sup> Generally, however, the wishes of the majority of creditors prevailed<sup>258</sup> and the court appointed the nominated applicant if such person was supported by a substantial body of creditors.<sup>259</sup> Where the circumstances revealed urgency and the application was supported by none of the creditors, or an insignificant number of them, the court made the appointment but reserved leave to the creditors to have the appointment set aside.<sup>260</sup>

The final trustee was elected at the first meeting of creditors.<sup>261</sup> The appointment was confirmed by the court and the Master issued a certificate which was of force throughout the Union.<sup>262</sup> The Act also made provision for the event that should no trustee be elected and the estate was not vested at the time of the meeting in a provisional trustee, the Master may appoint a trustee or apply at the cost of the estate to the Court to set aside the sequestration order.<sup>263</sup> This procedure was a step closer to the current procedure, where the sole responsibility and discretion to appoint a trustee in an insolvent estate lies with the Master.<sup>264</sup>

### 1.6.3 Legislation now in force

On 1 July 1936 the 1916 Insolvency Act was replaced by the current Insolvency Act of 1936, now in force as the principal Act.<sup>265</sup> The Insolvency Act of 1936 conferred the power to appoint a provisional trustee on the Master,<sup>266</sup> but failed to state how such an appointment should be made. This effectively conferred on the Master an unfettered discretion to appoint a person of choice as the provisional trustee of an insolvent estate. The Act of 1936 also firmly established the Master as supervisory authority in our insolvency law and became the main source of South African insolvency law.

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<sup>257</sup> Nathan 197.

<sup>258</sup> See, eg, *Ex Parte Reid* 1922 CPD 62.

<sup>259</sup> Nathan 197.

<sup>260</sup> Nathan 197.

<sup>261</sup> Sections 52-53 of the 1916 Insolvency Act.

<sup>262</sup> Nathan 187.

<sup>263</sup> Section 53 of the 1916 Insolvency Act. See Nathan 187-189.

<sup>264</sup> As discussed in Part V below.

<sup>265</sup> It is important to note that however complete the Insolvency Act of 1936 may be, it did not totally repeal the common law in respect of South African insolvency law, and English law also played an important role in the development of our insolvency law. See Burdette 15.

<sup>266</sup> Section 18(1) of the Insolvency Act.





The Act should however not be regarded as a complete statement of the law of insolvency and does not interfere with any common law right consistent with its provisions.<sup>267</sup> Mention must be made of the fact that to a considerable extent our various acts relating to insolvency law are declaratory of the common law.<sup>268</sup> In this regard the court remarked:

It should be remembered that, to a large extent, our successive statutes relating to insolvency were declaratory of the common law; they served to create machinery for the realization and distribution of insolvent estates and to regulate the proceedings to that end, rather than to alter the basic concept of a *concursum creditorum*.<sup>269</sup>

Although the Insolvency Act is regarded as the principal source of our insolvency law, it is not the only source, as the Companies Act<sup>270</sup> and the Close Corporations Act<sup>271</sup> also contain provisions for the winding-up<sup>272</sup> of a company or close corporation and furthermore there is also other legislation applicable to the winding-up of other legal entities such as banking institutions and insurance companies.<sup>273</sup> Apart from these statutory enactments, judgments of our high courts, including the Constitutional Court,<sup>274</sup> and as discussed in the preceding section, our common law principles, are also important sources of our insolvency law.<sup>275</sup>

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<sup>267</sup> Such as the *Actio Pauliana* – action available to creditors defrauded by alienation. For a comprehensive discussion of the *Actio Pauliana* see Boraine at 77-142.

<sup>268</sup> Smith 7.

<sup>269</sup> See, eg, *Richter v Riverside Estates (Pty) Ltd* 1946 OPD 209 at 223. See also Smith 8; Stander 17.

<sup>270</sup> Act 61 of 1973. Hereafter referred to as the Companies Act.

<sup>271</sup> Act 69 of 1984. Hereafter referred to as the Close Corporations Act.

<sup>272</sup> In the case where a company or close corporation is being wound up, one has to turn to the Companies Act or Close Corporations Act in order to find the provisions relating to these entities. These latter Acts are then “connected” to the Insolvency Act by means of “connecting provisions” in s 339 of the Companies Act and s 66 of the Close Corporations Act, which make insolvency law applicable also to these types of entities. For further reading on the subject see Burdette ch 5; see also Boraine “The Draft Insolvency Bill – an Exploration (Part 1)” (1998) *TSAR* 621, where reference is made of this uniformity.

<sup>273</sup> See s 68 of the Banks Act 94 of 1990 and Part VI of the Long-Term Insurance 52 of 1998 and Part VI of the Short-Term Insurance Act 53 of 1998 respectively. See also Mars 16; Burdette ch 7.

<sup>274</sup> Act 108 of 1996. Hereafter referred to as the Constitution. The Constitution is the supreme law of the land and provides the basis for the reform of all South African law.

<sup>275</sup> Mars 18. See Burdette ch 12 for a detailed discussion of this topic.

## CHAPTER 2: CONCLUSION

History with its flickering lamp stumbles along the trail of the past, trying to reconstruct its scenes, to revive its echoes, and kindle with pale gleams the passion of former days.<sup>276</sup>

These words of Winston Churchill underpin the notion that we often have a romantic view of history combined with a naïve belief that we will find the answers to our questions written somewhere in the past. Of course, many jurists and scholars have been fortunate to experience that “Eureka!” moment while studying the wisdoms of the ancient writers. Although the development of the concept of state regulation in our insolvency law has not received much attention in the main historical surveys of our insolvency law, nevertheless, drawing from the study of our common law, some pattern of state regulation did emerge. The establishment of the *Desolate Boedelkamers* and subsequent founding of the office of the Master of the Supreme Court could perhaps be classified as significant events in the history of this field of law. If not as dramatic, it could at the very least provide us with added insight into the unique regulatory system within the current South African insolvency law.

If we attempt to pinpoint only the most significant developments in the occurrence of regulation in insolvency law, we find that during the period of Roman law probably the most noteworthy event had been the first encounter with the phenomenon of “stewardship” with regard to the management or administration of the property of others. Initially the *Magister* was never anything more than a creditor acting in his own selfish interests and those of his electors, whereas the *curator*, which later entered the scene, characterised to a limited extent the principle of the protection of the public interest due to the requirement that bankruptcy proceedings had to be conducted according to a uniform plan and all the creditors obtained an equitable satisfaction of their claim.<sup>277</sup>

During the period of Roman-Dutch law, the establishment of the *Desolate Boedelkamers* and the 1777 Ordinance, introducing the practice of the *Desolate Boedelkamers* to Amsterdam, stand out as significant milestones. During 1777 an insolvency Ordinance was granted to the city of Amsterdam, which, significantly, had been responsible for the introduction of the *Desolate Boedelkamers* charged with the administration of the estate of all insolvent debtors. This important innovation in the Roman-Dutch law represented the first acquaintance with the concept

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<sup>276</sup> Winston Churchill.

<sup>277</sup> The general notion of “equality among all creditors”. See Mars 9.



of state regulation in the form of a regulatory authority overseeing the insolvency procedure. It is submitted that this development in favour of greater state regulation indicated a significant shift from a creditor-controlled system to a system of a more administrative nature.

The historical development of the English law provides a much more evident exposition of state regulation of bankruptcy law. The earliest *ad hoc* models had the King's Council taking control of a bankrupt's assets, and this in time evolved into a system in which the Lord Chancellor, acting through bankruptcy commissioners, held sway. Creditors' assignees were subsequently permitted to act under the watchful eyes of the commissioners. The state reassessed the supervisory jurisdiction with the endorsement of a more balanced model in the Bankruptcy Act of 1883. The Bankruptcy Act of 1883 devised a new system of joint official and creditor control. This approach established what are still the basic parameters of English bankruptcy law today.

The basic philosophy and approach of the English Act of 1883 were not challenged for most of the twentieth century and retained their influence right up to the period of the comprehensive review of bankruptcy law under the Cork Committee in 1977, which ultimately led to the current Insolvency Act of 1986. The process of administrative oversight established in 1883 was carried over to the present 1986 Act and is still the defining feature of English insolvency law.<sup>278</sup> The public administrator, and not the court, is responsible for virtually all the important decisions and establishes the detailed interpretation of statutory rules.<sup>279</sup> Of significance is the recognition of the constant theme of protecting the interest of the public through the role of the state in the administration of bankruptcy estates as illustrated *via* the strong administrative features of the English regulatory framework and the institutional support of bankruptcy law in general.<sup>280</sup>

If we direct our attention back to early South African insolvency law, the founding of the *Desolate Boedelkamers* during the eighteenth century played a significant role in shaping the future character of the regulatory process in South African insolvency law. To a large extent the *Desolate Boedelkamers* operated according to principles influenced by the 1777 Ordinance of Amsterdam. This state of affairs continued until the *Desolate Boedelkamers*

<sup>278</sup> Martin "Common-law Bankruptcy Systems" 373.

<sup>279</sup> Niemi-Kiesiläinen "Introduction" 11.

<sup>280</sup> As will be discussed in Part III hereafter.

was abolished and replaced with a *Sequestrator*, vested with basically similar jurisdiction and functions as the *Desolate Boedelkamers*. The *Sequestrator*'s office proved not to be a success, and was subsequently done away with and substituted with a commissioner whose duty it was to shut down the *Sequestrator*'s department.<sup>281</sup>

Two significant events occurred in 1828. The first occurred under the second British occupation, when a Charter of Justice was issued in order to revise the judicial system, which made provision for the establishment of an independent "Supreme Court" and also *inter alia* confirmed that the court had to make provision for the post of a "Master of the Supreme Court". The second noteworthy event occurred with the passing of Ordinance of 1828, when for the first time it was mentioned that in future all insolvent estates had to be administered by an official referred to as the "Master of the Supreme Court". The Master possessed many of the functions of the commissioners serving in the *Desolate Boedelkamers* in Holland. These two events signify the origin of the Master of the High Court as it is known today.<sup>282</sup> During the same period the Orphan Chamber, which had been mainly responsible for the administration of deceased estates and the interests of orphans, was abolished and its duties transferred to the newly appointed office of Master of the Supreme Court.<sup>283</sup> Although the amalgamation of these two institutions had been documented in literature, very little information could be found on the actual integrating process or aftermath of said merger. It could be argued that at the stage adequate attention had not been paid to the implications of the merger and especially the difference in objectives and viability of the two organisations.

If we ask the question what this study can draw from this brief excursion with the history of our insolvency, it is evident that no robust or evident evolution of the regulatory principles in both Roman and Roman-Dutch law can be revealed. It is submitted that the establishment of the *Desolate Boedelkamers*, as the predecessor to our current Master's office, and the incorporation of the office of the Master into the formal court structure, sets a pattern that has characterised our regulatory practice for centuries.

This leads us to the further question of whether the historical development of state regulation in English law delivered any meaningful contribution. Although the English regulatory

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<sup>281</sup> As discussed in par 1.6.1.

<sup>282</sup> As discussed in par 1.6.1.

<sup>283</sup> Wessels 674.



framework may not suit the current South African economic and social conditions in a strict sense, it is concluded that there are adequate similarities in their historical and legal elements to enable law-and policy-makers to borrow fruitfully from the English system and in particular the development of the role of the state in English insolvency law. The answer may lie in the words of Joseph Chamberlain while moving the second reading of the 1883 Bill:

Every good bankruptcy law must have in view two main, and at the same time, distinct objects. First, the honest administration of bankrupt estates, with a view to the fair and speedy distribution of the assets among the creditors whose property they were; secondly, following the idea that prevention was better than cure, to do something to improve the general tone of commercial morality, to promote honest trading, and to lessen the number of failures. In other words, Parliament had to endeavour as far as possible, to protect the salvage and also to diminish the wrecks.<sup>284</sup>

There is little doubt that institutional law reform has internationally been a major innovation in the legal world since the 1960's: "At their best, they provide principled and imaginative new law, and are catalysts of change, responsive to the world around them and to the public they serve."<sup>285</sup> Although the historical survey of the South African regulatory regime does not provide any clear illumination to the unique regulatory system presently in place, it does provide a conceptual foundation for future law reform proposals. In an exceedingly competitive global economy, institutions need to develop and adapt continuously and proactively. The challenge will be to identify particular problems relating to the current insolvency regime, and propose suggestions which would add clarity to this field of law which would assist in eradicating many of the problem areas in respect of insolvency regulation in South African insolvency law.

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<sup>284</sup> As cited in Rajak "The Culture of Bankruptcy" 22.

<sup>285</sup> Sayers "Co-operation across Frontiers" in Opeskin *et al The Promise of Law Reform* (2005) 243.