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SIR GEORGE STEPHEN

IN A LETTER TO THE

COMMITTEE OF THE CHAMBER OF COMMERCE.

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18th April, 1868.

To the Committee of the Chamber of Commerce.

GENTLEMEN—It is difficult to resist the temptation offered by your report, which appears in the papers this morning, to add yet another to the many efforts which I have made during the last twelve years to draw the legislative attention to the subject of Insolvency Reform, and especially when a very favourable opportunity is promised of urging it upon the consideration of our representatives as a matter that requires immediate action if our trading credit is worth sustaining. Hitherto your efforts as well as mine have altogether failed, and failed, I believe, principally because the abuses of the present system are not generally understood by those whose especial duty it is to correct them; nor does your present report, nor any of those which have preceded it, tend to enlighten them, probably because the abuses are so well known to yourselves that you naturally assume all the world to be familiar with them. I will endeavour to sustain your report by supplying its omission. I am well aware that the exposure may subject me to ill-natured remarks; I have had too much experience of public life to care about them. The operation of the present system has during the last three or four years become more fraudulent than ever; probably through the general conviction that the legislature never will reform it, it seems to be silently endured as an incurable evil. As circumstances have combined to make me the only individual, not restrained by official duty or etiquette, who can from personal knowledge make the exposure, it is my duty to speak out, be the consequences to myself what they may. There may seem to be somewhat of egotism in this introduction, but it is necessary to defeat by anticipation the comments likely to be made by those who are interested professionally in denying or upholding the abuses which I am anxious to reform. A more favourable opportunity could not occur, as it is generally known that, in reference to a particular case, the petition of a creditor for inquiry will be brought before the House of

Assembly, backed by the request of 500 constituents, all of whom are engaged in trade.

You are too familiar with the subject to make it necessary for me to remind you that the collection and equal distribution of assets is the essential as well as the primary object of every system of insolvency or bankruptcy, while the relief of the insolvent debtor is a secondary purpose, conditional on the first being secured so far as lies in the insolvent's power. Under our colonial law, however, this order is reversed, and the debtor's release, regardless of his possessing any *distributable* estate, is held to be the primary object of the insolvency statutes. It is essentially from this construction of the law that all the daily frauds practised by insolvents are found to arise. It has been ruled again and again that the possession even of a tattered wardrobe is a sufficient "possession of property within the colony" to entitle an insolvent debtor to the relief provided by the Act; and the result has been, as might have been expected, that the large majority of those seeking relief, and obtaining it too, have little or no estate for distribution beyond the four or five pounds that two or three old coats may produce on sale.

The consideration due to pauperism when caused by unavoidable misfortune ought to prevent our grudging such relief as may enable the insolvent to begin the world *de novo*, if he can honestly obtain the means; instances are not wanting where some of the wealthiest traders have almost commenced their career in the Court of Bankruptcy. If this humane construction of the law were the only ground of complaint, it would not deserve a second thought; the real grievance is that the system when thus construed not only throws temptation in the insolvent's way, but affords him every facility to defraud with impunity. It is to these points that I shall chiefly address myself.

The equity of the arrangement, that an insolvent shall be discharged from his liabilities on the *bona fide* surrender of all his property to his creditors, is too obvious to be questioned. It is the basis of every insolvency code of all civilised countries, and has been for twenty-two centuries, having been first introduced by the republic of Rome, 324 B.C.* But it seems to be necessarily implied that there is property to surrender; or in other words, that he stops payment as soon as he discovers that he cannot reasonably expect to find himself in a position to pay all his creditors in full by the continuance of his hitherto losing trade. Such is the principle of English bankruptcy, and the very continuance of a losing trade for any length of time (measured by the circumstances of the case), so as materially to reduce the assets, is to the judicial mind a reason for refusing the debtor a discharge. In our colonial practice it is otherwise, except in some very extreme cases, for it being held that the primary object

* *Liv.* viii. 28.

of the law is to relieve from liabilities, at whatever loss to the creditors, it follows that any prospect of a dividend is rather a lucky accident than a condition of relief. It would be easy to quote many examples of this; one of very recent occurrence will suffice. A wholesale butcher became insolvent; by his own evidence it appeared that within six weeks he had lost £5000. His debts amounted to £14,000. At the beginning of the six weeks he had represented to his creditors that he could pay all in full, with a surplus of £3000; at the end of the six weeks the surplus had vanished, and his debts had increased by £2000! Yet he obtained his certificate, subject only to a suspension for nine months for misconduct. There is not a Bankruptcy Court in England in which it would not have been absolutely refused, as I believe it would have been here, but for the technical subtleties introduced by the ruling of the Superior Court. It is clear that in this case, even in the mildest aspect of it, there was a waste of assets by continuing to carry on a hopeless and losing trade; but the loss to creditors was deemed as nothing compared with the release of the debtor, though for decency sake some slight censure could not be avoided.

Where a man finds that payment of a dividend, however small, is not essential to his discharge, he is tempted to do one of two things, both of which are fraudulent. He will either defer the evil day to the last, subsisting as long as possible on the wreck of his property; or he will in common phrase "plant"—that is, artfully conceal—what remains of it, so as to have in reserve wherewithal to begin again. To guard against the former, the law of bankruptcy renders every transaction of the bankrupt void from the date of the act of bankruptcy, and all property alienated afterwards can be recovered. To guard against the latter fraud, concealment of assets is a felonious offence. Here there is no similar provision against a waste of assets, and though such an enactment does exist to punish the concealment of property, it is practically rendered inoperative in all cases by the judicial construction of the insolvency law, that distributable property is not essential to entitle an insolvent to relief.

Whether a man spends his last sovereign on himself or "plants" it with a friend, being at the time indebted far beyond all hope of payment, it will scarcely be denied that great as may be the difference of criminality, the act in either case is fraudulent, as respects his creditors; nor can it be disputed that any system which in its practical operation promises him not only impunity, but actual relief, *in consequence of his fraudulent conduct*, is radically wrong, and I may add in stronger language, morally infamous. I will proceed to show that such is the real character of our present insolvency system. Before I do so I am bound, in justice to the learned gentleman reported to be its author, to state, and on the best authority, that he repudiates the authorship, his bill having been so mangled in passing through the New South Wales legislature that he is ashamed of it:

moreover the bill, even as he prepared it, was never intended to form part of the code of commercial law in an important commercial colony such as this has become, but only for a measure of relief to casual insolvents at a time when trade was too limited and insolvency was too rare an occurrence to be otherwise than the result of misfortune.

To proceed :—Fraud cannot be prosecuted without evidence; evidence cannot be obtained without investigation; investigation cannot be made without costs, and costs cannot be incurred without funds. This is the secret of the whole case—a secret well known to professional men, and also to official assignees, as well as to dishonest traders. The duty of official assignees is certainly to investigate, *coute qu' il coute.* As the Chief Justice once observed in a case in which I was professionally engaged, "They must take the good with the bad; if not, let them resign." If there were anything like an equality of good and bad, the dictum would be just; but when for one estate that pays them their commission there are about twenty from which they cannot legally earn sixpence; when office rent and clerks' salaries and incidental expenses absorb—as I know they do in some instances—more than half of the year's profit; when the Act itself limits their power to retain professional aid, how can it be reasonably expected that, there being no estate, they will, at their own risk, institute investigation which, under any circumstances, requires professional experience to be successful? "But," it may be replied, "the Court may investigate." Undoubtedly, according to English practice this may be done, but the colonial Court is only called a court by courtesy. The Chief Commissioner holds (and I will not say that he is wrong) that he only acts judicially where the Act expressly gives him judicial power; and that even in such cases (but here with all respect I differ from him) he must, in the professional phrase, be "set in motion" by special application before he can act. Independently of this difficulty, it must be borne in mind that to investigate thoroughly the evidence of third parties is always required; even when they reside in Melbourne or its suburbs, the expense of summoning them is not trifling, averaging about six pounds, as I am informed, and this from day to day if the examination is protracted; but where they come from the country, their travelling and hotel expenses are to be added. Where is it all to come from when there is no estate? Again, it will be rejoined by creditors, "We may as well acquiesce in the appropriation of our assets by an insolvent as allow them all to be spent in costs," and the rejoinder would be just if there really existed assets. It is the utter absence of assets, often alienated for the very purpose of suppressing inquiry, that deprives the creditors, in the large majority of cases, of any dividend whatever. Surely it would be better to receive half-a-crown in the pound than nothing, even though another shilling in the pound were sacrificed to pay for investigation. "Yet,"

it will be said, "we daily read in the papers long and apparently costly examinations of insolvents. How do you reconcile this fact with your theory?"

I would gladly have evaded the question. My answer to it will, at all events, prove that self-interest does not guide my pen. I dare not however, withhold what I believe to be the truth, though it compels me to dissent from the Chief Commissioner on a most important point of practice, and also from most, if not all, the official assignees. I have already observed that in many cases the dishonest insolvent "plants" his property. This is usually done by a colourable bill of sale to some relative, clerk, or friend, a few days before the insolvency, for some pretended consideration of money long since lent, or wages or salary in heavy arrears. The circumstances of the case justify a strong suspicion of fraud; sometimes the insolvent himself still deals with the property as his own; yet more frequently he exchanges places with his clerk or servant, and becomes their servant instead of their employer; sometimes a post-nuptial settlement is produced of long antecedent date, showing *primâ facie* that the property was vested in trustees; but to get at the truth, so as to justify an attachment of the property, there must be a professional inquiry, and this requires funds which the official assignee will not advance on the speculation of success. Creditors, however, are seldom wanting who are familiar with the grounds of suspicion; they consult some attorney whose practice in the court is known to be frequent; he advises the creditor to prove his debt and institute examination; or if the debt is open to dispute, he obtains from the assignee the loan of his name on a promise of indemnity for costs, the assignee considering it due to any creditor to render such assistance. The examination then proceeds with all possible severity, and is adjourned from one week to another till the insolvent finds that the costs of professional aid in his defence are at once intolerable and useless; it is quietly hinted, generally through his attorney, that *on terms* the examination will be abandoned, and no opposition made to his certificate; the "terms" are satisfied out of his "plant," or if he has made none, by subscription among his friends; all costs are included, of course—the primary object in such cases being to obtain costs—and other creditors are silenced because the examination, apparently, has failed. Where an insolvent is really innocent of fraud, but is known to have relations or friends in good circumstances, the same "little game" is often successfully played. I have myself at times been made the instrument of such oppressive proceedings, the result of which has been afterwards triumphantly avowed, it being well known that professional honour forbids the exposure of names or facts communicated in professional confidence; but I have long since declined to hold a brief where I had any reason to suspect that extortion was the secret object. Extortion is yet more easily effected in opposing the grant of a

certificate, so great is the license allowed to creditors at this stage of the proceedings. It usually happens that by the interest of friends, or his own activity, an insolvent who really understands business has the promise of a situation as clerk, traveller, or even partner, as soon as he obtains his discharge. A creditor hears of his prospects, and though he has no substantial ground of opposition, he examines in the hope of finding one, and by a little professional aid spins out the time for weeks or months. The vacancy cannot be kept open for ever, so that to avoid losing his opportunity the insolvent or his friends will agree to any "terms!" I have repeatedly made the formal objections that a creditor cannot, according to our acts, examine an insolvent except in opposition to his certificate, and even then only on such grounds as are specified in the acts; and that an official assignee cannot delegate his trust to any creditor; the Commissioner seems to be of a different opinion, for he has always overruled the objections, though founded on the tendency of the practice to aid extortion. My clients have not in any case been able, for want of means, to appeal to the Supreme Court; hence the point has not yet been decided on authority.

It is scarcely necessary to observe that the same difficulties in collecting evidence arising from the absence of distributable estate exist in resisting the grant of the certificate as in exposing fraud. As a matter of opinion, I am inclined to think that the English practice should prevail here, and that if in the course of the proceedings of any estate any circumstances appear on record militating against the grant, the Commissioner ought to take notice of them whether the insolvent is opposed or not. If my memory does not deceive me, such was the practice of the late Commissioner, Mr. Wilkinson. Every applicant for relief is bound to come into court with clean hands; if the record shows them to be otherwise, and the absence of all estate is strong presumptive evidence, he disentitles himself to relief.

There is another case in which the absence of any distributable assets prevents most important inquiry. It may perchance happen that though the insolvent is perfectly honest, his destitution has been occasioned by injury wrongfully sustained, and at the hands of persons well able to pay damages; he may fairly communicate this to his assignee, but to judge prudently of the expediency of embarking in litigation, even should the creditors desire it and subscribe to the cost of it, it is incumbent on the assignee to elicit all the facts by previous examination in the Insolvent Court; and in England it would even be necessary to take the opinion of the Court if the issue were such as required a trial at Nisi Prius, or a bill in equity. Here the assignee must act on his own discretion, though without the means to obtain the professional advice that ought to guide it. Similar difficulty occurs in resisting the proof of a fictitious debt. And even when creditors give an indemnity, the

assignee cannot act without risk, for an indemnity to a public officer for doing his official duty is not worth the paper on which it is written. It is needless to multiply examples of the extent to which the official assignees are impeded in the discharge of their duties by the absence of assets. It is as impossible to make bricks without straw now as it was in the days of the Israelites in Egypt.

The extreme facility with which certificates are obtained when not opposed by a creditor, is in some measure to be ascribed to the same cause, the total want of assets; for it is the official duty of the assignee to oppose the grant if he sees cause, as nobody can judge so well as he can of the conduct of the insolvent; but to oppose effectually he requires both evidence and professional aid, and he has not the means to provide either the one or the other. To make a mere show of opposition is useless, except for the purpose of extortion; to oppose in earnest entails in most cases costs as heavy as would be incurred in an ordinary criminal prosecution; for, in fact, it has been decided in the Supreme Court that the usual ground of opposition, the contracting of debts without intention to pay, or having any reasonable or probable expectation of being able to pay them, can only be sustained by reducing the charge to writing with the same punctilious accuracy, and can only be proved by the same strictly legal evidence, as the charge of obtaining goods by false pretences; that is to say, that though a man is at the time conscious of utter insolvency, and even files his schedule three or four days afterwards, it is not sufficient to sustain such an objection to his certificate that he purchased on credit of different people goods to the amount of £1000; it must be explicitly stated and proved that some particular parcel of them was so purchased of some particular individual; and, moreover, not that he was absolutely unable to pay *all* his creditors, but that he had not means sufficient to pay for that particular parcel, even though its cost might be only fifty or forty pounds. In most cases this is all but impossible, and thus again by the judicial construction of the Act one and the most common grounds of objection is virtually removed. The same rigorous principle is more or less adopted by the Commissioner, on the authority of this precedent, in nearly every objection that can be raised under the Act. As, for instance, concealment or alienation of property must be proved to be the concealment of some special article, and is not sustainable by the admitted absence of £5000, though the loss remains wholly unexplained, as in the case mentioned in the commencement. All this special pleading is very foreign to the character of bankruptcy proceedings, but it may have one incidental advantage in reducing the power of extortion merely to an apprehension of incurring ruinous costs in self-defence, though that is too often enough to intimidate into "terms," especially when coupled with public and *ex parte*

exposure where the insolvent, as does sometimes happen, is sensible of the value of a reputation for honesty. It is the humane, but, as appears to me, the erroneous construction of the Act by our judges, that the possession of property, whether distributable or not, is sufficient to entitle an insolvent to the relief given by the Act, that is the ultimate cause of all the frauds to which I have alluded. It was the custom of Lord Eldon, in all cases where there were no distributable assets, to make the solicitor who struck the docket pay the costs out of his own pocket; and though we have here no bankruptcy law properly so called, yet as nearly all our insolvents are engaged in trade, the same practice ought to prevail; nor do I believe that our judges would ever have held any other doctrine had they been familiar with the practical working of the system.

And it is open to another class of objections of great though inferior force. The official assignees are certainly amenable to the Supreme Court, but, as I shall explain to you, are *practically* under little or no responsibility. And here I would premise that I have no wish to inculpate, or even in any degree whatever to insinuate culpability, against any of them. Most of them are my personal friends, and men for whom I entertain high esteem; but it is not the less my duty, if I undertake to point out the prominent faults of the system, to call your attention to this.

Everybody knows that about five and thirty years ago official assignees were first appointed as an amendment of the bankruptcy system; but probably there is nobody in the colony except myself who was then so intimately connected with bankruptcy practice, as to remember the controversy about the expediency of the change, and the circumstances that gave rise to it. Up to that time, the management of every estate was given exclusively to trustees, elected by a majority of the creditors at their second meeting. These assignees received no remuneration for their services, except the privilege of nominating the solicitor to the commission; the result was this; as a general practice they either gave themselves no trouble about the estate or the claims upon it, but left all to the attorney, and became his tools; or what was more common, they remunerated themselves fraudulently by bargaining with him for sharing his costs; and not unfrequently by becoming themselves the purchasers of the estate, at far less than its value, in the name of some convenient friend. Nor even if such underhand proceedings became known, was there any remedy except by petition to the Chancellor, at the risk of costs. The notoriety of such cases, however, was such as to render it essential to create the new office of an official assignee. This was most distasteful to the merchants, and they then as now clamoured loudly about their right to manage their own interests. There was such apparent justice in this, that a sort of compromise was effected: the creditors were allowed to elect assignees as before, but still without any remuneration; they also

were entrusted with the sale of the estate, but were not permitted to receive the proceeds. All moneys due to the estate, and all expenditure on account of it, were payable to or by the official assignee, and immediately accounted for by him to the Court. The plan was found to work well, and without any material alteration continues to the present day. You will collect from this explanation that the official assignee in bankruptcy is simply an officer of the Court, with little more than financial duties to perform.

Our official assignees stand in a very different position; though officers of the Court, they are not under the control of that branch of it to which their duties attach them, and by which alone their manner of discharging their duties can be justly appreciated. If there should be ground of complaint, redress can only be obtained by a similar, but far more costly process, than a petition to the Lord Chancellor, and with far less prospect of a favourable result. There is no check on their receipts or expenditure, except by a plan of distribution within six months, but such plans are rarely filed where there is nothing to distribute, though in point of law they ought to be filed in every case; and if they are, there is no examination of them except now and then by some very suspicious creditor. I have seen one of these plans in which the sum received on account of the estate was ten pounds, and the expenditure two, the remaining eight being appropriated by the official assignee for his commission! It passed unheeded, for I am told that it is the constant and recognised practice.

Though invested with the absolute and usually the sole management of the estate, they manage it without control. I know that some of them feel the moral responsibility of this so seriously, that in important cases they call a meeting of the creditors to consult them, and in strict accordance with the Act, it ought perhaps to be done in every case, but it certainly is not; hence a wide and dangerous discretion is exercised in calling in debts, and enforcing claims; nor can it well be otherwise when there are no assets to pay the costs of litigation. Bills of sale meet them at every turn, and generally under suspicious circumstances; they dare not attach, and the property is abandoned. There is no check to make them responsible for this surrender of the property, except a vague and unmeaning report that "there is little or no hope of a dividend." Far different is the practice in bankruptcy; there the official checks are innumerable; the official assignee cannot expend a shilling, or move a step, without its being entered on record, and a satisfactory account must be filed on oath of every penny of assets surrendered.

But while responsibility is thus rendered too remote and too expensive to be of any real value, temptation to fraud is presented in every direction. It is highly to the honour of our official assignees in Melbourne that there is not on record—as far as I know and believe—a single instance of their yielding to such temptation. I

can therefore explain the nature of it with confidence that I can offend none of them; and it is expedient, because however well-founded our trust may be in them, their successors in office may not prove equally worthy. Honesty is a good horse, but must not be over weighted.

It is almost superfluous to observe that the same opportunity of extortion is afforded to the official assignee as to the creditor. I have already described the manner of it, and in fact I had a proof of it several years ago, where the then assignee at Geelong opposed the grant of a certificate because the insolvent would not repay his expenses and commission, amounting together to £17. I held a brief for the insolvent; the assignee pleaded that it was the usual practice. It is not necessarry to add that the certificate was immediately granted. The case was fully reported in the *Geelong Advertiser*, but no official notice was taken of it!

Again, in the case of a heavy and complicated estate, it invariably happens that claims are preferred of a doubtful character, and sometimes questions of partnership arise which may involve the liability of a solvent man to pay all the insolvent's debts. A case of this kind occurred to me in my colonial practice, as many did in my practice at home, and it terminated in the full payment of every creditor in the schedule, by establishing a partnership. Such, however, is the loose practice as regards the admission of proofs, that if the insolvent and the claimant collude together, and the claim is inserted as a debt in the schedule, the assignee admits it of course on the production of an affidavit in the usual form, and all check is wanting. The Commissioner holds that according to the Act he can admit a proof on any evidence whatever, if satisfactory to himself. In the case of secret partnership that I have just mentioned, it would have saved a man £1500 had it been thought possible that the assignee could be open to a bribe to remain silent; as it was I had the greatest difficulty to extract from the insolvent such facts as established a partnership in law, and only succeeded by one of those long and repeated examinations for which I have been often blamed by those who are not acquainted with the peculiar difficulties of insolvency practice under our colonial system. Had the assignee been as open to temptation as the insolvent, the creditors would never have received a farthing. Such opportunities ought not to exist, and it is to guard against them that the English practice requires every debt to be proved by the creditor in person, unless sickness or remote residence disables him, and of this the Commissioner is the judge. There are many debts of a character to afford an excuse to an easy conscience for swearing to an affidavit, but for which a creditor would be very unwilling to prove the consideration personally in open Court, and such claims ought never to come into competition with those of *bona fide* trade creditors, or only to undergo the merely superficial inspection of an official assignee; nor is the judgment of the

Court a much more severe ordeal, even if its attention is by accident specially called to the case, when it can admit the proof on any evidence whatever: in fact the practice of the Court has gone much farther than this, even to the absurdity of holding that the insolvent is not at liberty to oppose the admission of a proof unless there is a surplus of assets, though he is of necessity the best acquainted with the real consideration for the alleged debt, and liable to felonious punishment if he acquiesces in the admission of a false one. This error proceeds from a misunderstanding of the dictum of the Court of Chancery, which is, that the *possibility* of a surplus, not its actual existence, gives to a bankrupt a *locus standi* in every conceivable case. Such a possibility exists in contemplation of law till a bankrupt obtains his certificate.

But it is not the errors of practice that I am at present exposing, but the opportunities it allows of, and therefore the temptations afforded to fraudulent practices. No check is provided for securing the *bonâ fide* collection of the estate. I have already observed that our present assignees do, in cases of importance, call a meeting of creditors to direct their course, though even this is not imperative by the Act, nor is it generally done in the form that the Act requires. In bankruptcy the trade assignee realises the estate, and the official assignee is the check upon him; in our system they are, if I may so express it, amalgamated into one person; the one can do nothing without the other; whatever is done must be done by them jointly; thus there is no advantage gained by the creditors, unless it is the pleasure of paying a double commission, while the check intended by the appointment of official assignees is absolutely lost. I have already explained the nature of the frauds practised under the former system, and need not repeat the explanation; but in proof that I am not representing imaginary grievances, I may mention that in a recent case it came to my knowledge that a proposal was made to an official assignee to admit him to a moiety of the profits if he would assist in getting the proposer appointed as trade assignee of a certain estate; the proposal was indignantly rejected. In another case in which a trade assignee sued a creditor in the County Court for his contribution to the expenses, it came out that the sum total to be contributed was £700, while the commission of the official assignee was less than £100. I was not present, but I received the information from a gentleman that was; yet, according to the Act, each must have discharged precisely the same duties, and of course the remuneration to the one would not have exceeded the remuneration to the other.

I will confine myself to one more temptation, or rather source of temptation, in the case of the official assignee.

The Court being converted by the judicial decision into a Court for the relief of pauper insolvents, with merely a casual occurrence of distributable assets, their remuneration has become accidental,

scarcely allowing of an average little more than sufficient to pay office rent, salaries, and other incidental expenses. Large estates rarely fall under their management, because—for the reasons I have assigned, and others which I shall presently mention—the Insolvent Court is in such bad odour, both with debtors and creditors, that, with few exceptions, when there is a prospect of a dividend a private arrangement is considered preferable, though more open to fraud, if possible, than sequestration. But even in an estate so small as not to admit of a dividend, some ten or twenty pounds may chance to be realised—enough to pay the 8 per cent. commission, and perhaps a trifle over. Thus there is a direct inducement to an assignee to treat as hopeless all rights of property connected with the estate, if the assertion of them or inquiry into them will be attended with expense. I know this, because I have been retained in cases in which inquiry and litigation might be reasonably and justly expected, but where neither the one nor the other ever occurred, simply because the assignee would not risk the ten or twenty pounds he had in hand. So, at least, my clients have afterwards accounted for their escape from the unpleasant duty of refunding or restoring. This requires explanation. Suppose that there is an estate in which the assets collected amount only to ten pounds, according to the existing practice the assignee may appropriate eight of the ten; yet there may be debts to realise, or rights to enforce, that may produce £100, enough in the majority of estates to pay the creditors ten shillings in the pound. If the assignee realises such assets, he will get no more than his eight pounds per cent., and of this he is secure already. Why then should he, at the risk of costs, institute a litigation by which he can earn no more profitable commission? It is obviously his interest to do nothing.

I approach with great reluctance the subject of the administration of the insolvent law, but I must not be deterred by false delicacy from expressing my opinion that, bad as the law is in principle, it is rendered yet worse by the character of its practice, though neither the Commissioner nor his staff are responsible for this. The real cause of all is, that the Commissioner's official position is itself ambiguous—I might rather say amphibious. He is both judge and associate, principal and clerk, and therefore in practical reality neither one nor the other. In some few things the Act seems to invest him with judicial power. It enables him to admit proofs of debt, and with a wider discretion than was ever exercised by any bankruptcy judge, not excepting the Lord Chancellor; yet he cannot expunge a proof when once admitted, however erroneously. It enables him to commit a witness for "evasion or prevarication;" but if the witness is guilty of perjury, he can do nothing, though a disputed question rarely occurs where perjury is absent. It enables him to commit for contempt of Court and disobedience of his orders (in some few cases); but he cannot summon a witness, nor in the course of the

fourteen years that I have practised daily in the Court can I recall to mind a single instance of commitment for contempt, except for evasion or prevarication, though I have witnessed the exhibition of it in many instances. It enables him to investigate an insolvent's conduct, but not to grant his certificate; it enables him to examine the title to disputed property, but he can make no order for its restitution. Even in judicial display there is similar incongruity. He is seated on a sort of judicial throne, yet he may not array himself in the judicial garb. When he takes his seat all present rise to receive him, but this mark of respect or deference is not due as of customary right, but simply an absurd parody of the morning salutation that passes between the Bench and the Bar as professional brethren. He is not even the master of his own official staff of assignees and clerks; he can neither appoint them nor remove them *suo arbitrio*, nor apportion their duties or regulate their attendance; nor can he modify, or extend, or vary the practice of his Court as circumstances may from time to time require, nor impose costs for any irregularities of practice. Perhaps the worst feature of all is that he acts both as judge and jury in cases of a criminal character, and without grave responsibility, or the opportunity even of conferring with another!

It follows from this strange heterogeneous hodge-podge of abilities and disabilities, that heavy costs are constantly incurred in supplementing his powers, such as they are, by expensive application to the Supreme Court for summonses, orders, and the like, often involving the necessity of filing lengthy affidavits, and retaining counsel on matters only interlocutory. Then, to allow time to do this, examinations must be adjourned, and witnesses dismissed to their homes to be subpœnaed a second and a third time, often from a remote distance, at a serious aggravation of expense for travelling and hotel charges, as well as of professional costs. The client, whether creditor or assignee, becomes distrustful and alarmed, and will go no further. In this way the examination, if not instituted merely for extortion, is abandoned, often at the most critical point, and all the loss and delay are unjustly thrown on the professional advisers. I am far from saying that they never deserve it, for it is the duty of a solicitor to prepare himself with all evidence that is obviously essential before he enters on such examinations; and if the witnesses have been subpœnaed, it is the duty of the Court, as it is the practice of other Courts, only to adjourn from day to day. From the peculiar nature of bankruptcy examinations, this cannot always be done, but it may be done far more frequently than it is with us, when the actual litigation of the Court is scarcely enough to occupy its attention more than seven hours a week as investigation is now conducted, though were it properly conducted as many hours daily would scarcely suffice for 1100 estates annually surrendered.

Another inconvenience arising from the false position in which the Commissioner finds himself is in some respects of a yet more

serious character. His judgments do not carry the weight of authority. They are not recorded, except now and then in an abridged form in the newspapers; and if they were, they would weigh no more than *nisi prius* decisions, which go for nothing in the profession unless followed by a motion in the full Court, and it is but seldom that they are preceded by argument between able lawyers, well versed in the principles of bankruptcy cases. In the application of those principles to our Insolvency Act, there is moreover much diversity of opinion in the Supreme Court, the judges themselves having, I believe, but little practice in the English Courts of Bankruptcy. It results from this that counsel do not think themselves concluded by any previous judgment of the Commissioner, even if they happen to be aware of it, and feel themselves at perfect liberty to argue against it; the Commissioner has too much candour to persist if convinced by the argument, and hence arises the charge of vacillation which has been unjustly preferred.

And to the same absence of judicial authority may be ascribed the frequent impertinence of replying upon his judgments, even at the time of their delivery. It is undoubtedly competent to counsel, and even his duty, to remind the Court of any important fact that may have been passed over in silence, though militating against the view taken by the Court; but I cannot recollect in all my long professional life a single instance of an English barrister attempting to renew his argument after judgment given, except on appeal to the superior Court. Here it occurs almost daily. But it may be asked, "Why, then, are there so few appeals?" Simply because an appeal, if not sustained, carries with it the payment of the respondent's costs, which, added to those of the appellant himself, would amount to sixty or seventy pounds—a heavy penalty to pay in such trumpery cases as most of those in the Insolvent Court; yet, trifling as they are in pecuniary amount, they are of large importance to the pauper class, in which both the insolvent and his creditors are usually found, and involve legal difficulties almost as often as heavy failures. This fixes the Commissioner with a moral responsibility, of which he has to discharge himself under every disadvantage, without legal argument to assist him, yet conscious that practically there can be no appeal.

There is yet another evil arising from the undignified position of the Commissioner. His Court is not regarded as a judicial Court. It wants all the proprieties and decorum incident to a Court of law. Attorneys only appear as advocates by sufferance, not of right, and are in no way restrained by forensic etiquette, or by what may be called the honourable responsibility of the higher branch of the profession. They do not even as attorneys plead in their proper dress as officers of the Court, and are not subject to its official control. It may be asked, "What does this signify?" Some measure of personal knowledge of the daily practice of the Court is

necessary to appreciate the effect. I have on three occasions seen attorneys address the Court in a state of inebriety; on one occasion there were five attorneys on the barristers' seat, and nobody else except myself, all of whom had themselves been insolvent, and three were still uncertificated; every day may be seen gentlemen climbing over the backs of the benches in every variety of colour and summer dress; and on one occasion an attorney addressed the Court while reclining at full length on the counsel's bench, while too often mutual interruption and flat contradiction are substituted for quiet attention and sound or at least plausible argument. All this detracts largely from that respectful estimation in which every tribunal for administering justice ought to be held by the public, and prevents attorneys of the higher class from undertaking insolvency business, except in the few cases in which an accustomed and valued client may happen to be interested. Whatever tends to lower the professional decorum of a Court diminishes its authority and degrades the Court itself. It is due to the parties to whom I have alluded to add that probably not one among them has ever had the advantage of seeing the dignified formality with which all professional business is conducted, both by counsel and solicitors, in Westminster Hall; still less do they understand the practical value of professional etiquette in promoting order and social courtesy. I have known the Chancellor refuse to hear a barrister, though appearing in professional costume, because he wore a beard, nor did he waive the objection till informed that it was necessary to conceal the disfigurement of his face, occasioned by a wound at Waterloo. I have known another Chancellor reprove members of the bar for reading a newspaper in open Court. As to attorneys, their presence is altogether ignored, unless some accident has befallen their counsel.

It would be easy to accumulate proofs of the utter inefficiency of the Insolvent Court, as its business is at present necessarily conducted; it is in fact no more than a Court for the relief of a few honest paupers, and a multitude of knaves. The public are aware of this already, but not of the causes. I have said enough to explain the principal: the question remains, what is the remedy?

So largely do the abuses exceed the advantages that I should be disposed to say—"Abolish the Court altogether, even if you can find nothing to substitute for it." To a certain extent the public have already done this by private arrangement, for nearly every failure of commercial importance is followed by an assignment of the estate to trustees. Your Committee has, I believe, more than once heretofore suggested private arrangement as the remedy which the legislature should adopt. My own experience, however, of many years assures me that such a remedy is worse than the disease; and for this simple reason, that for one insolvent knave there are at least five creditors who are no better than he is, and private arrangements

give both to such creditors and their insolvent debtor still more favourable opportunities of fraud. I will explain this, for although your present report seems to be in favour of adopting Sir Roundell Palmer's Bill as varied by Mr. Higinbotham, I doubt whether you are yourselves fully aware of the frauds practised with impunity under this extra-judicial mode of winding up an estate, and I am certain that several members of the late Assembly did not even suspect them. Mr. Higinbotham's Bill, taken as a whole, would have been a great boon to the commercial world. My sincerity in saying this will not be doubted, it being well known that I am utterly opposed to his political principles and practice.

There are two forms of private arrangement: one under the surveillance of the Court; the other by assignment to trustees, subject to certain formalities, but essentially independent otherwise of all curial control. The first of these was introduced by the Act of 1849, but it was soon found to resolve itself into a system of bankruptcy equally expensive, but without its powers. It never was brought into general use. I am writing from memory, but before I left England I had occasion to inquire into the matter, and I found that in five years only five instances occurred at Liverpool, about the same number at Manchester, and in my brother's jurisdiction at Bristol not one. The latter form, however, was at first frequent, but of late years has been much less frequently adopted at Liverpool, but I have no means of judging as regards Manchester or Bristol. Two cases, in both of which I was counsel—for the petitioning creditors in the one and the assignee in the other—gave occasion for so much unfavourable remark that assignments to trustees were no longer tolerated, and for a time at least abandoned. I have mentioned these cases before, but they are so instructive that they will bear repetition. In the one, the deed of assignment had been set aside, and the creditors resorted to bankruptcy; one person had been admitted as a creditor under the private arrangement for £42,000. After three days' examination, on his attempting to prove his debt in the Bankruptcy Court, I reduced his claim to £18,000, and showed that the rest of his claim, though silently admitted under the trust deed, was altogether fraudulent. This reduction improved the dividend to *bonâ-fide* creditors by 5s. in the pound, at a cost of only about £20 to the estate. The other case was yet more conclusive. It will probably be in your recollection that Oliver, the great shipowner at Liverpool, failed in 1854, indebted to the amount of a million, but with assets of 18s. in the pound. Private arrangement was considered the best form of liquidation, and adopted, but not without much contention, three or four petitioning creditors being bought off in succession at a cost to the estate of £5000. An intimate friend of mine was a creditor for a large sum, I think about £6000, and one of the most active of the private-arrangement party. About a year after my arrival in the colony I received a

letter from him, informing me that a first and final dividend of Oliver's estate had been declared of half-a-crown in the pound, three or four of the principal creditors having, however, contrived to pay themselves in full! My friend was ruined by this result, and died soon after, the victim of that depressed, desponding state usually designated as "a broken heart."

In private arrangements there is no adequate provision, nor can there be, for investigating claims and following up property, or even for ascertaining assets. Fraudulent preferences cannot be set aside, expenses cannot be checked, and even trustees cannot be controlled except by litigation of the most expensive and dilatory character. A meeting of creditors is called, but not till the debtor has made his arrangements with some convenient friend to appear at it as a principal and angry creditor, and with some pliable accountant to skim over his books and vouch for the accuracy of his statements. The meeting is held; the debtor is frank but obsequious; the convenient friend is outrageous; the accountant explains, and vouches for everything and anything; "costs will absorb the estate in bankruptcy, and no dividend for twenty years." So private arrangement rules the day, and the convenient friend is asked to undertake the trust; he affects reluctance, but soon acquiesces, merely "to oblige his friends;" and if any dividend is declared, he comes in for half of it by virtue of his fictitious debt, and divides the profit with the debtor.

I am far from saying that such is the invariable case, or even the general one, but I do say that the private-arrangement form of liquidation is such as in all cases to allow of more or less of this fraud with impunity, while in every case the small creditor for fifty or a hundred pounds—though of more consequence to him, perhaps, than a thousand to his neighbour—is silenced and borne down by the influence of those who claim, whether truly or not, to be the heaviest losers; nor does my experience allow me to doubt that the waste of assets, and the costs of managing and realising, are much greater than in bankruptcy, and the temptation to dishonesty much more powerful when there is no summary control over the trustee, the accountant, or the attorney, and no official appointment to be lost as the consequence of detection. The practical value of such responsibilities cannot be comprehended except by men who have had considerable personal experience in the working of bankruptcy machinery.

The remedy for all appears to me to be the adoption of Mr. Higinbotham's Bill, subject, if possible, to some amendments, which nobody is more able to suggest than Mr. Fellows, but still without any modification of its principle. Had the bill gone no farther than to create an independent Court (with an appellate liability, of course), I should even then say that it would have reformed many abuses. By introducing the doctrine of "relation" the benefits would have been greatly multiplied; but to render such an act of legislation

complete, any new scheme ought to be assimilated as much as possible to the system of bankruptcy, so as to secure a certainty of administration by reference to the many thousands of cases that have been decided and reported in bankruptcy, involving almost every point that can occur in bankrupt law. Nor is it without its importance to observe that this has already been done in New South Wales and South Australia. If these colonies ever become (as doubtless they will, and perhaps at no very remote period) united by federation, it is most desirable that the intercolonial trade should be governed by uniformity of commercial law.

Here I might conclude my remarks. The abuses which I have exposed are many and great. The result of them is that in 1100 insolvencies during the year an average dividend is obtained of 2d. in the pound; in some ten or twenty cases only, a certificate is refused; and all the heavy expenses of the establishment or of investigation are thrown directly or indirectly on the insolvents' creditors, for it is a self-supporting Court, maintained by preliminary fees or by deductions from assets realised. If the legislature peremptorily insisted on statistical returns—which have often been ordered, but if made have never been published—or if a similar exposure were made of each case in detail as it comes before the Commissioner, public opinion would long since have been the reformer; but the daily press cannot afford space to publish evidence in detail except in a few cases where the position of the parties or the singularity of the circumstances may give them an interest; hence the privacy of insolvency proceedings, though carried on in open Court, aids the impunity of fraud. I cannot, however, reconcile it to my sense of justice to omit adding that in my opinion Mr. Higinbotham fairly earned the gratitude of the commercial classes by the introduction of his Bill, however erroneous I consider it in some few of its clauses; for it argues a just and comprehensive view of the difficulties which he had to encounter, and a resolute and legislative ability to meet them. I had nothing whatever to do with it, and this tribute of acknowledgment may therefore be received as sincere, especially from a decided political opponent.

I have the honour to remain, Gentlemen,
Your very obedient servant,

GEORGE STEPHEN.

P.S.—I have felt it to be due to you to submit this letter previously to its publication to two friends well acquainted with the subject, and in some places I have modified it as originally written, in deference to their opinion. I am not at liberty to mention their names; if I could do so, they would be ample authority for the statistics on which my argument is founded.

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