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## Bankruptcy and Probate Jurisdiction before 1571

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# BANKRUPTCY AND PROBATE JURISDICTION BEFORE 1571

R.H. HELMHOLZ\*

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## I. INTRODUCTION

For a student of the law of probate and legal history, an invitation to contribute to a volume of essays in honor of Professor William F. Fratcher is hard to decline. Few scholars have moved as easily and as successfully between current problems relating to the devolution of property at death and their historical antecedents. Professor Fratcher has also illuminated, on more than one occasion, the role that the English ecclesiastical courts have played in the development of modern probate law.<sup>1</sup> This Article attempts to carry this work forward by investigating the earliest kind of English bankruptcy, that first exercised within the probate jurisdiction of the ecclesiastical courts. It is based primarily on examination of the surviving manuscript records of these courts, records which are teaching us a great deal about the place of probate jurisdiction in the development of modern law.<sup>2</sup>

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1. See, e.g., Fratcher, *Fiduciary Administration in England*, 40 N.Y.U. L. REV. 12, 67-71 (1965); Fratcher, *Sovereign Immunity in Probate Proceedings*, 31 MO. L. REV. 127, 135-36 (1966).

2. The diocesan court records examined in the preparation of this Article consist principally of act books, i.e., official records of procedure in every cause that came before each consistory court. Those examined, with corresponding modern archives, are the following:

Canterbury	Library of the Dean and Chapter, Canterbury.
Chichester	West Sussex Record Office, Chichester.
Ely	Ely Diocesan Records, The University Library, Cambridge.
Gloucester	Gloucestershire Record Office, Gloucester.
Hereford	Hereford County Record Office, Hereford.
London	Guildhall Library, London.
Norwich	Norfolk Record Office, Norwich.
Rochester	Kent County Record Office, Maidstone.
St. Alban's	Hertfordshire Record Office, Hertford.
Winchester	Hampshire Record Office, Winchester.

Those records show conclusively that English bankruptcy practice has antecedents and perhaps even roots in the canon law administered by the Church courts. Although none of the standard accounts of the subject recognizes the relevance, or even the existence, of the jurisdiction of ecclesiastical courts,<sup>3</sup> examination of the records of those courts demonstrates that essential aspects of the law of bankruptcy were in use in England before the first secular legislation on the subject was enacted in the sixteenth century. All current treatments of the subject begin with the Tudor statutes,<sup>4</sup> principally the statute enacted in 1571. In fact, however, there was something worthy of note before then.

That no legal historian has ever raised the possibility that probate bankruptcy jurisdiction was exercised by the ecclesiastical courts may be cause for mild surprise. It is a reasonable assumption that the Church might have developed rules for dealing with estates of men who died with assets insufficient to pay their debts. Not only did the Church long exercise probate jurisdiction in England, but the ecclesiastical courts also once dealt with all sorts of debt claims brought by and against the estates of decedents.<sup>5</sup> Prior to the sixteenth century, they were accustomed to evaluating and settling the rights of creditors against executors and administrators. Since the royal courts in practice conceded this probate jurisdiction to the Church courts, there was no impediment to the development of rules for insolvent estates.

Moreover, it is also a reasonable assumption that the lack of any secular law of bankruptcy prior to the Tudor period would have augmented the number of insolvencies to be settled on death. Probate courts would inevitably have had to deal somehow with sorting out the resulting claims. Even the social attitudes of an earlier day might have suggested the appropriateness of the Church's jurisdiction over bankrupt estates. In medieval England, a man's death bed was often a place for reckoning up what he owed and what he was owed. Anxiety about one's fate in the next world often led men to want their debts clearly set down and to ensure that payment was

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For purposes of this Article, each case is referred to under the name of the decedent, i.e., "Estate of *N.*" This terminology is modern, and it is adopted here only as a convenience to the reader in locating and making reference to the original documents. A printed edition of one of the act books of the kind used in this Article is *THE COURTS OF THE ARCHDEACONRY OF BUCKINGHAM, 1485-1523* (19 Buckinghamshire Record Society, E. Elvey ed. 1975). See also B. WOODCOCK, *MEDIAEVAL ECCLESIASTICAL COURTS IN THE DIOCESE OF CANTERBURY* (1952).

3. See 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW 470-73* (7th ed. 1956); W. JONES, *THE FOUNDATIONS OF ENGLISH BANKRUPTCY: STATUTES AND COMMISSIONS IN THE EARLY MODERN PERIOD* (1979); J. MACLACHLAN, *HANDBOOK OF THE LAW OF BANKRUPTCY* § 26, at 20 (1956); Levinthal, *The Early History of Bankruptcy Law*, 66 U. PA. L. REV. 223 (1918).

4. 34 & 35 Hen. 8, ch. 4; 13 Eliz. ch. 5, 7.

5. The evidence on this point is laid out in Helmholz, *Debt Claims and Probate Jurisdiction in Historical Perspective*, 23 AM. J. LEGAL HIST. 68 (1979).

made as fairly as their assets permitted.<sup>6</sup> What the records of the ecclesiastical courts reveal about the existence of probate bankruptcy jurisdiction should therefore come as no great surprise.

## II. INITIATION OF BANKRUPTCY PROCEDURE

The evidence clearly shows the existence of probate bankruptcy before enactment of the Tudor legislation. Its frequency is less easy to estimate with confidence. The records are insufficient here, and at several other points, to yield unimpeachable conclusions. But one piece of evidence does suggest the prevalence of probate bankruptcy: the frequency with which executors named in the testaments of decedents disclaimed their executorships. Executors were subject to at least the possibility of being held personally liable for the debts of the man whose estate they administered,<sup>7</sup> and when they feared an excess of claims over available assets the safest course appears to have been to refuse the office. So, for example, in 1473 before the consistory court of the diocese of Rochester, John Turk, the executor nominated in the testament of Stephan Brown, "refused to take upon himself the burden of execution of this testament out of fear of the creditors, because the goods were insufficient for payment of the debts."<sup>8</sup>

Working through the act books of the Church courts produces many such entries. An executor at Lichfield in 1540 renounced his responsibility "because the decedent was and is greatly weighed down by debt."<sup>9</sup> A London man refused executorship in 1512 "because of the excessive debts in which the same decedent was indebted at the time of her death."<sup>10</sup> Some entries verge on the colorful, such as the executrix who refused to act "be-

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6. This assertion is based on the examination of numerous depositions in testamentary causes. They often record the circumstances surrounding the making of testaments, e.g., Estate of John Pope, Canterbury Deposition book X.10.1, f. 69v (1415), in which a witness deposed that the scribe "scripsit certa debita dicti Pope tempore mortis sue aut modicum ante."

7. See generally R. GOFFIN, *THE TESTAMENTARY EXECUTOR IN ENGLAND AND ELSEWHERE* 52-55 (1901); A. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT* 559 (1975).

8. Estate of Stephen Brown, Rochester Act book DRb Pa 4, f. 16r (1473): ". . . recusavit onus executionis huiusmodi testamenti in se suscipere propter metum creditorum quia bona non sufficiunt ad solucionem debitorum."

9. Estate of Gregory Fyderne, Probate Act book B/C/10/2, f. 63r (1540): ". . . quia predictus Gregorius defunctus erat et est ere alieno multum aggravatus et aliis legitimis causis."

10. Estate of Agnes Elham, London Probate Act book MS. 9168/4, f. 1r: ". . . propter excessiva debita in quibus idem defuncta mortis sue tempore etc. fuerat indebitata expresse renunciavit etc." For the diocese of London generally, see R. WUNDERLI, *LONDON CHURCH COURTS AND SOCIETY ON THE EVE OF THE REFORMATION* 115 (1981).

cause of the cruelty of the creditors,"<sup>11</sup> or the executors who renounced their position because of the "multitude"<sup>12</sup> or even the "uncertainty"<sup>13</sup> of the existence of creditors with claims against the estate. No reason for refusing executorship appears more often in the remaining act books than this one. Although not invariably followed by actual bankruptcy, that likelihood dominated the minds of enough executors to have left a significant mark in the records.

The consequence of these disclaimers was normally less in practice than might be thought. Evidently designed to prevent even the possibility of personal liability, disclaimer usually changed only the form of the administration. Technically, the decedent was declared intestate, since a willing executor was necessary for testation, but in practice administration was conceded to carry out the decedent's last wishes insofar as possible. Modern administration c.t.a. is a descendant of medieval practice. This meant another grant of administration, even if in a slightly altered form, and the actual testament was followed as closely as the claims against the decedent's estate would allow. The ecclesiastical officials very often committed administration to the same person who had just disclaimed formal executorship. A typical entry reads, "The executors of the testament of John Hevyn . . . refused to assume the burden of execution of the testament etc., nevertheless to them is committed administration of all goods of the said decedent, dying intestate."<sup>14</sup> Here only the name "executor" was refused; administration would proceed normally.

What renunciation did principally was set the stage for bankruptcy of the estate. The last wishes of the decedent expressed in his testament could not be carried out under the canon law if this meant the defrauding of creditors. This principle resulted in several variations from normal probate practice.

First, the oath sworn by the personal representative took a slightly different form. All men and women who administered estates in whatever capacity were required to swear a formal oath to administer faithfully, i.e.,

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11. Estate of Peter Bolcham, Rochester Act book DRb Pa 2, f. 164r (1451): ". . . propter crudelitatem creditorum et insufficienciam bonorum."

12. Estate of Roger Chip, Rochester Act book DRb Pa 2, f. 96v (1448).

13. Estate of Margaret Crofton, London Probate Act book MS. 9168/1, f. 93v (1498).

14. Estate of John Hevyn, Hereford Act book 0/13, p. 187 (1479): "Elizabeth relicta eiusdem et Ricardus filius dicti defuncti comparuerunt et recusarunt expresse subire onus executionis testamenti etc. tamen commissa est eis administracio etc. omnium bonorum dicti defuncti ab intestato decedentis in forma iuris etc." A succinct example from the diocese of Chichester is Estate of William Gysbourne, Act book Ep. III/4/1, f. 99r (1500): "Hac die comparuit Margeria relicta Willelmi Gysbourne et exhibuit testamentum eiusdem Willelmi et renunciavit administracionem eiusdem testamenti et acceptavit in se onus administracionis bonorum dicti defuncti."

to pay the debts and legacies of the person they represented.<sup>15</sup> But when bankruptcy was feared, to this oath was added the proviso, "insofar as the goods may suffice,"<sup>16</sup> or "as far as the goods extend,"<sup>17</sup> or "according to the quantity of the inventory."<sup>18</sup> A late sixteenth century entry from the diocese of Salisbury spelled out this modification fully. The official "charged . . . [the executors'] consciences that if and insofar as sufficient goods shall come into their hands, they should pay" the debts according to the schedule.<sup>19</sup> Their duty was limited accordingly.

Second, the sequestration of the decedent's assets was routinely ordered for bankrupt estates. The evident notion was that in case of insolvency the assets were subject to special risk and required special protection.<sup>20</sup> The act books yield examples of up to three sequestrators being named to protect the goods pending full settlement of the estate,<sup>21</sup> and they also yield *ex officio* prosecutions against persons charged with having violated the order of sequestration.<sup>22</sup> Seemingly no special place or means of sequestration was involved. None is mentioned in the records, and one defendant pleaded that he had no knowledge of the sequestration, suggesting that no physical signs of sequestration had been evident.<sup>23</sup> But some publicity may have been achieved by the order, and the sentence of excommunication which its knowing violation entailed may have provided a safeguard worth having.

Third (though not always limited to cases of insolvency), the ecclesiastical officials required that a public proclamation be made, calling for all creditors of the decedent to appear at a specified time to file their claims.

15. See the account of ordinary procedure in Jacob, *The Archbishop's Testamentary Jurisdiction*, in *MEDIAEVAL RECORDS OF THE ARCHBISHOPS OF CANTERBURY* 45-46 (1962). See generally M. SHEEHAN, *THE WILL IN MEDIEVAL ENGLAND* (1963).

16. Estate of John Tebold, Rochester Act book DRb Pa 3, f. 312v (1457): ". . . ad solvendum debita et quatenus bona sufficientia legata in testamento predicto."

17. Estate of Elena Gorwell, Canterbury Act book Y.4.2, f. 102r (1487): "Et iuratus de fideliter administrando quatinus bona extendunt."

18. Estate of John Dawson, Gloucester Vicar General's Act book DLC 330, f. 45r (1523): ". . . solvendoque debita et legata dicti defuncti iuxta vires inventarii."

19. Estate of Raoul Pearce, Office Act book 4, f. 15v (1599): ". . . onerando tamen eorum conscientias si et in quantum bona sufficientia ad eorum manus pervenerint dicti defuncti ad quem pertinebant eandem ratam solvere etc."

20. *E.g.*, Estate of Thomas Dixon, London Probate Act book MS. 9168/9, f. 37v (1539): "Adeo quod dicta Frideswida non audet assumere in se onus executionis dicti testamenti unde dominus ne bona interim pereant etc. sequestravit eadem."

21. *E.g.*, Estate of John Chambyr, Rochester Act book DRb Pa 2, f. 24r (1445).

22. Estate of Laurence Waren, Chester Archdeaconry Act book EDC I/4, f. 80r (1530); Estate of Edward Deux, London Act book MS. 9064/2, f. 245v (1488); Estate of William Gore, Rochester Act book DRb Pa 2, f. 109r (1449).

23. Estate of Edward Deux, London Act book MS. 9064/2, f. 245v (1488): ". . . asserens se non novisse ea fuisse sequestrata." See also R. HOULBROOKE, *CHURCH COURTS AND THE PEOPLE DURING THE ENGLISH REFORMATION, 1520-1570*, at 94 (1979).

For example, this entry from the diocese of Norwich in 1510: Richard Sandryingham, curate at Great Yarmouth, certified that he had, in the parish church, publicly required that "all and singular creditors to whom the . . . [said decedent] stood indebted should appear before his lordship, the official, on . . . [a certain] day to receive their share according to the schedule of goods of the said decedent."<sup>24</sup>

Standard procedure called for three separate proclamations to be made.<sup>25</sup> Normally they occurred in the parish church of the decedent, sometimes also in neighboring parishes, sometimes in the public market, or (in a London case of 1539) at Paul's Cross.<sup>26</sup> As in the Norwich entry, the curate who made the proclamation was required to send certification of the performance of his duty to the official of the consistory court, and, in theory at least, those creditors who failed to appear were foreclosed from making any claim against the estate in the ecclesiastical forum.<sup>27</sup> Thus modern "non-claim" statutes have an evident antecedent in medieval practice. How effective they were—and, in particular, whether they kept creditors from suing the executor separately in a secular court—are not questions to which the surviving records provide even a hint of an answer.<sup>28</sup> We are left to conjecture. What the remaining records do make clear, on the other hand, is the regularity of the proceedings to cite creditors with claims against estates and to protect the assets when there was reason to fear that they would be insufficient to meet the claims.

### III. TREATMENT OF THE CLAIMS OF CREDITORS

Whatever the practical effect of the foreclosure of further claims after the last proclamation, the next step—the actual filing of creditors' claims with the Church court officials—was a regular and apparently effective pro-

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24. Act book ACT/1, s.d. 15 January 1509/10: ". . . quod omnes et singuli creditores quibus dicti Willelmus et Robertus indebitati existent quod compareant coram domino officiali istis die et loco suas porciones iuxta ratam bonorum dictorum defunctorum percepturos."

25. *E.g.*, Estate of William Austen, Canterbury Act book Y.4.2, f. 104r (1489) (first proclamation made January 13, the second March 11, and the third March 31). Intervals between the proclamations were normally short.

26. Estate of John Turpyn, London Probate Act book MS. 9168/9, f. 103r (1540): "apud crucem divi Pauli."

27. *E.g.*, Estate of Robert Copratt, Chichester Act book Ep I/10/2, fols. 43v-44 (1520): "Dominus pronunciavit omnes alios non parentes aliquid de bonis defuncti vindicare contumaces et in penam contumaciarum suarum decrevit eos ulterius non fore audiendos et bona distribuenda inter dictos parentes iuxta ratam etc."

28. The executor could plead *plene administravit* to a suit on a debt brought in the royal courts, but it is by no means certain that this sufficed to bar the action. The Church courts themselves did not apply the rule inflexibly. In Estate of John Spencer, Chichester Act book EP I/10/2, f. 119r (1520), a new debt claim was entered after formal preclusion of further claims.

cedure. It has left considerable evidence in the surviving records, generally in the form of lists of claims against the estate. Often they were accompanied in the record by notation of the disposition of each claim. In some cases the procedure seems to have been extremely simple. William Sevan, for instance, was the only creditor of the estate of Margery Chorch, who died in 1460 within the diocese of Rochester. His claim was for 35s., but when probate and funeral expenses were deducted only 12s. was left in her estate. This sum was turned over to Sevan.<sup>29</sup> In other cases, however, the procedure was considerably more complex. When Robert Copratt died within the diocese of Chichester in 1520, he left at least forty creditors with aggregate claims of almost £300 against his estate. All their names and the nature of their claims were entered in the appropriate act book. The assets available to meet them came to only about £22, and about £13 once necessary deductions had been made. The creditors had to prove their claims, and even those who did so successfully received only a ratable award of 10d. on the pound.<sup>30</sup>

A necessary preliminary to the equitable division of assets was, of course, their collection. Here bankruptcy posed the special problem of transfers made in fraud of the rights of creditors. The English Church made special provision for the problem. A provincial constitution, or statute, made in 1343 and known by its first words *Cordis dolore*, declared excommunicate those who participated in such fraudulent transfers.<sup>31</sup> To avoid the consequences of excommunication and to merit absolution, transferees were required to return the fruits, i.e., the amount they had received without giving adequate consideration, to the decedent's estate. *Cordis dolore* also punished, by denial of Christian burial, the decedent who had alienated his own property in order to deceive his creditors. One example of an exhumation order in such a case has survived in the act books.<sup>32</sup>

*Cordis dolore* covered both outright gifts and transfers made in the form of a sale but without adequate consideration.<sup>33</sup> The evidence, however, does not suggest that as part of probate practice the ecclesiastical officials undertook a scrutiny of the fairness of all the transactions entered into by the decedent. They avoided it. The act books contain almost no disputed

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29. Rochester Act book DRb Pa 3, f. 418v (1460): “. . . unde funeralibus deductis parum remanebat unde officialis assignavit ei bona in dicto inventario pro satisfactione sua.”

30. Estate of Robert Copratt, Chichester Act book Ep I/10/2, fols. 43v-44 (1520).

31. It is found, with medieval gloss, in W. LYNDWOOD, *PROVINCIALE (SEU CONSTITUTIONES ANGLIAE)* 161-65 (1679).

32. Estate of William Warner, St. Alban's Act book ASA 7/1, f. 24r (1520).

33. A distinction was made, however, which required that the transferee by sale have known of the fraud on creditors. Donees, on the other hand, were covered whether they had knowledge or not. See W. LYNDWOOD, *supra* note 31, at 164 s.v. *recipientes*.



cases of sales,<sup>34</sup> and elsewhere within ecclesiastical jurisdiction the courts regularly enforced sworn contracts without apparent examination of their fairness.<sup>35</sup> Whether this unwillingness stemmed from conviction about the sanctity of obligations freely entered into or from reluctance to enter a tangled thicket of claims is impossible to say at this distance. But the unwillingness to entertain such claims seems fairly clear.

There is, on the other hand, considerable evidence that *Cordis dolore* was put into effect against genuinely gratuitous transfers. Standard procedure called for the express citation of donees, who were required to show cause why they should not be declared to have incurred the penalties of the constitution. Some of the persons cited did in fact present affirmative defenses at the ensuing hearing. One, for example, alleged that the transfer had been part of a contract to maintain the decedent during his old age.<sup>36</sup> Most gratuitous transferees, however, submitted to the court's jurisdiction and tendered the goods. Typical are the transferees at Rochester in 1465 who are recorded as admitting receipt of all the goods of John Pycot "long before his death . . . by grant for certain necessary causes, nevertheless, having no wish to occupy those goods in fraud of creditors," they offered to surrender them.<sup>37</sup> One man at London in 1497 ingeniously justified receipt of the decedent's goods by saying that his father had given them to him during his lifetime specifically in order to satisfy his debts.<sup>38</sup> Probate avoidance is evidently no invention of the twentieth century.

The ecclesiastical courts frequently dealt with such difficult cases by appointing the donee as administrator of the estate.<sup>39</sup> The donee himself then had to pay the debts of the decedent out of the assets already in his

34. Only one apparent exception has been found, and in it the disparity between the purchase price and the value of the two oxen in dispute (7s. 8d. as against 18s.) was considerable. Estate of Thomas Braibroke, Rochester Act book DRb Pa 2, f. 53r (1446).

35. At least the author has not found substantive unfairness as a defense in any of the *cause fidei lesionis* in the remaining records. See Helmholz, *Assumpsit and Fidei Laesio*, 91 L.Q. REV. 406 (1975).

36. *Ex officio* c. Pyndfold, Canterbury Act book Y.1.3, f. 180r (1422): ". . . fatetur quod prefatus Jacobus Hendeman donavit sibi omnia bona sua inter vivos ea intencione ut ipse Jacobus haberet a prefato Ricardo sustentacionem suam et quod dictus Ricardus exhiberet sibi necessaria sua quamdiu viveret." See also Clark, *Some Aspects of Social Security in Medieval England*, 16 J. SOC. HIST. 307 (1982).

37. Rochester Act book DRb Pa 3, f. 492v (1465): ". . . diu ante obitum suum dedit eis bona sua per cartam ex certis necessariis causis ipsi tamen nolentes huiusmodi bona occupare in fraudem creditorum."

38. Estate of James Day, London Probate Act book MS. 9168/1, f. 13r (1497).

39. *E.g.*, Estate of William Sutton, London Probate Act book MS. 9065J/1, f. 48r (1519). Thomas Chycheley was first cited for "detaining" the goods of the decedent. He appeared in court and was almost immediately assigned the task of compiling a list of the debts owed by the decedent. The practice survived at least to the end of the sixteenth century, *e.g.*, Estate of John Beton, Ely Act book

hands. If goods remained after all claims had been satisfied, so much the better for him. If not—if the estate were truly bankrupt—the donee was bound to satisfy the claims insofar as his assets allowed. Nothing would remain in his hands after the satisfaction of legitimate claims. This practice was certainly not ideal. It put administration into the hands of the person who stood most to gain by the rejection of claims against the estate. He was obliged to render an account of his administration, and creditors were always given the chance to prove their claims before the court. But these are measures of last resort in probate. Surely it would have been fairer to appoint a disinterested administrator. The ecclesiastical courts frequently resorted to a shorter, and doubtless easier, compromise with the problem of fraudulent alienations than modern standards of impartiality demand and even than the strict tones of *Cordis dolore* suggest.

The records make certain, moreover, that the dangers were more than theoretical. Administration under the canon law required evaluation of claims by the administrator of the estate. The schedules of debts found in the remaining act books sometimes record the acceptance, the refusal, or the compromise of claims against estates. The evidence given in support of each claim was also sometimes noted: a debt book,<sup>40</sup> a written obligation,<sup>41</sup> a tally,<sup>42</sup> or an oath supported by compurgators.<sup>43</sup> An entry from the diocese of Salisbury, for example, noted that John Follyot appeared during probate of the estate of Edward Adlambe. He “laid a claim to 21s., but he had no specialty.”<sup>44</sup> This notation probably was made necessary by the rule, adopted as early as the sixteenth century, that debts evidenced by a writing were to be preferred to those that rested on simple contracts.<sup>45</sup>

The court records themselves do not make clear much beyond the fact that the nature of each debt claim was examined by the administrator and, sometimes, by court officials. During the Middle Ages, the Church courts provided a regular forum for the trial of testamentary debt cases, but it abandoned this contentious jurisdiction during the reigns of the first two

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EDR D/2/18, f. 176v, in which the son of the decedent alleged the inter vivos gift and was assigned the duty of administration.

40. Estate of William Milde, Gloucester Act book GDR 17, p. 150 (1560): “Deinde comparuit quidam Thomas More et allegavit dictum defunctum debuisse ei tempore mortis sue xiii s. ad quod probandum produxit librum suum mercatoris etc.”

41. Estate of William Bayly, Salisbury Act book 2, f. 85r (1562), called *billie obligatorie*.

42. Estate of Clerk, London Probate Act book MS. 9168/1, fols. 35v-36r (1497): “Johannes Grove petit vii li. x s. quam summam petit per tallios.”

43. Estate of Whetstone, Canterbury Act book Y.4.4, f. 91r (1529).

44. Estate of Edward Adlambe, Salisbury Office Act book 2, f. 44v (1585): “Comparuit etiam Johannes Follyot et nomine Johannis illius vendicavit xxi s. sed nullam habet specialitatem.”

45. J. GODOLPHIN, *THE ORPHAN'S LEGACY, OR A TESTAMENTARY ABRIDGEMENT* PT. 2, at 217 (4th ed. 1701).

Tudor monarchs. If there was a law suit, it occurred in a secular forum.<sup>46</sup> Nonetheless, then as now, most debt claims were settled well short of trial. The court records suggest that discussion and settlement of claims continued to occur under the umbrella of the Church's probate jurisdiction even after the ecclesiastical courts ceased to hear such cases formally.

The early rules governing the order of payment of claims against an insolvent estate are difficult to determine from the Church court records. After the late sixteenth century, the English Church courts adopted a detailed system of priorities among creditors.<sup>47</sup> Some were based on the creditor's status, some on the nature of his claim. But it may be that these had their origins in the royal courts.<sup>48</sup> The medieval and early sixteenth century ecclesiastical records, as well as the fifteenth century commentary by William Lyndwood, do not provide a comparable system, but they do show that some claims were satisfied before others. The expenses of administration—things like the cost of making an inventory and even paying for the proclamation calling for creditors, in addition to regular court fees—were everywhere payable before the claims of creditors.<sup>49</sup> So were funeral expenses.<sup>50</sup> One of the common complaints leveled against the Church courts was their excessive probate fees, and practice in bankruptcy cases shows something of the reason.<sup>51</sup> The Church took its share at the expense of prior creditors.

The position of the wife's portion, her right to the equivalent of a forced share of her husband's estate, is also not entirely clear. Was it given priority over the claims of creditors? Two cases show that it was.<sup>52</sup> But this is a small number upon which to base a firm conclusion, and both cases

46. See Helmholz, *supra* note 5, at 77-80.

47. See H. SWINBURNE, A TREATISE OF TESTAMENTS AND LAST WILLS PT. 6, at 269-71 (2d ed. 1641).

48. For example, many of the citations given in support of the rules given by Swinburne's work come from English common law sources.

49. *E.g.*, Estate of Robert Copratt, Chichester Act book Ep I/10/2, fols. 43v-44 (1520).

50. *E.g.*, Estate of William Blakbourne, Chichester Act book Ep I/10/1, f. 64v (1506) (the debts owed were 62s. 7d., but nothing was left to meet them after the court had deducted what the Act book records as "expense funerales" and "alie expense curie" as well as "alie expense necessarie pro esculentis et poculentis curati et appreciatorum"); Estate of Nicholas a Doith, London Probate Act book MS. 9068/4, f. 10a (1513) ("Item funeralibus expensis iii s. Item ordinariis expensis ii s. vii d. Et sic remanent inter creditores x s. vi d.").

51. See Bowker, *Some Archdeacons' Court Books and the Commons' Supplication Against the Ordinaries of 1532*, in THE STUDY OF MEDIEVAL RECORDS: ESSAYS IN HONOUR OF KATHLEEN MAJOR 282, 296-302 (D. Bullough & R. Storey ed. 1971).

52. Estate of John Blake, Chichester Act book Ep I/10/4, f. 15v (1527); Estate of William Skyner, Chichester Act book Ep I/10/5, f. 19r (1533). There is also one Rochester entry which suggests, but does not clearly state, the same disposition: Estate of William Frawnces, Rochester Act book DRb Pa 5, f. 60r (1499).

come from the same diocesan court. Surprisingly, the prior creditor most often noted in the remaining records is the decedent's landlord. Where the decedent had leased the property in which he lived, the general creditors were paid their share only after the landlord had been paid in full. The records show that this at least was the rule within the dioceses of London,<sup>53</sup> Chichester,<sup>54</sup> and Rochester.<sup>55</sup> There is just a trace of suggestion that this may have been recognition of the landlord's ability to physically seize the decedent's goods.<sup>56</sup> It may also be that the king occupied a position as prior creditor in medieval practice. He clearly did later on,<sup>57</sup> although the two remaining lists of creditors containing debts to the crown do not show any sign of special treatment.<sup>58</sup>

The whole area of priorities in claims is admittedly obscure. The act book evidence is good enough to show only that not all creditors were invariably treated alike, and it may be that ecclesiastical practice clothed the executor with enough discretion to prevent the development of fixed rules.<sup>59</sup> There is a suggestion of this in the treatment by Swinburne, the late sixteenth century canon lawyer whose treatise on the law of wills is the standard authority for our knowledge of early English probate law.<sup>60</sup> There are also cases in the court records which contain divisions of assets that are difficult to account for on any principle other than that of discretion vested in the administrator.<sup>61</sup> No recognizable order of priorities emerges from the folios of many of the surviving act books.

53. *E.g.*, Estate of John Phipps, London Probate Act book MS. 9168/4, f. 17v (1513): ". . . de quibus debet iii libras domino fundi et sic nichil remanet inter creditores."

54. *E.g.*, Estate of Carpenter, Chichester Act book Ep I/10/5, f. 54r (1534), the landlord being the prior of Boxgrove.

55. *E.g.*, Estate of Richard Bregge, Rochester Act book DRb Pa 3, f. 511r (1465): "Postea exhibito computo de administracione et nichil remanente in manibus quia dominus fundi habuit omnia pro debitis eiusdem."

56. *Id.* A note records that "W. Downer dominus domus omnia bona arestavit pro arregeis firme." In Estate of Thomas Hyott, London Probate Act book MS. 9168/1, f. 142r (1499), there is also a note to the effect that "domina Jane vicompta Lyell domina domus arestavit pro reditu huiusmodi domus omnia bona."

57. See J. GODOLPHIN, *supra* note 45, at 216; M. SHEEHAN, *supra* note 15, at 223.

58. The king appears listed among ordinary creditors in the following two places: Estate of John Rith, Winchester Act book 4, f. 64r (1527); Estate of John Roysse, Chichester Act book Ep I/10/3, fols. 4r-4v (1524).

59. See Kitching, *The Prerogative Court of Canterbury from Warham to Whitgift*, in CONTINUITY AND CHANGE: PERSONNEL AND ADMINISTRATION OF THE CHURCH IN ENGLAND 1500-1642, at 207 (R. O'Day & F. Heal ed. 1976).

60. H. SWINBURNE, *supra* note 47, at 270: "And if there be divers obligations, then it seemeth to be in the power of the executor, to discharge which obligation and to gratifie which of the creditors he will."

61. *E.g.*, Estate of Carpenter, Chichester Act book Ep I/10/5, f. 54r (1534). After full payment of the landlord, the servants of the decedent and the Earl of

Payment of general creditors followed satisfaction of whatever preferred creditors there were. Sometimes nothing was left. Where there was, a ratable award, called a *rata bonorum* or *defalcatio* in the act books, normally followed.<sup>62</sup> As in modern bankruptcy practice, this entitled each unsecured creditor to a percentage of his claim. Thus, at Gloucester in 1561, each creditor of the estate of William Milde received 6s. in the pound.<sup>63</sup> In an insolvent estate administered at Chichester in 1533, the ratable award was 4s. for each pound claimed, a percentage of one fifth.<sup>64</sup> In one case from the diocese of Winchester in 1527, it was only 8d. in the pound, a mere thirtieth of the amount owed.<sup>65</sup> The unsecured creditor, then as now, had little to hope for where he had to seek satisfaction from the assets of a bankrupt estate. Creditors of men who died insolvent had the right to a share of the estate, enforceable before the tribunals of the Church. But what evidence is left shows that it often turned out to be a small share.

#### IV. CONCLUSION

The foregoing has described the outlines of bankruptcy practice in the ecclesiastical courts before 1571. What the records show is far from modern bankruptcy. Of that there is no doubt. It is one thing to provide for the orderly division of assets that once belonged to a man who died insolvent. It is quite another to provide a living person with a fresh start. We cannot pretend that the medieval ecclesiastical practices adopted a "modern" outlook on the problem of bankruptcy.

We can say, on one hand, that there were similarities between the

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Arundell received larger shares, although not their full claims, while the other creditors were paid only *secundum ratam*.

62. The actual amounts of the awards are not normally found in the Act books, which were used at the time to record what was to be done in the next court session and which therefore did not need to record fully the final act of each case. However, assignments to award the ratable are found in most diocesan books examined: Canterbury, Estate of Nicholas Mount, Act book Y.2.10, f. 121v (1522) (*secundum ratam porcionem*); Chichester, Estate of Robert Copratt, Act book Ep I/10/2, fols. 43v-44 (1520) (*iuxta ratam*); Gloucester, Estate of William Milde, Act book GDR 17, p. 150 (1560) (*pro qualibet libra vi s.*); Lichfield, Estate of Richard Grene, Probate Act book B/C/10/1, f. 13r (1533) (*iuxta ratam bonorum*); London, Estate of Daniel Fulcum, [Greater London Record Office] Vicar General's Act book DLC 330, f. 11v (1521) (*iuxta ratam inventarii*); Norwich, Estate of William Base, Act book ACT/1, s.d. 15 January 1509/10 (*iuxta ratam bonorum*); Rochester, Estate of John Dovill, Act book DRb Pa 2, f. 164v (1450) (*facta est defalcatio*).

63. Estate of William Milde, Gloucester Act book GDR 17, p. 150 (1561).

64. Estate of John Cocke, Chichester Act book Ep I/10/6, f. 12v (1533).

65. Winchester Act book C B 5, f. 34v (1527). Other fully documented examples of ratable awards are found in Estate of Nicholas Mount, Canterbury Act book Y.2.10, f. 121v (1522) (7s. 3d. in the pound); Estate of Robert Copratt, Chichester Act book Ep I/10/2, fols. 43v-44 (1520) (10d. in the pound); Estate of Robert Blake, Chichester Act book Ep I/10/5, f. 52v (1534) (3s. 2d. in the pound).

Tudor legislation on the subject and the prior canonical practice. A modern view of the plight of the bankrupt is conspicuously absent from the early statutes. The road to modern bankruptcy has been neither short nor straight.<sup>66</sup> The Tudor legislation, for example, provided no discharge of the insolvent debtor. It left no room for voluntary bankruptcy. The statutes envisioned a limited sort of bankruptcy, one in which the protection of creditors and the fair division of assets rather than the rehabilitation of the over-extended debtor furnished the principal provisions. In this, the legislation resembled prior practice in the ecclesiastical forum.

On the other hand, there were dissimilarities between prior ecclesiastical practice and the Tudor legislation. The most notable innovations were those required by the change to permitting bankruptcy for a living person. The definition of an "act" of bankruptcy—long a troublesome but necessary part of the initiation of the secular process—was one such. The Church courts had needed no comparable trigger, for death initiated their procedure. Other differences went beyond what the nature of the change in jurisdictions required. Most notably, the English law provided bankruptcy only for merchants and traders. The Church provided it for anyone who died insolvent and subject to its probate jurisdiction. There were also differences in detail. For example, the 1571 statute imposed fines and double penalties on those who fraudulently withheld the assets of the bankrupt from the commissioner.<sup>67</sup> Ecclesiastical practice had contained no equivalent feature.<sup>68</sup> Many, perhaps most, of the detailed features of the bankruptcy regime initiated during the sixteenth century differed from earlier practices of the Church courts. They were the result of innovation, or at least they were closer to prior secular practices in other areas of the law.

The relevant evidence thus shows both similarities and differences, and in making connections it may be unwise to go beyond that evidence. Nevertheless, three questions remain which should be raised, even if none can be answered satisfactorily. First, in what measure, if any, was the Tudor and early Stuart bankruptcy legislation consciously modeled upon ecclesiastical probate bankruptcy? Second, why did introduction of the secular bankruptcy procedure occur when it did? And third, did knowledge of Roman bankruptcy procedure play any part in the evolution of English law on the subject?

The first question, that of the conscious adoption of ecclesiastical rules by the Tudor legislators, should be the easiest to answer. But it is not. The genesis of the Tudor legislation is impossible to reconstruct from Parliamentary sources, and, as noted above, the dissimilarities between the procedures

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66. The development is well traced by W. JONES, *supra* note 3.

67. 13 Eliz. ch. 7.

68. *Cordis dolore* in fact mentioned no sanction other than excommunication; it was only indirectly, i.e., in order to have the sentence of excommunication lifted, that the donee in fraud of the rights of creditors was made to give up the property alienated.

spelled out in the secular legislation and the ecclesiastical antecedents are as great as the similarities. Still, the suggestion of influence is not implausible. No Englishman of any experience with the world could have been wholly ignorant of probate bankruptcy in the sixteenth century. Every consistory court in the country would have been enforcing its rules. And the men who enacted the secular laws came from the class of men who would certainly have had experience with wills. They would have known the ecclesiastical procedures. It makes sense to suppose that when they thought about what a bankruptcy regime should consist of, they might naturally have turned to what they knew already. Of course supposition, even likely supposition, is not proof. We lack any direct proof. Perhaps it is best to leave the question of conscious imitation open, noting simply that the congruence in essential features and the assured fact of familiarity make the possibility a lively one.

Second, even if we accept the ecclesiastical pedigree of the Tudor adoption of bankruptcy, what *did* cause the undoubted changes that the secular legislation entailed? Why did the developments occur when they did? Put another way, why did probate bankruptcy no longer suffice in sixteenth century England? Contemporary commentators attributed the necessity for legislation to an increase in the numbers and influence of foreign traders and to a general decline in the standards of honesty and frugality among all merchants.<sup>69</sup> Profligate habits, borrowed from abroad, inevitably led to bankruptcy on a level that the common law had to address. Modern commentators have naturally found this sort of explanation simplistic.<sup>70</sup> It cannot be shown that the Tudor Age witnessed any considerable rise in commercial dishonesty, and it is not even entirely clear that there was any marked overall rise in commercial activity during the period.<sup>71</sup>

Knowledge of the ecclesiastical antecedents therefore suggests a possible answer to this second question. We know that the Tudor Age redrew the boundary lines between the secular and the religious spheres of life. Obligations that had once been enforced by religious sanction were increasingly taken over into the secular sphere.<sup>72</sup> In this context, then, the enactment of bankruptcy legislation is simply one part of a much more fundamental change in English habits of mind. It was one consequence of the English Reformation. This is not a complete explanation, if only because of the differences between ecclesiastical bankruptcy, which was limited to decedents' estates, and the new secular procedures. It may well be that economic developments in fact had something to do with the introduction of secular bankruptcy. But at least the ecclesiastical evidence sets the

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69. See, e.g., E. COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND \*276-77.

70. W. JONES, *supra* note 3, at 51.

71. See S. JACK, TRADE AND INDUSTRY IN TUDOR AND STUART ENGLAND (1977).

72. See A. DICKENS, THE ENGLISH REFORMATION 325 (1964).

sixteenth century developments more accurately into their historical context.

Third, did the relatively sophisticated Roman law system of bankruptcy play any role in the law administered in the Church courts and in the Tudor changes? Insolvency in Roman law—in particular the *cessio bonorum*, under which a living person could avoid the penalties of the law by surrendering his property for the common benefit of his creditors—resembled and could well have provided some impetus for the new secular legislation.<sup>73</sup> We know that the sixteenth century was a period of resurgence of study of Roman law. Indeed, it once seemed to scholars that the future of the English common law was threatened by civilian learning under the Tudors.<sup>74</sup> It therefore seems natural to assume that civilian influence may have played some part in the foundation of English bankruptcy law. Proof of this assumption, however, is another matter. There were considerable differences between the early English statutes and the Roman law, not the least being that the former permitted no voluntary initiation of the process by the insolvent debtor. And, as with the suggestion of ecclesiastical influence, the suggestion lacks affirmative proof. Nothing like legislative history suggests conscious imitation. We must, it seems, treat it as a possibility only.

What is clear is that the history of bankruptcy in England did not begin in 1571, or even 1542. In its essence, bankruptcy was no new thing. The most recent student of the subject has defined the essence of bankruptcy as the “notion that creditors shared a community of interests,” which community entailed collection of all the debtor’s assets and “distribution *pro rata* of the proceeds.”<sup>75</sup> All these things the ecclesiastical courts had been putting into practice well before 1571. The secular legislation on the subject did not copy all the details of probate bankruptcy procedure. But the legislation was not without precedent. The ecclesiastical courts had enforced its important features long enough and regularly enough to require recognition of the early existence of probate bankruptcy jurisdiction.

73. See 2 W. BLACKSTONE, COMMENTARIES \*472 (suggestion that the English legislators “attended to the example of the Roman law”). For the Roman law of bankruptcy, see 4 S. SOLAZZI, IL CONCORSO DEI CREDITORI NEL DIRITTO ROMANO (1943).

74. The classic statement of this position is F. MAITLAND, ENGLISH LAW AND THE RENAISSANCE (1901); it is, however, no longer generally thought that there was any real threat to the position of the common law. See, e.g., Baker, *Introduction to THE REPORTS OF SIR JOHN SPELMAN* 23-51 (J.H. Baker ed., 94 Selden Soc. 1978).

75. W. JONES, *supra* note 3, at 18.



