

YALE LAW JOURNAL

VOL. XLII

FEBRUARY, 1933

No. 4

IN RE THE SMALL DEBTOR

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Provided always that I will not come within the compasse of positive lawes: and thys I wote well, that by all lawes a man may take as much for hys owne wares as he can gette, and it no synne for one man to deceyve an other in bargayning, so that it be not to muche beyond gods forbode, and a bargaine is a bargayne, let men say that they list.
THOMAS WILSON¹

IF the classic line had only read, "the poor debtor you have with you always," it would save a lot of current bother. In that event the text would have brought the comforting assurance that a situation we do not like is eternal and inevitable, and therefore beyond our responsibility and control. Yet the interpellation of a single word finds little warrant in human experience. From the dawn of time until this year of grace there have existed groups whose material well-being is hardly to be described by so substantial a word as wealth, nor has poverty as yet ever respected the wishes of the nation or age which sought its abolition. But, common as is the-condition-of-being-poor, its presence in association with the-state-of-being-in-debt is far from universal. So far as the evidence in scribbled records goes, one may start "in the beginning" and get within hailing distance of our own times before encountering so modern an association. During the short period of three or four thousand years, in which an abundance of material allows the story to be picked out, the poor debtor has bobbed in and out of the annals of mankind; but it is only within the last century and a half that he has become a social phenomenon. His unobtrusive entrances and exits have depended upon the changing ways in which societies have been ordered; and he is himself, not a natural, but a social phenomenon.

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1. The words are put in the mouth of the "Merchant" in *A DISCOURSE UPON USURY* (1572), reprinted with an introduction by R. H. Tawney (1925), at p. 251.

In fact the poor debtor² is a cultural product—which it took the processes called civilization some milleniums to create. It is a truism that goods must be produced before they can be consumed; neither an individual nor a community can reach through time and snatch for immediate enjoyment next week's catch or next season's harvest. Among primitive peoples, whose ways of life were simple and direct, and whose minds were concerned only with the physical ways of winning a precarious living, his like could not appear. As long as peoples lived on the margin of subsistence, shared a community of activities and possessions, and kept faith with the folkways into which each new generation was born, all had shares in whatever goods there were. In so elementary a society the idea of one man turning over to another a part of his store of good things and taking a claim upon an equivalent which the latter might at some future time come to possess was far too complicated to be thinkable.³ Nor could it be realized without the emergence of a number of community usages which the uncivilized mind could never have anticipated. The individual had to win from his group a measure of control over his own actions; his way of making his living had to be disentangled from the traditional round of community activities; a private property had to be established in articles of consumption; an appreciation of the worth of future goods had to make its way into habits of thought; an inequality in possessions had to appear and be formally recognized; a convention called contract had to come into existence and sanctions for the enforcement of obligations had to be contrived. As these kindred practices blundered into being, they brought along with them the beginnings of lending and borrowing. They were, however, able to give little vitality or prevalence to so strange a custom; and it was not until after the slow coming of the money economy and the tedious elaboration of instruments of credit that debt came to be a familiar thing.

But far more than this was essential to the emergence, as a distinct social phenomenon, of "the small debtor." As the communal was giving way to the individual economy, he made his first dubious appearance as a person in need who was the recipient of a "philanthropic loan." The term which hails from many a century later fails ade-

2. It is impossible to discover in reputable usage a term which is exact. The expressions "poor debtor" and "small debtor" are used with reluctance, and only to avoid the appearance in public of a word which does not have currency.

3. A custom of loans, of which the "potlatch" system is a conspicuous example, is to be found among many "uncivilized" peoples. It is, however, hardly an exception to the statement, for it is a most elaborate institution, usually involving social prestige and political power; it comprehends an elaborate cluster of usages which must have been a long time in the making.

quately to express the hybrid character of offering of goods or of money, the condition of whose repayment was a turn for the better in the circumstances of the borrower. In the literature of the not so "ancient world," the money-lender is a familiar figure, but his transactions are usually with traders, heirs to estates, and men of at least meager property. In general the nature of economic ties prevented the formation of any considerable group upon which usurers could force their wares; for, so long as the mass of workers were in slavery, or bound to land or lord by personal ties, they had not yet been accorded the adult privileges of contract. Nor, in cultures where his position and prospects were precarious, did the property-less worker recommend himself to the merciless solicitude of the moneylender. Since his best, and often his only, pledge was his body, the dubious and narrow values of the market for human labor imposed a severe limit upon such a traffic. This practice to no inconsiderable extent must have been a means whereby men in great need sold themselves into a state of vassalage, easily to be confused with slavery. It was only with the growth of town life, and the emergence of a class of laborers who lived by "hire" that a cultivation of the trade of the lower ranks was deemed worthy of the lender's attention. But if the creation of the Roman imperial system, with its far-flung division of labor, augmented the numbers of potential small debtors, the development of feudalism, with its personal ties and serfdom, diminished them. In fact, save for an occasional lapse, debt was for centuries far too aristocratic in its visitations to be often upon speaking terms with the man who works with his hands. An Assyrian patriarch seeking an increase in his flocks, a Greek pirate acquiring the respectability of trader, a Roman tax-gatherer anticipating revenues not yet due, a Spanish prince seeking the realization of dynastic ends, a German landed proprietor wishing to conserve his estate, or an English merchant adventurer dreaming of an increase in "fortunes to bottoms trusted," might pledge possessions or personal freedom against future expectations without the Tony's, Francois's, Hans's, and Harry's—the "average man"—of this world being greatly affected. At last, in the period of the sixteenth to the eighteenth centuries, when rising trades could no longer be confined to the grooves marked out for them, the small debtor became an increasingly familiar phenomenon. And, as the nineteenth century wore on, with the growth of industrialism and the fall—or was it rise?—of the worker to the status of wage-slave, he became the storm-centre of an institution.⁴

As an aspect of our adventitious culture, the institution of the wage-earner debtor is a creature of the course of events rather than of a

4. The writer is indebted for a number of leads to the engaging article on "Debt" by Max Radin, (1931) 5 *Encyc. Soc. Sci.* 32.

conscious design. At its focus lies a genuine core of need. The ordinary wants of an individual are regular and recurring; the income of the laborer possesses no such stability. The passage of time brings to every household its vicissitudes—such as marriage, sickness, death, or dependence—which make extraordinary demands upon the purse, and wages do not obligingly rise to the emergency. The personal insecurity which stalks the land may visit the family in the form of industrial accident, partial work, or unemployment, and the wants and urges of body and spirit are loath to take a corresponding vacation. All of these and like conditions suggest to the individual the propriety of relieving current necessity at the expense of future earnings. An attitude of mind cannot be eliminated from the most realistic balancing of prospective assets against immediate needs; a not inconsiderable body of wage-earners, however rosy their prospects, will run from debt as from the devil; a host of others are as prone as any statesman or banker to see “prosperity just around the corner.” Nor is it strange that the rational mind, with which the law and common-sense have endowed *homo sapiens*, is not proof against the accepted standards and the insidious allurements of a world of trade. Inasmuch as the furniture is durable, the clothes will last out of the season, and a single funeral is quite enough, there is a certain plausibility in the slogan of “pay as you wear.” In any event the borrower gets immediate possession of substantial articles in return for his signature upon a rather immaterial piece of paper. The lender or salesman assumes rightly enough that his customer is not an adept in the higher mathematics, and is rarely so inconsiderate as to kill the budding joy in a new possession by pointing out the rather extravagant toll on future earnings which price and carrying charge have been made to impose. The man in need knows that his pretentious neighbors are enjoying wares which “have not been paid for,” and the members of his family help him along to the restful conclusion that if they are to be denied the same tactics there is no hope of keeping up with the Jones’s. In the end the values which are calculable are mere terms in a romantic formula of to borrow or not to borrow.

In the elaborate ceremonial which accompanies purchase or loan, there is much that caters to the self-importance of the ordinary man. The preliminary inquiry into his standing and prospects is an inquisitorial ordeal from which a sensitive soul would shrink; but its terrors have their compensations. The small borrower sets no exaggerated value upon the privacy of his own affairs; the inquiry is into his “credit standing”; and for the occasion he is the centre of attention. He is keenly, even if vaguely, aware of high finance; he knows that captains of industry take collateral to banks, and that big

business carries on with credit. He is, in a household world and with a miniature stake, taking a fling at the rôle of financier. He is no longer compelled, at least in the cities, to resort to the crafty creature of saintly memory and of fiction called the loan-shark; in its stead, like any man of affairs, he has access to an institution of credit which has adopted the imposing title of Bank or the euphonious name of Personal Finance Company. The department store, or the finance corporation, takes on the prestige of the industries which it serves. The loan company has contrived to secure from the state an authorization to do business; its establishment is fitted out with the livery and all the trappings of a bank; its procedures, methods, forms, and what not, are modeled after those of its big financial brothers; its ways with its customers, free of petty chicane and sharp practice, have the precision and impartiality of a standardized practice. It is, by profession and practice, an enemy to the irregular business whose exploitative methods are graduated to what each unit of traffic can be made to bear. The transaction of the loan is tainted neither with charity nor with corruption; the borrower, however small the sum, is a party of a part in a business deal.

In the background, powerful and unobserved, the forces of an industrial culture converge on the transaction. The loan company has been organized for service and for business; it has expenses to meet which click on with the clock; it must yield returns on its capital or go the way of enterprises which once were. It is out, with the lure of its advertisements and the pressure of its salesmanship, to get customers, and to get them in volume large enough to earn profits. The shops, which handle sewing and washing machines, furniture and phonographs and radios, and the factories which manufacture such necessary and superfluous articles, all have a stake in the institution. All of them are geared to a certain volume of traffic; hardly one of them could run to capacity, or make both ends meet, on cash orders alone; the law of survival accords to none the luxury of taking too seriously this matter of being one's brother's keeper. In a competitive system, which has been overdone, the officers of every corporation in a process which stretches away "from factory to home," know that if their concern lets up in its pressure to buy, the trade will go to their rival. Accordingly, an ingenious and concentrated attack, with its appeals to the whole range of affective emotions from prestige to fear, is planned by a staff of experts and executed by a corps of shock troops against the hesitating and unorganized consumer. Nor is it relevant that markets may be prematurely exploited, that sales made now may be at the expense of future purchases, or that the ultimate buyer of wares may be so heavily loaded down with obligations as to impede the continued free flow of purchasing power.

Under the regime of competition the interests of the individual enterpriser are frequently at odds with those of the business community; and, whatever may be the eventual and general incidence of the policy, the establishment may have a choice of no alternative. Even if a line of goods be oversold, to the undoing of the parties affected and to the larger hurt of business, it is still necessary for the corporation which would survive to keep up its sales campaign. There are many persons, self-made or blessed of the gods, who delight in the practice of "sales resistance," but for others, of frailer stuff or more obliging disposition, the contest of the lone will of the individual against the organized forces of mercantiledom is an uneven one—and, however agonizing may be the struggle, in the end a name is signed to the terms "denominated in the bond."

It chanches, oddly enough, that the mutual understanding, of which the written contract is evidence, is not the end of the matter. In the transaction itself a to-be-continued is implicit, and usually the seeds of a growing mistrust are present from the first. The attitude of the lender remains the more poised;⁵ the whole affair is a single incident in the practice of his regular trade; he has already looked beyond the paper he holds to the potential resources which are his security; his problem is only the instrumental task of getting his own back—with a compensation for his trouble. The attitude of the borrower is likely to become heavily charged with emotion; he is an amateur at the game, and the execution of the loan is an event in his undramatic life. At the time of the negotiation he is half-aware that he is closing his mind to conditions which are prejudicial to his own best interests. As time passes, the enjoyment of the good fades, and the repayment of the sum—with a substantial addition for interest and costs, the complicated computation of which he can never quite get through his head—succeeds the previous question. The borrower is almost certain to rationalize his plight, to regard the lender as a villain who has taken advantage of his necessity, and to pity himself as the victim of a confidence game. If he is a stoic he will, none the less, set out to discharge the obligations of contract; if he is of less heroic mind or if the hard luck or uncontrolled desire which drove him into debt still dogs his steps, he will delay or resist payment. The result is not infrequently a protracted game, entailing a heavy social cost, and with eventual victory uncertain.

5. As long ago as the late sixteenth century, Thomas Wilson put these words in the mouth of his money-lender: "I am never out of charitie but when I cannot geate my money in, and then in deede I do chafe and create, and thynke my selfe not well used, when they do breake daye with mee. But at length I anger them worse than they anger me, when I have dryven them to an outlawrye; for a bargayne is a bargayne, and I will not forgive a peny to none of them all." *Supra* note 1, at 206.

In fact any single combat over collection is a mere skirmish in an endless warfare. Ages ago a consciousness of kind taught debtors that they had common interests, and as shrewd business men creditors united in protection of their acquisitive rights. In this continuous contest each of the parties has sought to create sanctions to serve its cause, to impose its livery upon reputable shibboleths, and to establish its values within the social fabric itself. As the fortunes of battle have vacillated there is hardly an institution—of morality, statecraft, propriety, business, or law—which has not been employed in the fray. In the domain of ethics the creditor has scored by citing the scriptural verse, "Owe no man anything", and by inculcating a belief in debt as "a sacred obligation"; the borrower has countered with an attempt to give a literal meaning to a lusty text, "Forgive us our debts as we have forgiven our debtors"—a maxim which his adversary is quite content to elevate to matters celestial by having it refer to the forgiveness of sins. In the political realm the debtor long ago scored notable victories in the establishment among Semitic peoples of a sabbatical year in which debts were forgiven, and in a prohibition of usury by many pastoral and agrarian peoples and by the Holy Catholic Church. And a resort to the ancient and honorable device of inflating the currency—to make sure that as principal a larger amount of purchasing power would not have to be repaid than was borrowed—has not to this day been abandoned. In Greece and in Rome the agrarians more than once took up arms to secure a more effective farm relief than the state was willing to offer. Even in the American Colonies acts were passed providing for a personal repudiation of contractual obligations, which in the Declaration of Independence, in the bill of complaints against His Majesty George the Third, are graciously referred to as "laws the most just and reasonable." It was with the memory of such things in mind that the gentlemen of substance and standing who drew up the Constitution gave a trick or two to creditors in forbidding a state to pass laws abridging the obligations of contract and in entrusting the control of bankruptcy to the Federal government. But, with the extension of universal manhood suffrage, the debtors gained political power, and many an exemption against attachment for debt was tucked away within "the higher law" of the state constitutions. As with morality and politics, so has it been with the other controls by which we attempt to hold to his duty the man who shirks. As one social order has given way to another, the battle front has been shifted and old weapons and tactics have been discarded for others better fitted to their current work; but the struggle has not abated. As it has gone on it has left a deposit of values, arrangements, and pressures which constitute the rules of the game of collection. It

is within this cluster of usages—rich, colorful, intricate, comprehensive as the means of coercion in our culture—that the lender and the borrower confront each other over the discharge of an obligation.

In the contest the result must depend upon the rules of the game and the skill with which the parties take advantage of them. In days of old the debtor took the risk; and the creditor, if he were tolerated at all, had all the better of it. A signet ring, a piece of jewelry, or some other personal article was usually given as a pledge, and it was expected that its sentimental value would impel the owner to exert himself to the utmost to redeem it. In addition the lender had as security chattels not immediately needed or a claim upon the services or possessions of the borrower. As it was written in the bond, so had it to be performed; parchment was a solemn matter and he who had chanced it for shekels could not renege. The moral sanctions which attended the transaction were imperative and made of the debtor's obligation a peculiarly personal one. In Rome the borrower, whose property could not make good his debt, was compelled to give an equivalent in personal service; and, in actual administration, this habitually led to a permanent servitude which had many of the characteristics of slavery. Under the feudal regime the person of the offender might be seized in satisfaction of penalties and amercements. As the state came to be the great agency of justice, upon complaint of the creditor and in the name of the common law, the body of the defaulter was "attached." This reputable custom, which taught men that they must not rashly take on serious obligations, exhibited great longevity, and it was not until well in the nineteenth century that it was abolished. The victory for the debtor was due to the rise of a democracy of borrowers, the growth of humanitarianism, and the lack of discrimination and the want of justice which attended the application of the good old rule to the affairs of the impersonal business corporation. But a formal outlawing could not completely strip so useful a convention of its vitality. A debtor, like any other man, is expected to be honest and upright in his dealings; he should quite properly be made to pay the penalty for conduct tainted with fraud; and in so sacred a matter evidence may be conclusive which would be far from sufficient in a criminal prosecution. If the category of fraud is not elastic enough to serve the emergency, the evasive concept of "contumacy"—which smells of theology—and the catholic usage of contempt of court may be made to give a satisfactory result. In England each year some thousands of small debtors, for any one of a number of secondary but legally sufficient reasons, go to prison. In this country, particularly in the eastern cities, such examples of exemplary justice are

far from unknown.⁶ And only a few years ago, as cases which reached the highest court in the land attest, one of the southern states, in an effort to secure a regular and reliable labor supply, employed legislation to get its colored citizens into a state of debt and to make them work it out. The man who, even though he is under no legal compulsion, consecrates his life to the satisfaction of debts unluckily or improvidently contracted is today a hero in the worlds of fact and of fiction. In the scheme of values which prevails, contractual obligation is still too elevated, even in comparison with liberty and the pursuit of happiness, to be dislodged from its strategic place in the law.

The account of the combat over property as a security for debt runs a parallel course. In the societies of yesterday the creditor made certain of the outcome in advance and allowed his customer to include a debtor's prison within his calculations by day and his dreams by night. So long as the borrower was personally bound, a material pledge was not of paramount importance; and if, as in Rome there was an exemption of a *beneficium competentiae*, or as in England estates were tied up by entail, these hazards were anticipated and the loan was reduced or not made. As the common law emerged, its rather sweeping powers of attachment epitomized the growth of a system of use and wont unfavorable to the debtor. But as debt became more popular, and the people came into greater political power, the risk was shifted towards the lender. The device employed "to restore the balance" was a writing of exemptions against executory process into the law of the land. In days of old, when people lived close to the soil, a man's cow, his horse, his harness, and his plow were his, even against his creditor and the sheriff; and, with such a list as a nucleus, it was not difficult to extend the exceptions into a generous catalogue. It was easy enough to make out a case for the exemption of the tools of a man's trade; the interests of the community which he served and his capacity eventually to satisfy his creditor alike demanded that he be left with the means to carry on. The immunity of the homestead from attachment was surely to be justified by the social value of the family; and if a state, such as Texas, stretched the category to include a "business homestead," the justification possessed a like elasticity. In this country the list of exemptions varies greatly from commonwealth to commonwealth; and a hardened classifier, without too much difficulty or too many compromises, may resolve the nation into creditors' states and debtors' states. In the America of today "the law on the subject" is a geographical fact.

6. See Nehemkis, *The Boston Poor Debtor Court—A Study in Collection Procedure* (1933) 42 YALE L. J. 561.

All of this legal scheme of attachment and exemption requires translation to become relevant to the small debtor. The fundamentals of current law, as they are laid down in state constitutions, are a product of an earlier America. Although the gains have to some extent been shared with wage-earners, they represent political victories for the handicraftsmen and the farmers. An exemption of the tools of his trade means nothing to the factory worker; an exception of his homestead grants the denizen of a tenement or a flat an immunity from seizure only of his household goods. A guerilla warfare, rather than a major conflict, has attended the accommodation of an inherited code to the problem of small-scale debt in an industrial society. In this process the creditor, with an eye to his security, has fixed his attention upon the laborer's one certain resource and has sought the attachment of wages. The debtor, taking advantage of the spirit of the law, has won a counter-victory in an exemption. The result has been a compromise in which the sterner writ of the common law has been subdued into the garnishment of the revised statutes. The creditor, well versed in all the maxims about foresight in Poor Richard's Almanack, has looked far ahead and at the time of sale or loan has attempted to secure from the purchaser or borrower a pledge of his future earnings. The notion of freedom of contract, which the nineteenth century elevated high among legal values, has lent its sanction to "the assignment of wages," and such is its hold upon the judicial mind that one court has declared illegal a "free contract" between employee and employer to the effect that wages were not to be assigned in the name of freedom of contract.⁷ As a final attempt at escape, although it was never meant for him, the small debtor may resort to bankruptcy. Here, in form at least, he seems to hold the better hand; for he may at his will put in his petition, he cannot be compelled to do so by his creditors,⁸ and the court is bound to grant a discharge.⁹ But bankruptcy, like any legal process, has its peradventures and unanticipated eventualities; about it are possibilities which legislatures or courts may easily quicken into life.¹⁰ At the moment the matter of the law rests here; but the parties are unsatisfied, not without ingenuity, and alert; and there is already evidence that the story is to be continued.

The law, however, is not the game. It fixes the rules by which the contest is to be carried on, and it grants or withholds values to

7. See Fortas, *Wage Assignments in Chicago—State Street Furniture Co. v. Armour & Co.* (1933) 42 YALE L. J. 526.

8. BANKRUPTCY ACT §§ 4 (b) and 1 (27).

9. *Id.*, § 14.

10. See Douglas, *Wage Earner Bankruptcies—State vs. Federal Control* (1933) 42 YALE L. J. 591.

the tricks which the parties seek to play. Yet the result must depend in no small measure upon the skill and resources with which the participants play their hands. In the agrarian order which is almost past, conditions made the creditor's chances somewhat better than the bill of exceptions set down against him would seem to indicate; for the neighborhood was small, individuals were well-known, and such property as was subject to attachment was too substantial to be spirited away or concealed. In the formative years of industrialism, the situation was changed; our society became impersonal, property passed into intangibles represented by paper, a pyramiding of ownership caused material possessions to be lost beneath a flood of financial documents, and an ease in transfer of title enabled wealth to be put beyond the reach of the creditor. But the use of such conditions and devices as an escape always requires a bit of thought and sometimes a sum of money; and they have been of far more help to the large than to the small debtor. In fact ingenuity has been matched with ingenuity, and lenders have succeeded in blocking up many a way of escape. They have been particularly successful in matching the contumacious tactics of the man with the petty obligation; for his numbers are large, his case invites a standardized procedure, and the discipline of example can be employed to keep the host in line. It may well be that the sum is far too piddling and the result far too uncertain to justify a resort to the dilatory processes of law; but the threat, especially when hurled at a solitary unmasterful individual by a formidable corporate entity, is often as good as the result. If the debtor, remembering that he is a free man in a free country, jumps his job for another or hies himself away to another place, there is an intricate network of collection agencies, with their minions schooled to the task, to seek him out and to confront him with unpaid notes. In many a shop and factory the rules forbid just what the debtor has done; and the money-lender has learned to turn this to account by intimating that he may find it necessary to bring the matter to the attention of the employer. The threat of a loss of his job, even when implied rather than formally made, is often an effective control. It is true that all of these coercions are subject to substantial discount; but in a matter in which his emotions are aroused, the wage earner is not enough of a realist to be objective. Besides, the lender does have it in his power to become a mighty nuisance; and any small debtor may be selected for the "wholesome example."¹¹ In last analysis his situation is exposed; the objective of the creditor's strategy is the worker's employment, and for him there is no escape from the compulsion of the wages system.

11. See Fortas, *op. cit. supra* note 7, at 541.

In all of this there are issues enough. The roots of the cluster of usages called the small loan ramify to all the institutions in our culture. The most immediate of the problems is the incidence of the prevailing arrangements upon the petty debtor. In many instances at least the vicissitudes of life compel the borrowing of money, and to expect him to limit his indulgence in debt to the sternest necessity is to ask of human flesh and spirit more than it is capable of yielding. The arrangements which society has contrived, or which have just grown up, to serve his needs, are clumsy and uneconomic. Although here and there an enterprise of philanthropic character is in operation, we have in general left the satisfaction of the demand to business. Here, as is almost inevitable where profit-making marks out the way, specialization has come into vogue, and various kinds of commercial houses have arisen to serve various groups of borrowers. In this selective process, the lower paid wage-earners have been separated from their more affluent brethren, and a distinct type of institution has arisen to confront them. In all of these small-credit enterprises the rates which must be charged are extravagant. The loans are all petty, each requires its separate negotiation and its particular account; the repayment is usually in instalments of a few dollars, each of which demands its distinct entry; the expenses incident to collection are large; and the risks have not as yet been reduced to zero. The debtor must, in addition to the principal, pay an extra sum which comprehends such a miscellany of items as to smother any charge which might properly be called interest.¹² And, just to insure charity its just due, the debtors who discharge their obligation must pay for those who do not. If the amount cannot be quickly repaid, it increases rapidly; it is hardly an exaggeration to picture the cumulative pressure of the accelerating burden of debt upon a constant income as the relation of a geometric to an arithmetic series. In many instances, a new loan is obtained to retire an old one, and an individual bargains himself into a permanent state of debt. It is not easy for the state to ameliorate the severities of the institution; an administrative suspension of the business would be quite expensive and would hardly reach the source of the trouble; the laws against usury, formulated in a simpler society, are irrelevant, for even conservative estimates place the charges necessary to the service at several times the legal rate of interest. A number of students are wondering if we can continue to rely upon commercial

12. Licensees under the Uniform Small Loans Law are prohibited from assessing any charges above the prescribed rate of interest which, however, is calculated to include in addition to a reasonable return upon the loan, the necessary costs of carrying the transaction. GALLERT, HILBORN and MAY, *SMALL LOAN LEGISLATION* (1932).

houses to supply credit to the part of our population which lives at "the subsistence level."

Nor is the legal aspect of the subject without its anomalies. At the moment an attempt is being made to reform bankruptcy which is the ultimate means for liquidating a debt. It is true that the institution has in the past been rather adventitiously used merely to clear up insolvencies. It has, however, possibilities, as an agency of control, both for the prevention of the tangles which it seeks to resolve and for the rehabilitation of its subjects.¹³ It is surprising that so much less has been said about the financial reëducation of the bankrupt than the personal reform of the criminal. Although the question is beset with difficulties, the wisdom of legislators and of judges might devise ways of turning an accepted practice to more constructive uses. At present the use of the device of bankruptcy by wage-earners is sporadic; it varies from group to group and from locality to locality;¹⁴ it might well be more generally employed to secure greater equity among creditors and to help the debtor to get his accounts in order. In any event the way of reform leads back from bankruptcy to credit, and no program can meet with success which does not take account of the usages which make it up and come to grips with the conditions under which it should be granted.¹⁵ Here America adds its touch of complication to a difficult question; for the several states of the union have authority in matters relating to the loan, and control over bankruptcy rests with the federal government.¹⁶

The problem is all the more engaging and difficult because it cannot be insulated from the culture in which it is cast. The man-who-borrows has his place in a going business system; he demands his loan to purchase its goods and services; he looks to an income from it as a means of repayment. The whole round of borrowing and repayment has its incidence upon the course of trade. The volume of purchases which it makes possible helps towards running our productive machine towards capacity; the toll in human and material waste which its extravagant and blundering methods entail acts as a check upon its effective operation. Where the balance lies, and how it can be made favorable is the question under consideration, stated in larger terms. And beyond this irregular rhythm of prosperity and depression lie still more fundamental questions. If the potential borrower were freed from economic insecurity, if there were col-

13. See Douglas, *op. cit. supra* note 10; Sturges and Cooper, *Credit Administration and Wage Earner Bankruptcies* (1933) 42 YALE L. J. 487.

14. See Sturges and Cooper, *op. cit. supra* note 13.

15. *Ibid.*

16. See Douglas, *op. cit. supra* note 10.

lective provision against the disasters of life, if his power to earn a regular income could be assured, if he were more provident in bartering away his future earnings, and if he could acquire a more responsible attitude towards his obligations, the whole institution of small debt might be domesticated to human use. But this handful of "if's" implies alike a reduction of an unruly society to order and an elevation of the ordinary man to the rational human the law assumes him to be. And at this point it is well to call a halt, for the venture further is to raise the larger problem of the future of the mercantile state.