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Plus Ça Change, Plus C'est La Même Chose? The Reform of Bankruptcy Law in Scotland

Donna MCKENZIE SKENE*

Introduction

1 Professor Fletcher has recently taken the opportunity to assess the state of insolvency law, and insolvency practitioners, in the early 21st century, reviewing past experience and expressing thoughts on the future.[1] It therefore seems not inappropriate in this paper to offer some thoughts on a similar theme in the more limited context of bankruptcy law in Scotland. Bankruptcy law in Scotland is almost wholly devolved to the Scottish Parliament, which has taken the opportunity to legislate extensively in this area.[2] It has thus undergone a series of reforms in a relatively short period of time, the most recent following an explicit reconsideration of the principles and concept of bankruptcy in Scotland. There is no doubt that these reforms bring about far-reaching changes to the law, but it may be asked to what extent, if any, they bring about fundamental change to the principles and concept of bankruptcy in Scotland. This paper seeks to begin to answer that question – no more - by considering the reforms against the historical development of bankruptcy in Scotland. It concludes that while there has been extensive reform over time, the underlying principles and concept of bankruptcy have not in fact changed fundamentally, but the possibility of more fundamental change in the future cannot be ruled out.

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* Donna McKenzie Skene is a Senior Lecturer at the University of Aberdeen School of Law. The author would like to thank her colleague Dr Abbe Brown for helpful comments on a draft of this paper; the usual disclaimer applies.

[1] I. Fletcher, "Spreading the Gospel: the Mission of Insolvency Law, and Insolvency Practitioners, in the Early 21st Century" (2014) 7 *Journal of Business Law* 523-540.

[2] For a detailed account, see D. McKenzie Skene, "Credit where Credit is Due: The Effect of Devolution on Insolvency Law in Scotland" (2014) 23 *Nottingham Law Journal* 111-132.

Early Law

2 Before the development of what might be thought of as bankruptcy law as such, creditors had a number of diligences[3] available to them for enforcing their debts such as comprising (subsequently adjudication)[4] for use against the debtor's heritable property and poinding and arrestment for use against the debtor's moveable property. There was also imprisonment for use as a compulsitor to make the debtor disclose hidden assets against which such diligences could then be used.[5] Creditors still, of course, have a number of diligences available to them for enforcement of their debts, although these have recently also been subject to extensive reform by the Scottish Parliament and now incorporate considerably greater debtor protections than hitherto.[6] Imprisonment for debt, however, has been almost completely abolished.

3 A debtor with multiple debts who was unable to pay those debts could try to reach agreement with individual creditors, enter a composition contract with creditors generally or grant a trust deed for creditors, but such arrangements all depended on creditor agreement: creditors who did not agree could continue with enforcement action and there was no procedure by which dissenting creditors could be bound. The option of negotiating arrangements with individual creditors or entering a composition contract still remains, as does the option of granting a trust deed for creditors, although the law relating to trust deeds for creditors has also been subject to a series of reforms over time, including the introduction of a procedure for binding non-acceding creditors, and trust deeds for creditors have become increasingly regulated by statute.

4 There was, however, no collective statutory procedure whereby a debtor could obtain a discharge from his debts in exchange for surrendering his assets to his creditors. There was a procedure known as *cessio bonorum*, which Bell tells us was adopted from the Roman law in the fourteenth century[7] and which allowed a debtor to avoid, or be released from, imprisonment by surrendering his assets to his creditors. The debtor remained liable for any unpaid balance of his debts, however, and any assets he subsequently acquired would be open to the diligence of creditors with any part of their debts still unpaid. There was, therefore, no real possibility of

[3] Diligence is the Scottish term for the methods of enforcing unpaid debts.
[4] See the Adjudications Act 1672.
[5] See Lord Dunedin in *Caldwell v Hamilton* 1919 SC (HL) 100, at 106.
[6] See, in particular, the Debt Arrangement and Attachment (Scotland) Act 2002 and the Bankruptcy and Diligence etc. (Scotland) Act 2007. Not all of the reforms have been brought into force: in particular, the replacement of adjudication by two new diligences in the form of land attachment and residual attachment.
[7] See G. Bell, *Commentaries on the Law of Scotland* (2nd ed) (1826, W. Blackwood, Edinburgh) in Part X, where reference is made to the procedure being adopted "even so early as the date of Regiam Majestatem", Regiam Majestatem now generally being dated to the fourteenth century.

a fresh start for the debtor. The *cessio bonorum* procedure also underwent a series of reforms over time, until its abolition by the Bankruptcy (Scotland) Act 1913.[8]

5 At this early stage, therefore, as between debtors and creditors, the law was very creditor-oriented, while with regard to creditors *inter se*, the law allowed individual creditors to pursue such remedies as were open to them without regard for other creditors. This allowed a "race of diligence" in which those creditors who were able to act more swiftly could gain an advantage over others.[9]

Early Bankruptcy Legislation

6 The earliest bankruptcy legislation as such was concerned with the problem of debtors attempting to put their assets beyond the reach of their creditors (or some of them). There were remedies for conduct of this kind at common law but they seem to have been regarded as inadequate, which led first to the enactment of the Bankruptcy Act 1621, which dealt with gratuitous alienations by debtors to "conjunct and confident" persons and other voluntary alienations after the commencement of diligence, and later to the enactment of the Bankruptcy Act 1696, which dealt with fraudulent preferences created by debtors favouring particular creditors at the expense of the general body of creditors within a short period prior to the debtor's "notour bankruptcy".[10] These provisions were also creditor-oriented, in so far as they sought to make provision for the return to the debtor's estate of property which was regarded as property which should have remained available for the payment of (all) creditors. These statutes remained in force until they were repealed and replaced by the current provisions on gratuitous alienations and unfair preferences in the Bankruptcy (Scotland) Act 1985.[11] The Bankruptcy (Scotland) Act 1985 also introduced new provisions based on the same principle for the challenge of certain orders on divorce (and now the dissolution of a civil partnership)[12] and of extortionate credit transactions,[13] while further provisions for the challenge of excessive pension contributions were introduced subsequently.[14]

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[8] For a detailed account of the changes, see H. Goudy, W. Cullen and A. Mitchell, *A Treatise on the Law of Bankruptcy in Scotland* (4th ed) (1895, T & T Clarke, Edinburgh), Introduction.
[9] See Lord Dunedin in *Caldwell v Hamilton* 1919 SC (HL) 100, at 106.
[10] The Act laid down a number of criteria by which it could be determined that the debtor was publicly or "notoriously" bankrupt. 'Notour bankruptcy' was effectively replaced by 'apparent insolvency' in the Bankruptcy (Scotland) Act 1985.
[11] Sections 34 and 36, Bankruptcy (Scotland) Act 1985, respectively. It may be noted that the common law remained, and still remains, in force alongside the statutory provisions.
[12] Ibid., section 35.
[13] Ibid., section 61.
[14] Ibid., sections 36A-36F.

7 In the period between the enactment of the Bankruptcy Act 1621 and the Bankruptcy Act 1696, the first legislation to regulate competing diligence was enacted. The Diligence Act 1661 made provision for the *pari passu* ranking of comprisings (subsequently adjudications) and the Judicial Sale Act 1681 introduced the process of ranking and sale whereby land which was the subject of competing adjudications could be sequestrated, i.e. put into the hands of the court, which then arranged for the land to be factored (if necessary) and sold, and for the creditors to be ranked on the proceeds. A similar form of process was then introduced for moveable property by the Bills of Exchange (Scotland) Act 1772, an act for *inter alia* "rendering the payment of the creditors of insolvent debtors more equal and expeditious". This provided *inter alia* for the sequestration of a debtor's moveable estate, its management by a factor (later known as a trustee), its subsequent sale, and the distribution of the proceeds among the debtor's creditors, all under the supervision of the court. It did not, however, make provision for the debtor's discharge. The introduction of this collective process sought to remedy what the preamble to the Act referred to as "the injustice and inequality" of the race of diligence referred to above and, as noted, to render the payment of creditors "more equal and expeditious". It was therefore essentially creditor-oriented also. This process is regarded as the genesis of the modern process of sequestration which, as will be seen, has remained and will continue to remain at the heart of bankruptcy law in Scotland despite successive reforms.

Subsequent Development of Bankruptcy Legislation

8 The Bills of Exchange (Scotland) Act 1772 was originally enacted for a period of seven years, but was extended until it was replaced by the Payment of Creditors (Scotland) Act 1783, another act "for rendering the payment of creditors more equal and expeditious". The preamble to that Act noted that the 1772 Act had been found by experience to be in some respects insufficient for its intended purpose but that it was expedient that the plan of the Act should be varied and some additional rules and regulations should be introduced, and accordingly it made a number of changes to the sequestration process, extended it to include the debtor's heritable property and introduced for the first time a mechanism for the discharge of the debtor without the consent of all creditors, albeit limited in effect. Thus, the key elements of the modern sequestration process were now in place, and although the process remained essentially creditor-oriented, the introduction of provision for the discharge of the debtor, albeit limited in effect, was debtor-oriented. The Act also, however, limited the availability of the process to traders, a limitation which remained until the Bankruptcy (Scotland) Act 1856.

9 The Payment of Creditors (Scotland) Act 1783 was also originally enacted for a period of seven years but extended and then followed by a series of further temporary statutes, all "for rendering the payment of creditors more equal and expeditious", which made further changes suggested by experience to the

sequestration process and the provisions for the debtor's discharge, until the Bankruptcy (Scotland) Act 1839 was enacted as a permanent measure.[15]

10 The Bankruptcy (Scotland) Act 1839 was passed as a result of reports on sequestration produced by commissioners under the chairmanship of Professor George Joseph Bell who were appointed in 1833 with a view to reform of the law of Scotland. It made a number of further improvements to the sequestration process and was said to show "a great superiority over the earlier statutes".[16] It was in turn amended in a number of respects by the Bankruptcy (Scotland) Act 1853 and then replaced by the Bankruptcy (Scotland) Act 1856, which acted as a consolidating statute but also made a number of important changes to the law, including the removal of the restriction of the sequestration process to traders, the extension of the role of the sheriff court, further changes to the provisions for discharge and the creation of the office of Accountant in Bankruptcy. The removal of the restriction of the sequestration process to traders in particular can be seen as debtor-oriented in so far as the benefits of the process were now available to all debtors.

11 The Bankruptcy (Scotland) Act 1856 was itself amended on a number of occasions and was eventually replaced by the Bankruptcy (Scotland) Act 1913. In the interim, the Debtors Act 1880 abolished civil imprisonment for debt with some exceptions and introduced a new form of the *cessio bonorum* procedure, while the Bankruptcy and Cessio (Scotland) Act 1881 made changes to the discharge procedure in sequestration and introduced similar provisions for discharge into the *cessio bonorum* procedure.

12 The Bankruptcy (Scotland) Act 1913 was passed following a review of bankruptcy law by the Cullen Committee, which recommended some improvements to the law but no fundamental change. The improvements included the abolition of the *cessio bonorum* procedure already mentioned, the introduction of a process of summary sequestration for dealing with small assets cases, the first statutory provisions regulating trust deeds for creditors and the expansion of the role of the Accountant in Bankruptcy.

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[15] The Payment of Creditors (Scotland) Act 1783 was eventually replaced by the Payment of Creditors (Scotland) Act 1793. This made further changes to the sequestration process, removed the limitation of the previous Act on the debtor's discharge and introduced the option of discharge on composition. It was enacted for a period of five years, but was also subsequently extended on a number of occasions until it was replaced by the Bankruptcy Act 1814. That Act made further changes to the sequestration process and was enacted for a period of seven years but was subsequently extended on a number of occasions until the Bankruptcy (Scotland) Act 1839 was enacted as a permanent measure.

[16] Goudy *et al.*, above note 8, at 4.

Modern Bankruptcy Legislation

13 The Bankruptcy (Scotland) Act 1913 was ultimately replaced by the Bankruptcy (Scotland) Act 1985 following an extensive review of bankruptcy law and related matters by the Scottish Law Commission.[17] The Scottish Law Commission noted that there had been no thorough examination of bankruptcy law since the work of the commissioners which had led to the Bankruptcy (Scotland) Act 1839, and it set out:

> "to re-appraise in the light of present business needs and social attitudes the policies of bankruptcy law and the administrative structure required to give effect to those policies."[18]

14 The resulting legislation made some major changes to the law, but in other respects retained the basic structure of the sequestration process as established in the earlier legislation. It made numerous changes to the process of sequestration itself. As already noted it repealed the Bankruptcy Act 1621 and the Bankruptcy Act 1696 but replaced them with more modern provisions and introduced other new statutory provisions on prior transactions. It abolished the summary sequestration procedure introduced by the Bankruptcy (Scotland) Act 1913, but introduced a new procedure for "small assets cases" and made provision for payment of the expenses of sequestration in such cases to be made from public funds where the debtor's estate was insufficient to meet them. It introduced provision for an automatic discharge of the debtor and new provisions for the protection of the debtor's family. It also introduced additional provisions relating to trust deeds for creditors, including a procedure whereby a trust deed could become protected with the result that non-acceding creditors would be bound by it. The general thrust of these changes is debtor-oriented: in particular, the introduction of public funding in small assets cases, which gave debtors to whom it might otherwise have been denied access to the sequestration process for the purposes of debt relief; the introduction of an automatic discharge, which allowed a debtor a fresh start; the introduction of certain protections for the debtor's family, if not the debtor; and the introduction of protected trust deeds, which made it possible to bind a minority of dissenting creditors.

15 Largely as a result of the mostly unforeseen consequences of the introduction of the provision for payment of the expenses of sequestration in small assets cases from public funds where the debtor's estate was insufficient to meet them, which resulted in considerable expenditure of public funds, the Bankruptcy (Scotland) Act 1985 was amended by the Bankruptcy (Scotland) Act 1993.[19] It removed the provision for payment of the expenses of sequestration in small assets cases from

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[17] Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No. 68, 1982).

[18] Ibid, at paragraph 2.7.

[19] For full details, see W. McBryde, *Bankruptcy* (2nd ed) (1989, W. Green, Edinburgh), at paragraphs 1.18 *et seq*.

public funds and instead made provision for the Accountant in Bankruptcy to become trustee in those sequestrations where no other trustee was appointed, thus retaining the concept of public funding of such cases but in a different form. It made further changes to sequestration procedure and introduced a new summary administration procedure in addition to the small assets procedure. It also altered the provisions whereby a trust deed could become protected to make the obtaining of protection easier.

Post-Devolution Reform

16 Following the establishment of the Scottish Parliament, the first major reform was brought about by the Debt Arrangement and Attachment (Scotland) Act 2002, which made provision, *inter alia*, for a debt arrangement scheme as an alternative to sequestration or a trust deed for creditors for individual debtors. The introduction of such a scheme had previously been recommended by the Scottish Law Commission but not taken forward.[20] That Act also extended the list of items exempt from diligence and thus sequestration. Again, these changes are essentially debtor-oriented. Further reform was brought about by the Enterprise Act 2002 which, with the consent of the Scottish Parliament, abolished Crown preference in sequestration.

17 The next tranche of reforms was brought about by the Bankruptcy and Diligence etc. (Scotland) Act 2007, which amended extensively the Bankruptcy (Scotland) Act 1985 and also made provision for major reforms to the law of diligence. The impetus for the bankruptcy element of the reforms came from a desire to have a comprehensive and integrated debt management framework in Scotland and the need to respond to developments such as the introduction of the debt arrangement scheme and changes to bankruptcy law in England and Wales. It was not intended to rewrite the whole structure and content of bankruptcy law, which was seen as unnecessary, but to develop and refine the existing law taking into account the needs of debtors, creditors and small businesses and policy developments in other areas. The reforms aimed to reduce the stigma of bankruptcy and encourage responsible risk-taking while providing an effective regime to protect the public from fraudulent or culpable bankrupts. The resultant changes included changes to the provisions for discharge, counter-balanced by the introduction of a bankruptcy restrictions regime; some changes to the composition of the debtor's estate; changes to the sequestration process and its administration; the abolition of summary administration and small assets cases, counter-balanced by a new regime for low income, low assets debtors; the reform of protected trust deeds; and, indirectly, the

[20] See Scottish Law Commission, *Fourth Memorandum on Diligence: Debt Arrangement Schemes* (Scot. Law Com. Consultative Memorandum No. 50 (1980)) and Scottish Law Commission, *Report on Diligence and Debtor Protection* (Scot. Law Com. No. 95), Chapter 4.

introduction of an element of debt relief into the debt arrangement scheme. These changes, particularly the changes to discharge, were seen as very debtor-oriented.

18 The next tranche of reforms was brought about by the Home Owner and Debtor Protection (Scotland) Act 2010 which made further amendments to the Bankruptcy (Scotland) Act 1985. The impetus for that Act was concerns over potential homelessness resulting from the financial crisis in 2008 and the subsequent recession. The changes to bankruptcy included making debtor access to sequestration easier and adding further debtor protections to protected trust deeds, and again can be seen as debtor-oriented. Further reform followed when the Debt Arrangement Scheme was re-vamped in 2011.[21]

The Most Recent Reforms

19 The most recent reforms are, for the most part, contained in the Bankruptcy and Debt Advice (Scotland) Act 2014 and associated secondary legislation, most of which is due to come into force on 1 April 2015, although some changes to protected trust deeds and the debt arrangement scheme, including the introduction of a business debt arrangement scheme for sole traders and partnerships, have already been implemented.[22] A much-needed consolidation of the bankruptcy legislation was also planned, but has unfortunately been delayed.

20 These reforms were promulgated on the basis that the earlier reforms enacted by the Scottish Parliament had focused on specific issues such as low income, low asset debtors and the opportunity was being taken "for the first time in a generation" to consider the principles and concept of bankruptcy and other debt management solutions, since the scheme contained in the Bankruptcy (Scotland) Act 1985 remained largely based on that laid down in the Bankruptcy (Scotland) Act 1856 and the world had become quite different to the world of 1985 when it was enacted.[23] The reforms intended to introduce a new model of debt advice, debt management and debt relief fit for the 21st century, a "financial health service" providing:

> "rehabilitation to individuals and organisations…while acknowledging their financial responsibilities."[24]

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[21] See the Debt Arrangement Scheme (Scotland) Regulations 2011, SSI 2011/141 and the Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011, SSI 2011/238.
[22] See the Protected Trust Deeds (Scotland) Regulations 2013, SSI 2013/318 and the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014, SSI 2014/294 respectively.
[23] See Scottish Executive, *Consultation on Bankruptcy Law Reform* (February 2012), available at: <http://www.scotland.gov.uk/Resource/0038/00388465.pdf> (last viewed 5 November 2014).
[24] Idem.

21 Its key principles are said to be ensuring that the people of Scotland have access to fair and just processes of debt advice, debt relief and debt management; that those who can pay, should pay, while acknowledging the wide range of circumstances and events that contribute to financial difficulty and insolvency for both individuals and businesses; and securing the best return for creditors by ensuring that the rights and needs of those in debt are balanced with the rights and needs of creditors and businesses.[25]

22 The reforms are undoubtedly far-reaching. They provide for mandatory debt advice, the option of a pre-application moratorium, a common financial tool for calculating debtor contributions and the possibility of payment holidays to be part of every procedure[26] and for further changes to sequestration (including changes to the level of qualifying debt, revised provision for no income debtors, extension of the period for making income contributions, capturing acquirenda and reversion of assets, the transfer of further functions from the court to the Accountant in Bankruptcy, changes to the discharge procedure and the introduction of financial education), the debt arrangement scheme (including the introduction of a business debt arrangement scheme for sole traders and partnerships) and protected trust deeds. One thing not encompassed by the reforms, however, is the treatment of the family home, which is intended to be the subject of a later consultation, notwithstanding that potential changes to the treatment of the family home in bankruptcy might reasonably be regarded as a fundamental issue in the context of bankruptcy reform concerned with the principles and concept of bankruptcy and other debt management solutions.

Plus Ça Change?

23 While there is no doubt that these reforms do bring about far-reaching changes to the law, do they in fact bring about any fundamental change to the principles and concept of bankruptcy law in Scotland? The concept of a financial health service can certainly be said to be new, but it is suggested that neither its constituent elements of rehabilitation and financial responsibility nor its key principles as outlined above are in fact new.

24 With regard to the principle of access to fair and just processes of debt advice, debt relief and debt management, not only may it be said that this is not new, but it might be said that much of what has been a fairly continuous process of reform of sequestration and increasing regulation of trust deeds for creditors has been for just this purpose. It might fairly be said that the idea of what is fair and just in this context has fluctuated over time and that the advent of, and emphasis on, debt

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[25] Idem.

[26] Some of these already existed in some but not all procedures.

advice and debt management (as opposed to debt relief) processes is a more recent phenomenon, but it is suggested that the underlying principle remains the same.

25 It is notable that, in general, successive reforms have left the basic underlying structure of bankruptcy law established at a relatively early stage substantially unchanged, even where these have followed what was intended as a root and branch review of the existing law. The Scottish Law Commission in its review of the law which preceded the enactment of the Bankruptcy (Scotland) Act 1985 noted that the review carried out by the Cullen Committee prior to the enactment of the Bankruptcy (Scotland) Act 1913 was not a systematic review of the policies of Scottish bankruptcy law and that there had been no thorough examination of that law since the review which preceded the enactment of the Bankruptcy (Scotland) Act 1839.[27] Yet although the 1839 Act did make important changes to the sequestration process, it did not make fundamental changes to the structure of sequestration. The Scottish Law Commission's own review was itself a root and branch review of the law, but although it also resulted in some substantial changes, some of which were characterised as changes of principle, as was noted in the context of the most recent reforms, it retained the basic structure of the sequestration process established in the earlier legislation. The changes introduced by the Bankruptcy and Diligence etc. (Scotland) Act 2007 were explicitly not intended to rewrite the whole structure and content of bankruptcy law. The most recent reforms did follow an explicit consideration of the principles and concept of bankruptcy and other debt management solutions as a whole, yet it is suggested that they will not bring about fundamental change to the basic structure of the law either. In particular, the process of sequestration remains central, and although there are undoubtedly significant changes to different aspects of the procedure, what may be regarded as the essential elements of the process remain unchanged.

26 In terms of alternatives to sequestration, there has always been provision for this although it may fairly be said that the options are now greater, and perhaps more effective (at least from a debtor perspective), than hitherto. As already noted, debtors have always had the option of entering into an arrangement with individual creditors, entering a composition contract with creditors generally or granting a trust deed for creditors, and these options remain, although protected trust deeds have become increasingly regulated by statute. The alternative of the *cessio bonorum* procedure was abolished by the 1913 Act, but a further alternative to sequestration now exists in the form of the debt arrangement scheme and, most recently, the new business debt arrangement scheme for sole traders and partnerships.

27 The sequestration process was introduced for the purpose of stopping the race of diligence and rendering payment of creditors equal and expeditious, and it is still intended to fulfil that purpose today. The introduction of a discharge for the debtor,

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[27] See Scottish Law Commission, above note 17, at paragraph 2.7.

however, meant that it also served the purpose of allowing the debtor a fresh start, which also remains a fundamental part of the present law. It may fairly be said that the availability of a discharge/fresh start has varied over time:[28] as already noted, discharge was not part of the sequestration process as originally introduced, but it was introduced at a very early stage thereafter, although sequestration itself was then restricted to traders and only later became generally available. It may also fairly be said that the conditions for obtaining a discharge have also varied over time, sometimes stricter and sometimes more liberal as attitudes have changed, with the law following the changes introduced by the Bankruptcy and Diligence etc. (Scotland) Act 2007 perhaps representing the high point of liberality from which the most recent reforms seek to retreat somewhat. Nonetheless, the principle remains the same.

28 The Bankruptcy and Diligence etc. (Scotland) Act 2007 reforms to discharge and the countervailing introduction of a bankruptcy restrictions regime were based on a policy of encouraging entrepreneurship, but that policy has always been part of Scottish bankruptcy law. In 1810, Bell said:

> "It is a point, even of public expediency, that an honest merchant, who has failed, should be enabled to recommence his trade, unencumbered with the load of former debts, which he has already done everything in his power to discharge."[29]

He went on to say:

> "The policy of the law of bankruptcy, in mercantile cases, in so far as regards the person of the bankrupt, is so framed as, in the *first* place, to give encouragement to honesty, and fair mercantile enterprise; and to afford a reasonable relief against those misfortunes, to which every man exposed to the chances of trade is liable; and, *next*, to restore to the public the exertions and the talents of a trader or manufacturer, who has, without his own fault, become a bankrupt."[30]

29 It might fairly be said that in modern times, the vast majority of debtors are consumers and not traders. As noted above, however, the restriction on the availability of sequestration (and thus a discharge) to traders was removed in 1839, and all debtors have been treated alike in this respect since then. Bell's statements also highlight an intention to distinguish between honest debtors and others which was another key element of the Bankruptcy and Diligence etc. (Scotland) Act 2007 reforms reflected in the introduction a new bankruptcy restrictions regime for "culpable" debtors. That regime can, however, be seen as an extension of the existing regime for imposing disabilities on bankrupts, the difference being that historically, a debtor who was regarded as deserving of remaining subject to such disabilities would generally have remained subject to them as a result of being

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[28] For a detailed account of the history of discharge in Scotland, see D. McKenzie Skene, "Morally Bankrupt? Apportioning Blame in Bankruptcy" (2004) *Journal of Business* Law 171-218.
[29] Bell, above note 7, at v.
[30] Ibid., at 369.

denied a discharge or having it deferred, whereas the bankruptcy restrictions regime seeks to separate the issue of continuing disabilities from the issue of discharge. Although the means has changed, therefore, once again the principle remains the same.

22 With regard to the principle that a debtor who can pay, should pay and the related principle of ensuring the best return for creditors, again it can be said that this is not new. As already noted, the earliest bankruptcy legislation was concerned with debtors putting assets beyond the reach of creditors (or some of them) and made provision for recovery of those assets in appropriate cases and this remains a fundamental part of the present law. In addition, it has always been the case that on sequestration, with limited exemptions, all of the debtor's property, including property acquired during the sequestration prior to the debtor's discharge (generally referred to as acquirenda), forms part of the sequestrated estate. It may fairly be said that the list of exemptions has expanded over time, in line with changing social attitudes, and that provisions for the reversion of certain property to the debtor in certain circumstances have been introduced, although the most recent reforms in fact restrict these somewhat. The principle, however, remains the same. Furthermore, what might loosely be described as the debtor's surplus income is also captured on sequestration.[31] In the context of trust deeds, it is the debtor's decision what property and/or income is included, but a trust deed can only become protected if it conveys either the same property as would vest on sequestration or the same property as would vest on sequestration under exclusion of a dwelling house which it is permitted to exclude. The debt arrangement scheme generally includes income but not assets, although in certain cases assets may be included, but it is a debt management procedure with limited debt relief. The big issue in this context, however, is the debtor's home. The Bankruptcy (Scotland) Act 1985 introduced some restrictions on realisation of the debtor's interest in the family home on sequestration for the protection of the debtor's family, and these provisions have now been extended to protected trust deeds, but in most cases they result in a delay in realisation only. As already noted, a consultation on the treatment of the family home is planned but has not yet taken place. If, however, the family home were to be made wholly or partly exempt in future, it is suggested that this might be regarded as a fundamental change in bankruptcy policy, particularly since in most cases it may form the only or main non-exempt asset.

23 This leads to the issue of what might be described as no or small assets cases and how to deal with them. This is not a new problem and it has long been recognised that such cases justify special provision. Different approaches have been tried: the Bankruptcy (Scotland) Act 1913 introduced a summary sequestration

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[31] Originally, both income derived from the estate which vested in the trustee and any other income of the debtor vested in the trustee but there was provision for the debtor to be given an allowance; since 1985, income other than that derived from the estate which vests in the trustee vests in the debtor but the debtor is required to pay any surplus income to the trustee for the benefit of the creditors.

procedure which the Scottish Law Commission found to have been a failure;[32] the Bankruptcy (Scotland) Act 1985 replaced it with a procedure for small assets cases with public funding which had the unforeseen consequence of unacceptable levels of expenditure of public funds; the Bankruptcy (Scotland) Act 1993 consequently revamped small assets cases and introduced a new form of summary sequestration with a different form of public funding in the form of the appointment of the Accountant in Bankruptcy as trustee; and the Bankruptcy and Diligence etc. (Scotland) Act 2007 abolished both small assets and summary administration procedures and introduced new provisions for low income, low asset debtors with the appointment of the Accountant in Bankruptcy as trustee. The most recent reforms will replace the low income, low asset criteria with new criteria and a modified procedure known as minimum assets procedure (MAP), thus creating a hybrid of previous approaches. The principle of special treatment for such cases therefore remains the same, notwithstanding that the issue of public funding for such cases remains troublesome.

24 With regard to the principle of striking a balance between the needs of creditors and debtors, once again this is not new. To give but a few examples from throughout the development of the law, the principle was recognised by Bell;[33] by Goudy, who referred to the "fundamental equity" of the bankruptcy laws in this respect;[34] by Fyfe, who in his commentary on the Bankruptcy (Scotland) Act 1913 considered one of the three leading objects of bankruptcy legislation to be to safeguard the interests of various classes of creditors as well as of the bankrupt and to afford him a reasonable opportunity of retrieving his fortunes;[35] by the Scottish Law Commission in its review which led to the Bankruptcy (Scotland) Act 1985, which spoke of the difficulties of balancing the interests of debtors and creditors on the one hand *and* the interests of creditors *inter se* on the other hand within the sequestration process;[36] by the process which led to the debt arrangement scheme, which was concerned specifically with striking a balance;[37] and by the consultations which preceded the Bankruptcy and Diligence etc. (Scotland) Act 2007, which were also concerned with striking the right balance.[38] It might fairly be said that the perception of where the balance should be struck has varied with the times and the detailed provisions of the law at any given time can be seen as reflecting the relevant perception at that time. In terms of the balance between debtor and

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[32] See Scottish Law Commission, above note 17, at paragraph 1.4.
[33] Bell, above note 7, at i *et seq*.
[34] Goudy *et al.*, above note 8, at 1.
[35] At 1.
[36] See Scottish Law Commission, above note 17, at paragraph 2.18.
[37] The report of the Working Group established by the Scottish Executive which, *inter alia*, revived the idea of a debt arrangement scheme was entitled *Striking the Balance – a New Approach to Debt Management*.
[38] See Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (November 2003) and Scottish Executive, *Modernising Bankruptcy and Diligence in Scotland: Draft Bill and Consultation* (July 2004).

creditors, in early times the balance was tilted almost wholly in favour of creditors and sequestration was essentially a creditor remedy although the debtor might ultimately obtain a discharge. In more recent times, however, the focus has shifted to sequestration as a debtor remedy and to debtor access to sequestration for the purposes of debt relief. The Bankruptcy and Diligence etc. (Scotland) Act 2007 and the Home Owner and Debtor Protection (Scotland) Act 2010 successively opened up debtor access to sequestration for that purpose and, as noted above, this and many of the other reforms previously enacted by the Scottish Parliament can generally be seen as tilting the balance (considerably) in favour of the debtor. Creditor petitions for sequestration are and have been for some time on a downward trend, although it must be noted that the process of sequestration is the same no matter who initiates it, subject to any special procedures for low or no asset cases. The most recent reforms, however, can be seen to have sought to tilt the balance back at least a little in favour of creditors. In terms of the balance between creditors *inter se*, this has perhaps altered less, with the exception of the abolition of Crown preference. Once again, however, the principle of striking the appropriate balance remains the same.

Conclusion

25 Despite radical changes in society since the introduction of the first bankruptcy legislation, it seems clear that bankruptcy law today is still concerned with many of the same basic issues which it and successive reforms have sought to address. Furthermore, it seems clear that even following the latest reforms, while there have been numerous and in some cases far-reaching changes to the detail of the law, the underlying principles and concept of bankruptcy have not in fact changed fundamentally and the law continues to retain the same essential structure although the individual elements have been reformed to a greater or lesser degree. It is true that the balance between debtors and creditors and, to some extent, between creditors *inter se*, has tilted backwards and forwards over time, reflecting changing attitudes and circumstances, and indeed it is this which has driven the periodic reform of the law in an attempt to achieve the balance seen as appropriate at the time. It is suggested, however, that despite numerous differences of detail, the fundamental principles and concept of bankruptcy law remain readily recognisable. A conclusion that *plus ca change, plus c'est la même chose* therefore seems justified at the level of principle, if not of detail, although it might fairly be pointed out that, as is often said, the devil is often in the detail.

26 Nonetheless, the possibility of more fundamental change is not inconceivable. It has already been noted that there is still the potential for change in relation to the treatment of the family home and suggested that any move towards total or partial exemption of the family home from sequestration might be regarded as a change of principle rather than detail. The possibility of changing the way partnerships and other entities are treated on insolvency, which was suggested by the author as

worthy of consideration when the most recent reforms were first mooted although not subsequently consulted on, would also represent more fundamental change. At present, such entities fall within the scope of the bankruptcy legislation, but in some other jurisdictions, for example England and Wales, they fall within (a modified version of) the corporate insolvency regime, which may appear more appropriate. Then there is the potential impact of new legislative guidance specifically relating to bankruptcy law at the European and international level,[39] and although the latest reforms explicitly sought to ensure that the reform of bankruptcy law in Scotland would be consistent with (the then existing) internationally-developed principles and best practice,[40] the possibility of further differentiation between consumer and other debtors may require to be considered in that context. There is also the potential impact of the increasing focus on potential areas for harmonisation of domestic insolvency law,[41] which although currently concentrated on specific aspects of insolvency law many of which are solely or mainly relevant to corporate insolvency may also influence any future bankruptcy reform. It therefore remains to be seen whether any future reform will bring about more fundamental change to the principles and concept of bankruptcy as such.

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[39] See, for example, The World Bank, *Report on the Treatment of the Insolvency of Natural Persons* (2013) and the European Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency.

[40] See Scottish Executive, above note 23, Introduction, Part 4.

[41] See, for example, European Parliament, *Harmonisation of Insolvency Law at EU Level* (2010); European Parliament *Harmonisation of Insolvency Law at EU Level with Respect to Opening of Proceedings, Claims Filing and Verification and Reorganisation Plans*, (2011); European Parliament Committee on Legal Affairs, *Report with Recommendations to the Commission on Insolvency Proceedings in the Context of EU Company Law* (2011); European Commission Communication of 12 December 2012 on a new European approach to business failure and insolvency; European Commission Consultation on a new European approach to business failure and insolvency (2013); European Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency; INSOL Europe, *Study on a New Approach to Business Failure and Insolvency – Comparative Legal Analysis of the Member States' Relevant Provisions and Practices* (2014).

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