
Imprisonment for Debt in Lower Canada, 1791-1840

Evelyn Kolish*

Imprisonment for debt has passed from the law of Quebec, but its history remains interesting as a marker on the border between civil and criminal liability, and as a means of tracing the evolution of debt recovery mechanisms. In the first part of her paper, the author describes the law relative to imprisonment for debt in Quebec between 1760 and 1840, contrasting it with the laws of England and the American colonies. Changes in the law during this period are placed within the context of the contemporary public debate, which pitted *Canadian* (francophone) advocates of wide powers of seizure and judicial sale against *British* (anglophone) merchants, who wished to retain imprisonment as a means of preventing fraudulent bankruptcy actions. In the second part of the article, the author examines the prevalence of the remedy by analyzing sheriffs' records. The distribution of creditors and debtors is broken down on the basis of sex, ethnicity and occupational group. The author concludes that imprisonment for debt was never more than a marginal phenomenon in Quebec, especially when compared with the experiences of England and the United States. This may be accounted for by differences in attitudes towards the institution, and by the wider scope of the remedy of seizure and sale, which made imprisonment less necessary and less useful.

L'emprisonnement pour dettes est disparu du droit québécois, mais son histoire présente encore aujourd'hui un double intérêt, à la fois comme indicateur de la frontière entre responsabilité civile et criminelle, et comme témoignage de l'évolution des mécanismes de recouvrement de créances. Dans la première partie de l'article, l'auteur résume le droit concernant l'emprisonnement pour dettes au Québec de 1760 à 1840, en le comparant au droit anglais et américain. Les changements dans le droit de l'époque sont étudiés à la lumière d'un débat public qui opposait les *canadiens* (francophones), partisans d'une augmentation des pouvoirs de saisie et de vente judiciaire, et les marchands *britanniques* (anglophones), qui désiraient plutôt garder le mécanisme d'emprisonnement pour dettes afin d'empêcher les faillites déclarées frauduleusement. Dans la seconde partie de l'article, l'auteur étudie l'utilisation de ce mécanisme au moyen d'une analyse des rapports de shériffs. L'auteur regroupe les données sur les créanciers et débiteurs en fonction de leur sexe, ethnicité et occupation. L'auteur conclut que l'emprisonnement pour dettes n'était, au mieux, qu'un phénomène marginal au Québec, surtout en comparaison avec l'Angleterre et les États-Unis. Ceci peut être expliqué par les différentes attitudes à l'endroit de ce mécanisme, et par la plus grande flexibilité du recours de saisie et de vente, qui a rendu l'emprisonnement moins nécessaire et moins utile.

*Of the Montreal Business History Project, McGill University. The author wishes to thank Jean-Marie Fecteau for the use of figures from his research into the records of the Quebec prison.

*Synopsis***Introduction****I. The Law and the Debate on Imprisonment for Debt, 1760-1840****II. Imprisonment for Debt Seen through the Sheriffs' Returns****Conclusion**

* * *

Introduction

Very little research has as yet been done in Canada on the history of creditor/debtor relations, and particularly on the most extreme debt collection mechanism that the law offered to creditors: imprisonment for debt.¹ This paper investigates the history of this phenomenon in Quebec, in the period from 1791 to 1840.² As a starting point, the evolution of the law and of the public debate on the question in Lower Canada is examined in light of the English and American experiences. The paper then sets the law and discourse on imprisonment for debt into the context of the actual use of

¹For an overview of these aspects of the law in English Canada, see C.R.B. Dunlop, *Creditor-Debtor Law in Canada* (Toronto: Carswell, 1981), c. 5. For studies specifically on imprisonment for debt in Quebec, one must go back to two 19th-century works: E. Lareau, "De l'emprisonnement en matières civiles" (1874) 6 R.L. 84, 277 and (1875) 7 R.L. 379; R. Lemieux, *De la contrainte par corps* (Montréal: C. Théoret, 1896). More recent material is to be found in chapters on bankruptcy in E. Kolish, *Changement dans le droit privé au Québec et au Bas-Canada, entre 1760 et 1840: Attitudes et réactions des contemporains* (Doctoral thesis in Legal History, Université de Montréal, 1980) [unpublished] [hereinafter *Changement*]. See also E. Kolish, "L'introduction de la faillite au Bas-Canada: Conflit social ou national?" (1986) 40 Rev. d'hist. de l'Amérique française 215 [hereinafter "L'introduction de la faillite"].

²The paper will deal briefly with the situation prior to 1791, but will not follow the evolution of imprisonment for debt in Quebec to its partial abolition in 1849 by *An Act to Abolish Imprisonment for Debt, and for the Punishment of Fraudulent Debtors, in Lower-Canada, and for Other Purposes*, S.L.C. 1849, 12 Vict., c. 42, or on into the *Code of Civil Procedure* (ss 781 to 833 of the *Code* of 1867), whence imprisonment in civil matters was finally expunged, except in cases of contempt of court, in 1966. The period covered by this study is largely dictated by necessary time constraints, and by the author's greater familiarity with the evolution of the civil law prior to 1840.

this legal mechanism, through analysis of empirical evidence in the form of printed sheriffs' lists of *capias* issued,³ of bail granted and of debtors imprisoned, covering the judicial districts of Quebec and Montreal for the years 1813-1828 and 1794-1828 respectively.⁴ Finally, through a comparison of the Lower Canadian experience with those of England and the United States, the paper attempts to increase our understanding of the role of imprisonment for debt within the panoply of debt recovery measures (ranging from attachment of goods to bankruptcy), particularly by considering the possible impact of social and economic change on the gradual erosion of the creditor's right to imprison a defaulting debtor.

I. The Law and the Debate on Imprisonment for Debt, 1760-1840

Imprisonment for debt was not practiced in Quebec during the French regime. In France itself, imprisonment for debt was less prevalent than in Great Britain, for the great *Ordonnance* of 1667 on civil procedure had abolished general imprisonment for debt, restricting its use to a few specified categories of debtors.⁵ In New France, doubtless partly due to the practical limitation posed by the lack of prisons, as well as to the socio-economic circumstances of a settlement colony in the early stages of development,⁶

³A *capias* was a writ of attachment, used either for seizing the goods or the body of a debtor. One needs to distinguish between two types of *capias* used in the process of imprisonment for debt in England and British North America: the *capias ad respondendum*, used before trial (imprisonment on mesne process), theoretically to ensure the debtor's presence, but in fact, in England at any rate, largely to initiate actions for debt quickly and cheaply, and the *capias ad satisfaciendum*, used after judgment, to coerce the debtor (or his friends and family) to pay the amount awarded (plus costs).

⁴These lists were compiled at the request of a legislative committee of inquiry on insolvency and bankruptcy in 1828. See the *Appendix to the Journals of the House of Assembly of the Province of Lower-Canada*, app. M (1828-29).

⁵Essentially, imprisonment could still be used in the case of debts to the government, commercial debts (*i.e.*, between merchants), damages in excess of 200 francs and for certain debtors in semi-public positions such as guardians. Women, minors, persons over seventy, the clergy and members of the military in active service were exempt. For a contemporary résumé of legislation and jurisprudence in France, see P.J.J.G. Guyot, *Répertoire universel et raisonné de jurisprudence civile, criminelle, canonique et bénéficiale*, vol. 4, rev'd ed. (Paris: Visse, 1784) at 597-606 (*contrainte par corps*). For more detail on the evolution of the law on imprisonment for debt in France, including developments up to the middle of the 19th century, see Lemieux, *supra*, note 1 at 29-42.

⁶Both the absence of prisons and the existence of attitudes more favorable to debtors than to creditors are common patterns in North America in the early years of colonization: see P.J. Coleman, *Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607-1900* (Madison: State Historical Society of Wisconsin, 1974) for the overall trends and a discussion of developments in each of the eastern seaboard states as far south as Georgia. See also W.N.T. Wylie, "Arbiters of Commerce, Instruments of Power: A Study of the Civil Courts in the Midland District, Upper Canada, 1789-1812" (Doctoral thesis in History, Queen's University, 1980) at 57, 79-80 [unpublished].

creditors did not use imprisonment as a means of debt recovery. When driven to the point of using the courts, creditors in New France relied upon the seizure and sale of goods and of real property, along with the *cession de biens*, a process of voluntary judicial assignment for bankrupt merchants that did not automatically discharge the debtor of his debts, but that precluded recourse to imprisonment.⁷

It was as a direct result of the Conquest, and of the wholesale introduction of English law into the province by the Royal Proclamation of 1764, that imprisonment for debt made its first appearance in Quebec. In the present state of research, we do not yet know how often creditors actually resorted to arrest and imprisonment for debt recovery, nor how many debtors ended up in gaol prior to the mid-1790's. Probably *capias* were relatively rare and imprisoned debtors very few, as there were still no prisons and the state of economic development was essentially as it had been during the French regime.⁸

Nonetheless, such evidence as we have does suggest that the King's old subjects (the British community)⁹ viewed imprisonment for debt as an essential cornerstone of the debt recovery system. The question of creditor/debtor relations was hotly debated in the early years of British rule, when the British merchants in Quebec successfully resisted an attempt by Attorney-General Francis Masères to issue a commission in bankruptcy, on the assumption that English bankruptcy law had become as much a part of the colony's laws as the common law.¹⁰ One determined critic argued that bankruptcy legislation would have a negative effect on

those merchants who have had good Faith enough to trust their Fortunes in a Province where *the only and indeed the best Security they have for such Debts is the Bodies of their Debtors*, the greatest part of whom have a very small, if

⁷Although the *cession de biens* was eliminated in the 1770's and 80's by the judges of the Court of Common Pleas on the grounds that the Code marchand had not been registered by the Conseil supérieur, it is clear from the court records of the French regime that the *cessions de biens* was alive and well in New France and that its procedure conformed to French practice: see J.A. Dickinson, *Justice et justiciables: La procédure civile à la Prévôté de Québec, 1667-1758* (Québec: Presses de l'Université Laval, 1982) at 63. The Code marchand was the common designation for the *Ordonnance sur le commerce* of 1673, the royal ordinance which codified commercial law as it existed in France.

⁸The number of writs for the arrest of debtors issued annually in Montreal in the 1790's was not high, and the number of debtors imprisoned was, predictably, much smaller: see Figure 1, below. There is little reason to think that the use of *capias* would have been much more prevalent earlier.

⁹Note that "British" and "Canadian" are used throughout to designate English Canadians and French Canadians, in accordance with contemporary usage.

¹⁰See Changement, *supra*, note 1 at 49-56 for the exchange between Masères and the merchants.

any, Capital in Trade. Would it be reasonable, to deprive them of a Prerogative which they enjoy throughout the British Colonies?¹¹

As in the American colonies, the dependance on British creditors had a visible impact on the attitudes of colonial merchants towards insolvency and bankruptcy legislation.¹² Also, the costs of English-style bankruptcy proceedings, both in time and money, as well as the fear of fraud and of a potential epidemic of bankruptcies in the prevailing precarious economic situation, led merchants to prefer private arrangements (by means of deeds of assignment) in dealing with honest insolvents, and to opt for the threat of imprisonment for the others.

It is then scarcely surprising that the Legislative Council lost little time in reintroducing the creditor's right to imprison his debtor after the Quebec Act swept away civil imprisonment by restoring Canadian civil law in 1774. The Ordinance on civil procedure of 1777, designed to provide a rough mix of English and French procedural rules now that Canadian law and custom was to be dispensed within a British judicial framework, not only introduced imprisonment on mesne process for debtors owing more than £10 whose creditors suspected them of intending to abscond, but also introduced imprisonment after judgment in cases where the sale of the debtor's goods, chattels and lands had not yielded enough to repay the debt. Imprisonment after judgment was, however, only to be used "for the satisfaction of commercial matters between merchants, as well as of all debts due to merchants for goods, wares and merchandizes by them sold." If an insolvent debtor swore, after one month in prison, that he was not worth £10, his creditor was obliged to pay 3s. 6p. weekly for his maintenance, in default of which the court would order the debtor to be released, unless the plaintiff could prove that the defendant had "secreted or conveyed away his effects to defraud his creditors."¹³ Debtors resisting seizure or attempting to hide property could be imprisoned even for debts under £10.

These dispositions differentiated the law on imprisonment for debt in Quebec from procedures in England, and provided both similarities and differences with the law in the American colonies. Firstly, in contrast to England but like most of the American colonies, Quebec allowed creditors to seize and sell land for debts.¹⁴ In fact, imprisonment on final process

¹¹"A.S.", Letter to the Editor, [*Quebec*] *Gazette* (28 January 1768).

¹²See Coleman, *supra*, note 6 at 269-70, and also the chapters on individual states.

¹³*Ordinance to Regulate the Forms of Proceedings in the Courts of Civil Judicature Established in the Province of Quebec*, P.O.Q. 1777, 25 Geo. 3, c. 2, arts 4, 37 and 38. See also *Ordinance to Regulate the Proceedings in the Courts of Civil Judicature, and to Establish Trials by Juries in Actions of a Commercial Nature and Personal Wrongs to be Compensated in Damages*, P.O.Q. 1785, 26 Geo. 3, c. 2.

¹⁴See Coleman, *supra*, note 6, chapters on Virginia and Delaware on the use of writs of *elegit* on the English model (Virginia also adopted a system of replevy bonds, at 203-4).

could only take place after the debtor's personal and real property had been seized and sold, and found insufficient (or, presumably, if the debtor had no property to be seized and sold). Execution against real property was entirely in accord with French civil law, in which not only were ordinary actions on unsecured debts normally followed by the seizure and sale of personal and real property, but where the seizure and sale of real property was the normal procedure for debts secured by hypothecs (those first cousins to the mortgage). No doubt this is one of the factors that helps to explain why *Canadien seigneurs*, unlike Virginia planters, never even thought of trying to exempt landed property from seizure and sale for debt.¹⁵

It may be noted that imprisonment on final process did not mean, as it did in England, that the creditor lost his right of execution against the debtor's property. On the contrary, in Lower Canada, execution against property preceded imprisonment. Theoretically, at least, this would remove one of the motives prompting creditors in England to keep their debtors in prison indefinitely.¹⁶

Until 1838, mesne process in England could be brought against anyone whose debt was past due and who owed more than the minimum fixed by statute.¹⁷ In the eighteenth century in the English legal system, warrants for arrest on mesne process were in fact a common way of beginning an action for debt recovery.¹⁸ In Lower Canada the right to imprison on mesne process was dependant upon the debtor being fraudulent, either by hiding or withholding property, or by absconding (or being suspected of intent to abscond). Of course, this difference could easily become meaningless, if the courts were to simply accept the affidavit of the creditor (or, after 1785, of his clerk

¹⁵For this aspect of English law, see I.P.H. Duffy, *Bankruptcy and Insolvency in London During the Industrial Revolution* (New York: Garland, 1985) at 64. See also J. Innes, "The King's Bench Prison in the Later Eighteenth Century: Law, Authority and Order in a London Debtors' Prison" in J. Brewer & J. Styles, eds, *An Ungovernable People: The English and their Law in the Seventeenth and Eighteenth Centuries* (New Brunswick, N.J.: Rutgers University Press, 1980) 252, for an excellent diagram of the legal process of debt collection.

¹⁶The minimum debt to which mesne process could be applied in England was £10 in superior and 40s. in inferior courts from 1725 to 1779, then £10 in all courts until 1811, £15 until 1827 and £20 until 1838: see Duffy, *ibid.* at 63 n. 12.

¹⁷In his sampling of documents from the English King's Bench, Court of Common Pleas and Exchequer Court, Francis found that approximately 40 of actions for debt in these courts were initiated by bailable process (warrants for arrest): see C.W. Francis, "Practice, Strategy, and Institution: Debt Collection in the English Common-Law Courts, 1740-1840" (1986) 80 *Nw. U.L. Rev.* 807 at 830.

¹⁸Figures on judgments for debts over £10 are taken from the author's study of civil litigation as shown by the court registers: see Changement, *supra*, note 1, app. A. These figures only include cases that went all the way to judgment, not all cases initiated, so that it is not possible to compare with Francis' findings of the relative proportion of cases initiated through either bailable or serviceable process.

or lawyer) as to the size of the debt and of the debtor's intent to abscond. The actual figures on the number of warrants for arrest issued, in comparison to the overall volume of judgments rendered in cases for debt over £10, suggest that creditors in Lower Canada began to resort more frequently to arrest to initiate debt recovery proceedings after the turn of the century, and particularly after 1815 (see Figure 4 below).¹⁹

Perhaps the most interesting feature of the initial legislation on imprisonment for debt in Quebec was the stipulation that imprisonment on final process would be limited to merchants, as well as to those indebted to merchants for goods purchased. While bankruptcy procedures in England and some American states²⁰ were limited to merchants in the eighteenth and early nineteenth centuries, no such limitation applied to imprisonment for debt, either on mesne or on final process: debtors from all social groups were liable to arrest. In France, by contrast, imprisonment for debt was limited to merchants and a few other specified types of debtors, but it was not available to merchant creditors against their non-commercial debtors. The *Ordonnance* of 1777 was thus particularly favorable to the merchants and traders of Quebec, allowing them to imprison their insolvent debtors, of whatever social class, although they could not themselves be imprisoned on final process for non-commercial debts.

Why did this particular limitation exist in Quebec? In the absence of any record of debate or controversy on the question, one can surmise that in the context of considerable controversy over the introduction of English rules of evidence and the use of juries in commercial cases, a free hand in drafting the provisions on imprisonment for debt may have been seen by the members of the so-called "French Party" as a necessary concession to the British merchants who were their most vociferous opponents.²¹

¹⁹This is a tentative deduction reached by comparing the rise in the number of *capias* issued in Montreal to the relative stability of the number of judgments on debt recovery in the superior sessions of the Court of King's Bench for the District of Montreal (126 judgments in 1795, 122 in 1815 and 159 in 1825). These figures are taken from a sampling of the civil court registers carried out as part of the author's doctoral research: see Changement, *supra*, note 1, app. A. This deduction is only reasonable if we assume that the number of judgments rendered remains roughly proportional to the number of actions begun. If not, an assessment of the relative use of normal civil debt recovery proceedings, as compared to suits initiated by arrest, must await more systematic research in the court records.

²⁰For the situation in England, see Duffy, *supra*, note 15 at 18-23. In the United States, several states experimented with similar laws restricted to traders only, but the long-term trend was for relief laws of broader scope: Coleman, *supra*, note 6 at 5, 11, 45-47, 188 and 270.

²¹For a general picture of the political and legal situation referred to here, see A.L. Burt, *The Old Province of Quebec*, vol. 2 (Toronto: McClelland and Stewart, 1968), c. 16-17; H. Neatby, *The Administration of Justice Under the Quebec Act*, (Minneapolis: University of Minnesota Press, 1937); H. Neatby, *Quebec: The Revolutionary Age, 1760-1791* (Toronto: McClelland and Stewart, 1966), c. 13-14.

There does not appear to have been any opposition to imprisonment for debt from the Canadian elite or the general population. In fact, there is no direct evidence at all of how the Canadians felt about it. Junius, a correspondent of the *Quebec Herald*, asserted that although liability to arrest for debt “no doubt at first alarmed the Canadians ... they however soon found that restraint subservient to their own interests, by arresting one another when occasion required it.”²² Junius was not exactly an objective observer, however, being both an avowed champion of English law (while a critic of Canadian law) and a proponent of broadening the scope of imprisonment on mesne and on final process to apply to all categories of defaulting debtors, whether or not they intended to abscond, and regardless of the size of their debt.²³ He was not the only British commentator, then or later, who believed that “the dread and horror of a prison” would have “the most salutary effects” on potential defaulters.²⁴ It is impossible to determine whether Canadians shared this belief, although they clearly were less likely to be involved in the procedure, either as creditors or debtors (see Figures 1 to 3, below).

Creditor/debtor relations did not become the subject of public debate again until the 1820's. Then, for the first time, in conjunction with the repeated attempts of the *Parti canadien* to re-introduce the Canadian bankruptcy procedure (*cession de biens*, which had been eliminated by the courts in the 1780's), a current of opinion hostile to imprisonment for debt became visible.²⁵ It seems likely that this public sympathy for the plight of imprisoned debtors was related to recent increases in their number, with a particularly high incidence of arrests and imprisonments in 1820 (see Figure 4 below). As was generally the case in reform movements elsewhere, this sympathy only applied to the *honest* debtor. Some kind of bankruptcy provision, allowing the debtor willing to hand over all his property in order to be freed from prison, was increasingly seen as necessary to avoid “substituting the punishment due to crimes for those due only to accident or misfortune”, so that “the Province will no longer be disgraced by bankrupt laws at once at variance with the principles of common justice and the dictates of humanity.”²⁶ There is no way to determine how widespread this

²²*Quebec Herald* (30 November 1789).

²³For Junius' general attitude and his other comments on the laws and the administration of justice see *Changeament*, *supra*, note 1 at 214-29.

²⁴*Quebec Herald* (15 March 1790). In the issue of 17 May, another correspondent, signing himself “A Free Thinker”, suggested that the province should revise its law on imprisonment to be the same as English law, to avoid pushing creditors to perjury (regarding intent to abscond) in order to apply the terrors of arrest to their debtors.

²⁵For a description of the debate on bankruptcy legislation, see “L'introduction de la faillite”, *supra*, note 1 at 217-25.

²⁶*Montreal Gazette* (20 December 1823).

moderately humanitarian attitude had become, although the *Montreal Herald*, alarmed at what it perceived as a misguided majority opinion, lost no time in denouncing it and preaching that severe laws were necessary as “an impulse to enterprise and commercial integrity”.²⁷

The arguments exchanged by proponents and adversaries of imprisonment for debt in Lower Canada in the 1820's and 1830's differ very little from those which were being used in England and the United States. Opponents appealed to sentiments of charity by emphasizing the unhealthy atmosphere of the prisons,²⁸ and the lack of separate prison facilities for debtors, perforce lodged indiscriminately with criminals.²⁹ Newspapers described individual cases involving the sickness or death of debtors in prison,³⁰ or cases where creditors kept an insolvent debtor in prison for so long that the sum of the weekly pension exceeded the original debt.³¹ Opponents emphasized cases where men were kept in prison for extended periods for relatively small sums, and where their imprisonment left wives and children without any means of livelihood.³² In addition to these humanitarian arguments, opponents stressed the futility of imprisoning honest debtors who were genuinely insolvent, and argued that “society has a claim on [the debtor's] industry and the exertions of his moral and physical fa-

²⁷[*Montreal Herald* (3 January 1824).

²⁸See *Journals of the House of Assembly of the Province of Lower-Canada* at 130-31 (12 December 1828); *Journals of the House of Assembly of the Province of Lower-Canada* at 141-43 (8 February 1830).

²⁹See the speech by Solicitor General C.R. Ogden in the report on the debates in the House of Assembly, [*Quebec Gazette* (1 March 1827):

[I]n England insolvent Debtors could be arrested — but what a difference between the Places of Confinement in the Mother Country and in this Province! There the Prisoner was sent into the King's Bench where he might have all kinds of Amusements; Here, on the Contrary, he was shut up in an infected Prison and under the same Roof with the most infamous Criminals.

Later in the same report, D.-B. Viger alluded to “a shameful traffick in Liquor which rendered the Prisons a focus of immorality instead of being a Place of Punishment and Repentance.”

³⁰See the [*Quebec Gazette* (4 September 1833), for an editorial on, and report of, the testimony at the Coroner's inquest into the death of Robert Shortis in the Quebec city gaol. A petition from Frederick Pearl mentions the death of Samuel B. Sheldon in the Montreal gaol in April of 1825, after 3 years of imprisonment: see *Journals of the House of Assembly of the Province of Lower-Canada* at 142 (8 February 1830).

³¹*Le Canadien* (28 October 1840). A letter to the editor signed “P” recounts the case of John McRhail, a lumber merchant, imprisoned for 400 weeks at a cost to his creditor of £100, for a debt of £45.

³²See the petition from debtors in the Montreal gaol in *Journals of the House of Assembly of the Province of Lower-Canada* at 110 (29 November 1831); and the speech of D.-B. Viger, published in *Le Canadien* (25 November 1835), on the bill that would become *An Act for the More Speedy Relief of Insolvent Debtors in Certain Cases, and for a Limited Time*, S.L.C. 1835, 6 Will. 4, c. 3, in which he mentions as one of the benefits of the bill, that the final judgment debtors released on bail could henceforth “se pourvoir mieux à la subsistance de leurs familles.”

culties.”³³ In contrast to merchants who believed that reducing the right to imprison would encourage men to seek credit beyond their capacity to repay,³⁴ critics of imprisonment suggested that the onus should lie on creditors to be more prudent in extending credit.³⁵

Petitions to the Assembly pleading for a reduction of the right of creditors to imprison were invariably referred to special committees, and either stimulated specific legislative proposals, or at least were used to support such existing projects as the on-going effort to re-introduce *cession de biens*. However, during the 1820's there was stubborn resistance to any major change in bankruptcy law and in the creditor's right to imprison, coming mainly from the Legislative Council and the merchants of Montreal and Quebec. This resistance stemmed partly from the fear of fraud during bankruptcy proceedings and the belief that the threat of imprisonment was a creditor's only effective way of forcing a fraudulent debtor to give up any property that he might be concealing. This time-honoured distrust of possible fraud in bankruptcy proceedings was reinforced in Lower Canada by the absence of registry offices and by the existence of tacit general hypothecs protecting the interest of married women and minors in the real property of their husbands and guardians.³⁶ Local British merchants in particular felt that these aspects of Canadian law virtually amounted to an invitation to fraud on the part of dishonest debtors who knew that a portion of their real property would be preserved in the hands of their wives, even if they themselves knowingly contracted debts they were unable to repay. This mistrust of potentially fraudulent use of tacit hypothecs came up repeatedly in the legislature and in the newspaper debate on creditor/debtor relations.³⁷ It is a specifically Lower Canadian phenomenon, reinforcing the general concern about fraud common to creditors in England and the United States.

³³Petition from the inhabitants of William Henry in *Journals of the House of Assembly of the Province of Lower-Canada* at 236 (1 March 1830).

³⁴See the testimony of William Finlay and Andrew Paterson in *The Appendix to the Journals of the House of Assembly of the Province of Lower Canada*, app., Minutes of Evidence (24 December 1831).

³⁵See the editorial comment on the death of Robert Shortis in the [*Quebec*] *Gazette* (4 September 1833): “[I]f the creditor knew he could not punish by imprisonment, he would not allow debts to be contracted, or, if contracted, their payment to be long delayed.”

³⁶On the question of registry offices, see E. Kolish, “Le Conseil législatif et les bureaux d'enregistrement (1836)” (1981) 35 *Rev. d'hist. de l'Amérique française* 217.

³⁷See the amendments to one of the bills on *la cession de biens* (entitled “An Act to Remove All Doubts with respect to the Benefit of the Cession of Property, (Cession de Biens) in Certain cases therein-mentioned”) in *Journals of the Legislative Council of the Province of Lower-Canada* at 124 (16 March 1826); the petition of the merchants of Quebec in *Journals of the House of Assembly of the Province of Lower-Canada* at 188 (22 December 1828); the speech by Thomas Lee in the *Star and Commercial Advertiser* (17 December 1828); the testimony of William Patton in *Appendix to the Journals of the House of Assembly of the Province of Lower-Canada*, Minutes of Evidence (24 December 1831).

Another reason for the commercial milieu's resistance to reform was probably the conviction on the part of merchants and traders that the existing state of the law was relatively adequate, and that any changes might well eliminate their privileged use of imprisonment without offering them any particular new benefits. However, towards the end of the 1820's, circumstances began to change. An international economic down-swing in 1825 had brought financial problems to quite a few merchants, and recourse to deeds of assignment was proving ineffective. At a time when creditors seem to have become less satisfied with traditional means of debt recovery, the Assembly moved beyond its earlier proposals for restoring *cession de biens*, and proposed more innovative and threatening changes: abolishing imprisonment for non-commercial debtors and making discharge an automatic consequence of *cession*.

The Assembly's position on imprisonment on final process of non-commercial debtors did not augur well for the partisans of a broad right to imprison:

[T]he imprisonment, by execution, of a debtor not being a Merchant or Trader, for Goods, Wares, and Merchandize by them sold, is contrary to the Common Law of the Country, and to the rules of Justice, useless to commerce and extremely injurious to the other branches of Industry ...³⁸

This was a clear attempt to return to the principles of French law, and to deprive merchants and traders of the privileged position granted them by the *Ordonnance* of 1777. Commercial opposition to the bill was strong. A spokesman for the merchants accused the Assembly members (who were mostly professionals) of being motivated by class interests.³⁹ The Montreal Committee of Trade organized a petition against the bill, warning the Assembly that they deemed "any alteration in the existing laws touching Imprisonment for Debt, not only unadvisable but fraught with danger and injustice to commercial men" unless such a change was a part of more general legislation on bankruptcy and insolvency.⁴⁰

In the worsening economic context of the early 1830's, concern about potentially disadvantageous piece-meal legislative tinkering pushed the merchants and traders of the province from a simple defense of the old law into a demand for a commission of inquiry to lay the groundwork for a general reform covering bankruptcy and insolvency alike.⁴¹ Their petitions, added

³⁸*Journals of the House of Assembly of the Province of Lower-Canada* at 120 (9 December 1828).

³⁹See *Star and Commercial Advertiser* (17 December 1828).

⁴⁰Petition of the Committee of Trade of Montreal in *Journals of the House of Assembly of the Province of Lower-Canada* at 160 (17 December 1828).

⁴¹See, e.g., the petition published in the [*Montreal*] *Gazette* (2 April 1833), signed by the members of the Committee of Trade and 308 other merchants.

to those of ordinary concerned citizens and of debtors imprisoned in the gaols of Montreal and Quebec city,⁴² kept the related questions of bankruptcy laws and imprisonment for debt before the legislature, so that several bills dealing with the problem were debated every year from 1830 through 1835. Most of these bills were lost on their way through the legislative mill, with especially the more general bills falling victim to partisan conflict over the choice of the best "national" legal model.⁴³ The stalemate on bankruptcy was finally broken by the Special Council during the inter-regnum of non-parliamentary government after the Rebellions of 1837-1838 and prior to union with Upper Canada. The new bankruptcy law of 1839⁴⁴ did not, however, resolve the broader issues of insolvency and imprisonment for debt, confining itself to bankruptcy procedures (including discharge) for merchants and traders only, modelled on English bankruptcy legislation.

However, in spite of the obstacles posed by the clash of economic, partisan and nationalist interests to a general reform, the Assembly and the Legislative Council had been able to agree on various less extensive measures touching creditor/debtor relations. Pro-creditor and pro-debtor bills were passed in roughly equal numbers, the former generally extending powers of seizure and arrest against absent and fraudulent debtors, the latter gradually reducing the creditor's power to imprison.⁴⁵ Between 1825 and

⁴²Petitions from prisoners, individually or as a group, were presented to the Assembly regularly from 1825 on: see *Journals of the House of Assembly of the Province of Lower-Canada* at 126-27 (5 February 1825); *Journals of the House of Assembly of the Province of Lower-Canada* at 27 (31 January 1827); *Journals of the House of Assembly of the Province of Lower-Canada* at 130-31 and 159 (12 December 1828); *Journals of the House of Assembly of the Province of Lower-Canada* at 141-43 (8 February 1830); *Journals of the House of Assembly of the Province of Lower-Canada* at 110 (29 November 1831); *Journals of the House of Assembly of the Province of Lower-Canada* at 263 (2 January 1833); *Journals of the House of Assembly of the Province of Lower-Canada* at 176 (1 February 1834). Only one petition was found from the general population (from the inhabitants of William Henry): see *Journals of the House of Assembly of the Province of Lower-Canada* at 236 (1 March 1830).

⁴³For details on bills and legislative conflict see "L'introduction de la faillite", *supra*, note 1 at 226-33; *Changement*, *supra*, note 1 at 519-33, 624-38.

⁴⁴*An Ordinance Concerning Bankrupts, and the Administration and Distribution of their Estates and Effects*, P.O.L.C. 1839 (3d Session, Special Council), 2 Vict., c. 9.

⁴⁵Pro-creditor laws: *An Act to Facilitate the Proceedings Against the Estate and Effects of Debtors, in Certain Cases*, S.L.C. 1824, 4 Geo. 4, c. 13; *An Act to Facilitate the Proceedings of Law in Certain Cases therein Mentioned, Relating to Writs of Capias and Attachment*, S.L.C. 1827, 7 Geo. 4, c. 8; *An Act to Prevent Fraudulent Debtors Evading their Creditors in Certain Parts of this Province*, S.L.C. 1829, 9 Geo. 4, c. 27; *An Act to Facilitate the Proceedings against the Estates and Effects of Debtors, in Certain Cases*, S.L.C. 1829, 9 Geo. 4, c. 28; *An Act Further to Suspend Certain Parts of an Act or Ordinance therein Mentioned, and to Consolidate and Further to Continue for a Limited Time the Provisions of Two Other Acts, therein Mentioned for More Effectually Ascertaining the Damages on Protested Bills of Exchange, and for Determining Disputes Relating thereto, and for Other Purposes*, S.L.C. 1833, 3 Will. 4, c. 14; *An Act to Prevent Debtors from Wasting or Diminishing the Value of their Immoveable Property under Seizure, to the Injury of their Creditors*, S.L.C. 1836, 6 Will. 4, c. 9.

1835, the legislature increased the basic list of goods exempt from seizure, facilitated bail for debtors arrested by virtue of *capias ad respondendum*, exempted debtors of over seventy years of age from imprisonment on final process, and passed several temporary relief laws granting debtors on final process freedom within the city (and later, within the judicial district) upon their finding special bail, due only in the case of their leaving the province prior to final payment of their debt.⁴⁶

At the time of the outbreak of the rebellions, therefore, only those unfortunates whose creditors were paying the weekly alimentary pension and who could find no one to stand bail for them were likely to spend any extended time in prison. It was to relieve this poorest and most vulnerable category of debtors⁴⁷ that the legislature finally passed an act to grant imprisoned debtors freedom on their giving up their property for the benefit of their creditors; and this act was generally considered to have abolished imprisonment for debt, even though imprisonment was still applicable to certain types of debtors, as it had been in the *Ordonnance* of 1667 and would be in the Quebec *Civil Code*.⁴⁸

II. Imprisonment for Debt Seen through the Sheriffs' Returns

In the process of debating the question of bankruptcy, insolvency and imprisonment for debt, the Assembly of Lower Canada requested the sheriffs of Montreal, Quebec and Three-Rivers to supply it with returns of the number of *capias* issued and of debtors who gave bail or were imprisoned, along with details on the size of their debts and the dates on which they were arrested and freed. These returns were published in Appendix M of

⁴⁶The relevant statutes are, respectively: *An Act to Continue Two Acts therein mentioned for Preventing the Seizure of Certain Articles*, S.L.C. 1833, 3 Will. 4, c. 11. (the two acts are *An Act to Exempt from Seizure in Satisfaction of Certain articles therein mentioned*, S.L.C. 1831, 1 Will. 4, c. 4, and *An Act to Exempt from Seizure in Satisfaction of Judgment, the Bedding and Necessary Wearing Apparel of Debtors*, S.L.C. 1829, 9 Geo. 4, c. 3.); *An Act to Alter and Amend Certain Parts of an Ordinance Made and Passed in the Twenty-Fifth Year of the Reign of His Late Majesty King George the Third, Intituled, "An Ordinance to Regulate the Proceedings of the Courts of Civil Judicature, and to Establish Trials by Juries, in Actions of a Commercial Nature, and Personal Wrongs, to be Compensated in Damages, in What Relates to the Issuing of Writs of Capias ad respondendum and to Special Bail*, S.L.C. 1825, 5 Geo. 4, c. 2; *An Act to Exempt Septuagenary Persons from Imprisonment for Debts, in Certain Cases*, S.L.C. 1827, 7 Geo. 4, c. 19; *An Act for Affording Relief, During a Limited Time, to Insolvent Debtors*, S.L.C. 1827, 7 Geo. 4, c. 7; *An Act to Afford Relief, During a Limited Time, to Insolvent Debtors*, S.L.C. 1832, 2 Will. 4, c. 1; *An Act for the More Speedy Relief of Insolvent Debtors in Certain Cases, and for a Limited Time*, S.L.C. 1835, 6 Will. 4, c. 3; *An Act to Afford Relief During a Limited Time to Insolvent Debtors*, S.L.C. 1835, 6 Will. 4, c. 4.

⁴⁷This was the opinion of Judge Meredith, cited by Lemieux, *supra*, note 1 at 54-55.

⁴⁸Arts 2271-2277 C.C.L.C. as rep. *An Act to amend the Civil Code*, S.Q. 1897, 60 Vict., c. 50, s. 38; and also arts 781-795 C.C.P.(1866) as superseded by arts 832-852 C.C.P.(1897).

the *Journal of the House of Assembly of Lower Canada* in 1828, and provide a good source of data with which to build up a realistic assessment of the nature and extent of imprisonment for debt in the colony. The time periods covered and the nature of data given are not the same for the three cities; consistent comparison is therefore not always possible. The exact titles of the various lists are given in an appendix to this paper, along with annotations as to the limitations of the information given in each.

Although this paper limits itself to descriptive statistics in its analysis of the data in the sheriffs' returns, it is nonetheless expected that a clearer picture of the reality of imprisonment for debt in Lower Canada will emerge.⁴⁹ Specifically, the paper examines the data on gender and ethnicity, the numbers of debtors involved globally and over time, the relative proportion of writs leading to bail or to imprisonment, the size of the debts, the length of time spent in prison, the proportion of use of imprisonment on mesne and on final process, and the incidence of multiple writs for a given debtor or repeated use of the mechanism by a given creditor.

As might be expected, the data on sex show that very few women were implicated as debtors in the process of imprisonment for debt. Out of 2 755 writs issued in Montreal from 1794 to 1828, only 25 named female debtors,⁵⁰ and only 6 women had actually been imprisoned there. In Quebec, the involvement of women seems to have been equally minimal. This may well explain why the Assembly never bothered to propose legislation exempting women, as several American states did, even though such an exemption existed in *Ancien régime* French law.⁵¹

The data on the ethnicity of debtors and creditors is more surprising, at least at first glance. Imprisonment for debt in Lower Canada appears to have been a predominantly British phenomenon, both in terms of creditors using the mechanism and of debtors caught up in its toils. Figures 1, 2 and 3 illustrate the distribution of ethnic groups in terms of writs issued, bail granted, and debtors imprisoned in Montreal from 1794 to 1828. Note that 85% of writs named British defendants, while only 13% named Canadians.⁵²

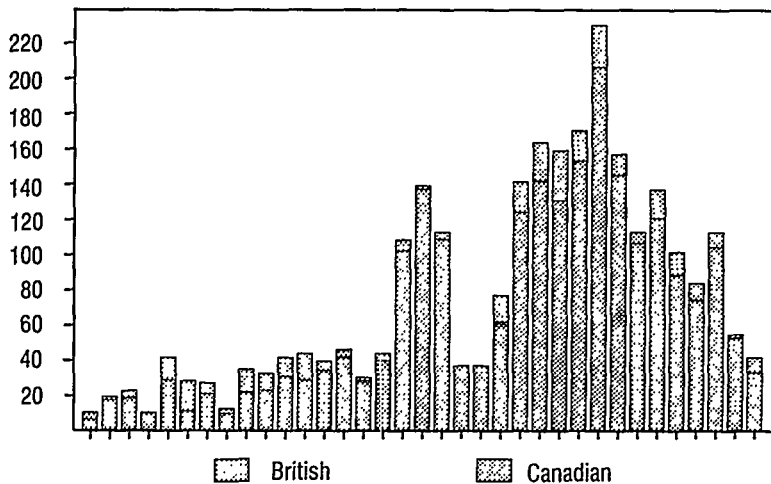
⁴⁹The statistical analysis was not sophisticated; it was limited to standard functions available on D Base III.

⁵⁰In fact, there were only 20 different women on the list, as two of them were named on more than one writ. Gender was determined on the admittedly imperfect basis of first names. Where only initials were indicated, it was assumed that the debtor was male.

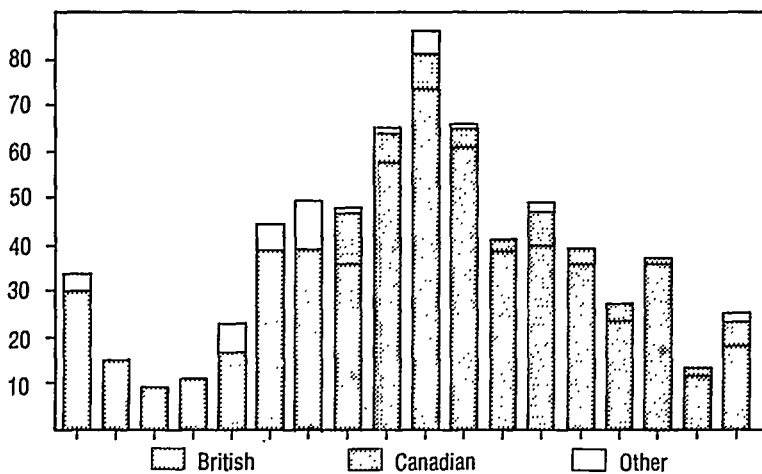
⁵¹On the question of exemptions for women in the United States, see Coleman, *supra*, note 6 at 45, 52, 62, 64, 68, 73, 77-78, 119, 138, 149, 155, 177, 224, 235, 243 and 257.

⁵²Ethnicity was determined simply by the most probable origin of the name of the debtor or creditor, with all the potential for error that this implies. In those lists including both first and last names, when the ethnicity of the first name appeared to differ from that of the surname, ethnicity was assigned according to the first name. Names neither British or French in appearance were classified as "other".

**FIGURE 1
DISTRICT OF MONTREAL
ETHNIC DISTRIBUTION OF WRITS
ANNUALLY, 1794-1828**

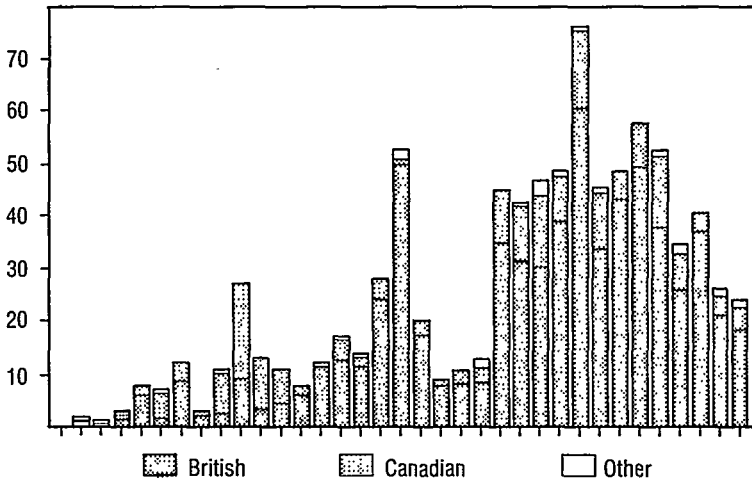


**FIGURE 2
DISTRICT OF MONTREAL
ETHNICITY OF DEBTORS RELEASED ON BAIL
ANNUALLY, 1811-1828**



Proportions are essentially the same for bail, while they differ somewhat for imprisonment, with a higher percentage of Canadians among the imprisoned debtors (22% Canadian, 75% British). There does not appear to be any long-term trend in these relationships over time.

FIGURE 3
DISTRICT OF MONTREAL
ETHNIC DISTRIBUTION OF IMPRISONMENT
ANNUALLY, 1794-1828



In Quebec city, the overall proportions are almost identical to those in Montreal. In addition, some of the lists supplied by the the sheriff of Quebec city also named the creditors, so that the inter- and intra-ethnic dimensions of the phenomenon emerge. As Table 1 indicates, in the majority of cases, creditor and debtor were from the same ethnic group, as was indeed the case in general civil litigation in Lower Canada.⁵³ Interestingly enough,

TABLE 1

	B/B	C/C	B/C	C/B	Totals
Writs	71%	4%	7%	12%	454
Bail	76%	4%	3%	8%	118
Jail ⁵⁵	69%	6%	7%	12%	204

however, in inter-ethnic cases, Canadians were more frequently the plaintiffs than were the British (in contrast to the general situation in civil litigation). In fact, Canadians used the threat of imprisonment more frequently against their British debtors than against debtors of their own ethnic group.⁵⁴

⁵³About 88% of cases were intra-ethnic in Montreal, and 71% in Quebec city: see Chagnement, *supra*, note 1, app. A at 709.

⁵⁴*Ibid.* at 709 and tables 11 and 12.

⁵⁵This is based on list #11 (Appendix, below) and includes less than half of the debtors imprisoned in Quebec. There is no data on creditors for other debtors.

The predominance of intra-ethnic cases is not surprising, as Dickinson's study of the Prévoté de Québec has already shown that there was a marked tendency for litigants in New France to be drawn from the same geographic area and social group.⁵⁶ Links between creditors and debtors in pre-industrial North America were also still largely personal in nature, so that one would expect relatively few cross-ethnic credit links, with the possible exception of professionals and retail merchants. This was especially so in the countryside where there might well be no other option.

Country merchants, dealing essentially with a land-owning farming community, were unlikely to see the threat of imprisonment as relevant to their debt collection problems.⁵⁷ One must not forget that imprisonment for debt was only an option for debts of over £10 due to merchants and traders, so that it would be unavailable for small debts, which constituted the vast bulk of the work of the circuit courts in rural areas.⁵⁸ One also suspects that the use of such a mechanism, so contrary to Canadian custom, would have been very ill-received among the rural population, which was overwhelmingly Canadian.

Indeed, as Figures 1 to 3 show, Canadians do not seem to have been as involved with the imprisonment mechanism as their demographic presence would justify. This was true even in urban areas, where they made up over half the population for the period under examination. The reasons for this are doubtless partly socio-economic. The British population was over-represented, in terms of its demographic weight, both in commerce and in artisanal activities.⁵⁹ If the main victims and users of imprisonment for debt are to be found among small retailers and artisans, as has been suggested for England,⁶⁰ then one would expect a greater British presence. Still, the occupational imbalance between the two ethnic groups in Montreal and Quebec is not large enough to account for the massive British dominance in the sheriffs' returns on imprisonment for debt.

⁵⁶See Dickinson, *supra*, note 7, c. 7-8.

⁵⁷On the problems of rural merchants and debt collection, see A. Greer, *Peasant, Lord, and Merchant: Rural Society in Three Quebec Parishes, 1740-1840* (Toronto: University of Toronto Press, 1985) c. 6.

⁵⁸See Changement, *supra*, note 1, app. A, table 3, rows marked "T" for "Tournée" (Circuit court).

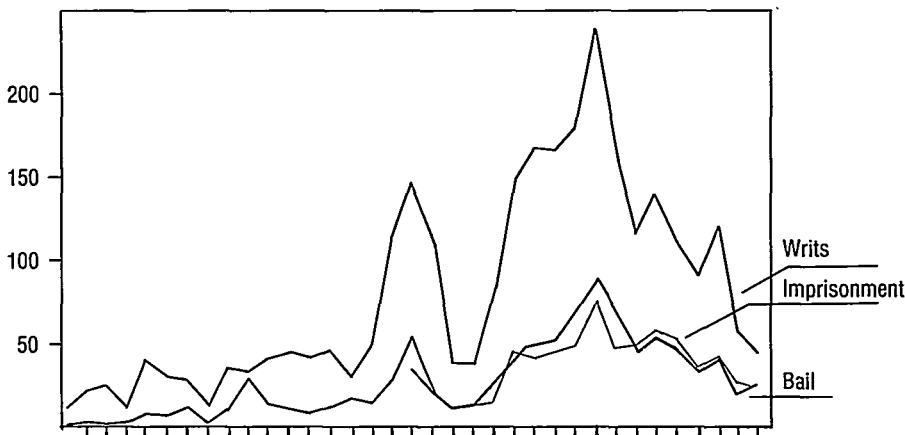
⁵⁹Although they made up only 33% and 50% of the population of Quebec city and Montreal respectively in 1831, the British made up 55% and 65% of the businessmen, and 39% and 55% of the artisans: see R. Rudin, *The Forgotten Quebecers: A History of English-Speaking Quebec, 1759-1980* (Québec: Institut québécois de recherche sur la culture, 1985), c. 3 at 82, citing F. Ouellet, "Structures des occupations et ethnicité dans les villes de Québec et Montréal" in *Éléments d'histoire sociale du Bas-Canada* (Montréal: Hurtubise H.M.H., 1972) 177.

⁶⁰See B. Kercher, "The transformation of imprisonment for debt in England, 1828 to 1838" (1984) 2 Australian J. Law and Society 64; Duffy, *supra*, note 15 at 379, table 6.5.

Different attitudes towards imprisonment for debt in the two ethnic groups may well be of considerable importance. Possibly Canadians were still more deeply rooted than their British fellow subjects in the informal ties of family and social authority structures and felt less need for judicial solutions. However, Canadians made good use of the other legal mechanisms of debt recovery available to them, as an analysis of general civil litigation has shown.⁶¹ It seems more likely therefore that social custom and legal tradition, which made imprisonment for debt familiar to the British and unfamiliar to the Canadians, go a long way in explaining the dominance of British names in the sheriffs' returns.

What about the overall extent of imprisonment for debt in Lower Canada? Figure 4 shows the evolution of the numbers of writs issued, of debtors released on bail, and of debtors imprisoned in Montreal, from 1794 to 1828. The three time series coincide fairly well in their fluctuations. Note that there are relatively few cases annually prior to the sudden peak in 1811, and that there is an overall rise in numbers from 1815 through to 1826, after which numbers drop to a much lower level. Without further research in the court and prison records, it is impossible to say whether this drop was temporary or represented a long-term trend. The highest peak was hit in 1820, with 240 writs issued and 77 debtors imprisoned.

FIGURE 4
DISTRICT OF MONTREAL
WRITS ISSUED, BAIL, IMPRISONMENT
ANNUALLY, 1794-1828



⁶¹About 70 of the 3 088 debt recovery cases in the samples were at the suit of Canadian plaintiffs. For the figures, see Chagnement, *supra*, note 1, app. A at 719, tables 9 and 10.

It is tempting to explain the peaks in 1811 and 1820 by the impact of the international business cycle, although in that case one wonders why there is no similar peak in 1825-1826. There has possibly been a tendency to underestimate the impact of local factors on the solvency of colonial businessmen and artisans, as Robert Sweeny has illustrated in his analysis of the Bank of Montreal's contested promissory notes in the 1820's.⁶² Only detailed research on a trade-by-trade and industry-by-industry basis is likely to reveal the economic reasons for the major fluctuations in the issuing of *capias*. However, another potential explanation lies in the massive flow of British immigration following 1815. Since the risk of giving credit is greater in a population in flux than in a smaller, close-knit community where lenders and borrowers are well known to one another, it would not be surprising to see the influx of British settlers reflected in an increase in the use of imprisonment for debt. Note however that the inflow of British immigrants continued unabated into the 1830's, which cannot be said of the number of *capias* issued.

Figures 5 and 6 illustrate the breakdown of the writs issued in terms of the eventual result. In Montreal, slightly less than one third of the debtors against whom writs were issued ended up in prison and about the same proportion were released on bail, mostly without being imprisoned. Slightly more than 40% of the cases ended in some other way: principally, one suspects, either through immediate settlement of the debt, or through the sheriff's inability to find the debtor. These two possibilities were certainly of prime importance in the English experience.⁶³

Although the sheriff's returns from Three-Rivers are too restricted to constitute a significant sample, they do provide at least a suggestion of the fate of writs leading neither to bail nor to imprisonment. Out of the 7 writs of *capias ad respondendum* issued in Three-Rivers between May 1827 and October 1828, one debtor paid immediately, one paid two days after his arrest, one was released on bail, three could not be found and one stayed in prison and was eventually jailed on final process.⁶⁴

⁶²R.C.H. Sweeny, *Internal Dynamics and the International Cycle: Questions of the Transition in Montreal, 1821-1828* (Doctoral thesis in History, McGill University, 1985) [unpublished].

⁶³See Francis, *supra*, note 17 at 831-32.

⁶⁴See *Journals of the House of Assembly of the Province of Lower-Canada*, app. M (12 December 1828).

FIGURE 5
OVERALL RESULTS OF WRITS ISSUED
DISTRICT OF MONTREAL, 1811-1828

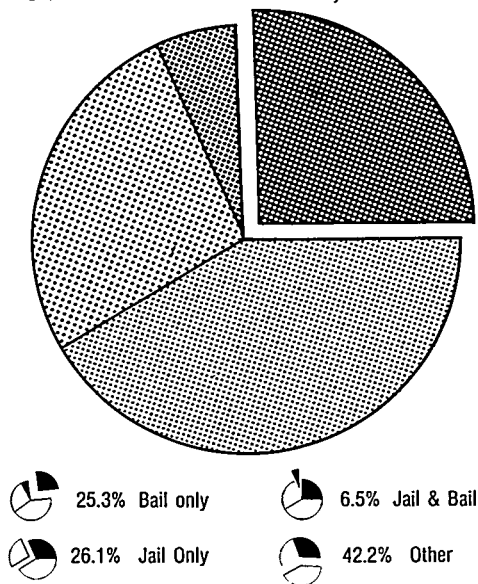
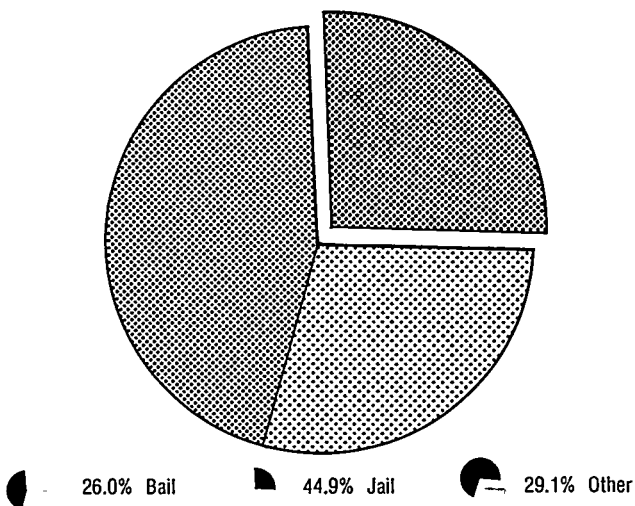
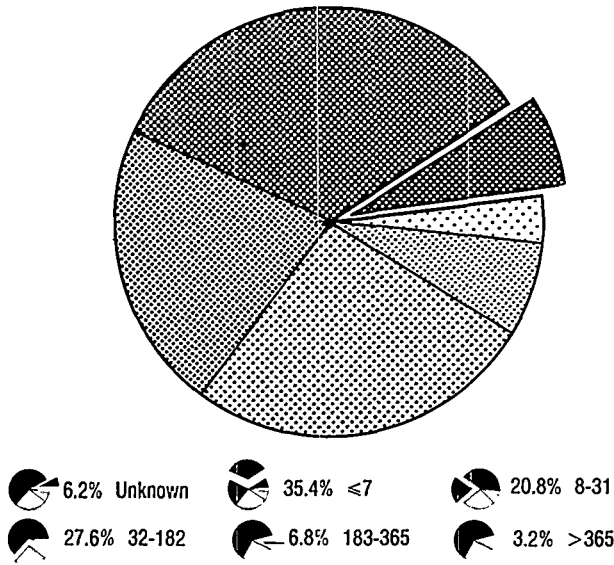


FIGURE 6
OVERALL RESULTS OF WRITS ISSUED
DISTRICT OF QUEBEC, 1822-1828



This breakdown of the outcome of *capias* issued addresses directly the question of the efficacy of imprisonment for debt as a means of debt recovery. The proportions shown in Figures 5 and 6 do not provide a direct answer to the question of how many of the creditors involved recovered their debts. However, if the situation in Lower Canada was similar to the English experience, the most common pattern among the debtors who could be located was payment on, or shortly after, arrest.⁶⁵ Many of the debtors jailed would have obtained their release either through paying their own debt or through having it paid by family, friends, or business relations — and occasionally by religious or charitable individuals or organizations.⁶⁶ This is especially likely for those who did not remain in prison for any extended period of time. As Figures 7, 8 and 9 indicate, over a third of the debtors imprisoned

FIGURE 7
RELATIVE DURATION OF IMPRISONMENT (IN DAYS)
MONTREAL, 1795-1828



⁶⁵See Francis, *supra*, note 17 at 830-32.

⁶⁶Although there was no Lower-Canadian equivalent to the Thatched House Society, there is reason to believe that members of the Catholic clergy at least visited imprisoned debtors and occasionally paid their debts or provided funds to help pay for food and clothing: see a letter signed "An Englishman" in *Le Canadien* (13 December 1817).

FIGURE 8
DURATION OF IMPRISONMENT (IN DAYS)
DISTRICT OF MONTREAL, 1795-1828

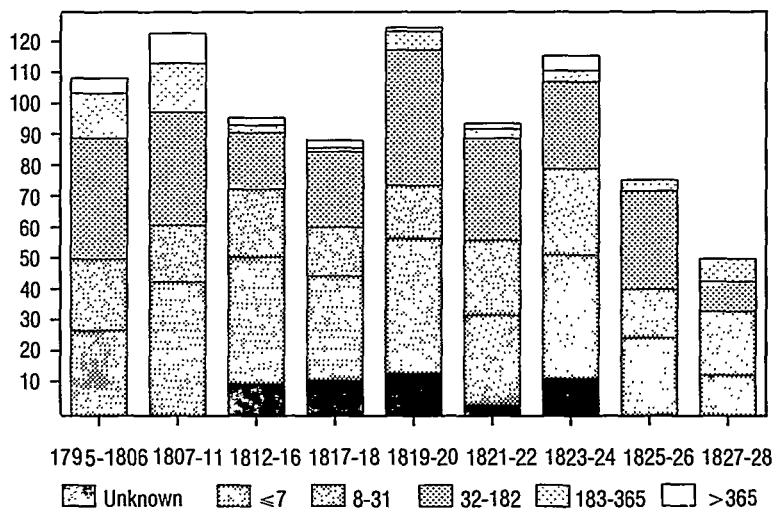
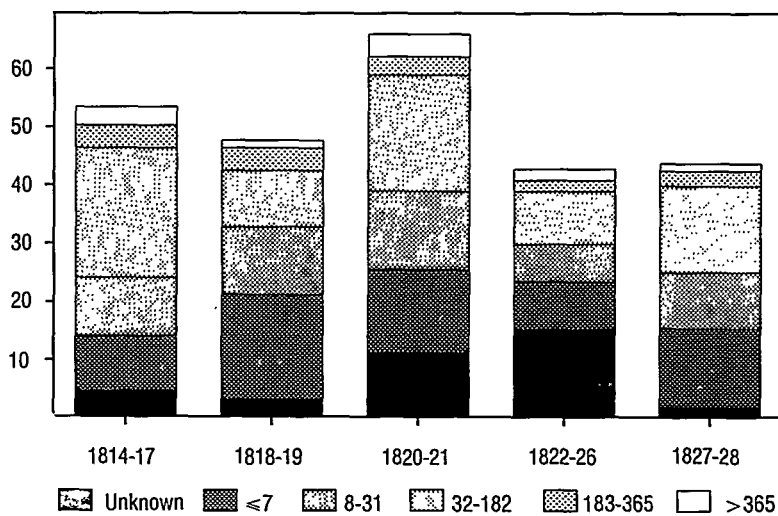


FIGURE 9
DURATION OF IMPRISONMENT (IN DAYS)
DISTRICT OF QUEBEC, 1814-1828



were released within a week, over half were released within a month, and over three-quarters were released within six months. There does not appear to have been any tendency for the average duration of imprisonment to rise or fall consistently over time.⁶⁷ Consequently, one could assume that a considerable number of the creditors whose debtors were imprisoned received payment.

From defendants released on bail, creditors would not be able to get the speedy payment that was often their motive for resorting to writs of *capias* rather than to ordinary litigation for debt.⁶⁸ However, since bail in Lower Canada (as in England) was twice the amount of the debt, defendants released on bail would very likely still be able to pay, if not in a lump sum, then at least gradually over time.

Overall, looking back at Figures 5 and 6, the majority of writs were likely to be successful in obtaining payment, on the assumption that creditors recovered their debts from most of the third of the debtors bailed, plus perhaps from half of the debtors imprisoned, or from those neither bailed nor jailed. Quite possibly more than half of the imprisoned debtors paid up, as Clinton Francis found that in England close to 90% of debt actions begun by arrest resulted in settlement before final judgement.⁶⁹ From the point of view of debt recovery, imprisonment for debt in Lower Canada appears to have been relatively effective in action, not to mention the unmeasurable effect of its very existence as a deterrent to potential defaulters.

The question of the effectiveness of debt actions initiated through arrest brings up the related question of the relative use of imprisonment on mesne and on final process. The lists for Montreal, both for writs issued and for defendants released on bail, are all cases on mesne process. Unfortunately, separate lists of *capias ad satisfaciendum* issued were not supplied for Montreal, and the list of imprisoned debtors does not make the distinction

⁶⁷Note that average durations of imprisonment were not calculated. It is possible that a tendency to shorter average duration might emerge if the exceptional cases of imprisonment over a year were excluded.

⁶⁸See Francis, *supra*, note 17 at 830-31.

⁶⁹*Ibid.* at 831 n. 87.

between those on mesne and on final process. For the city of Quebec, however, this distinction was made. From 1814 to 1822, only 10 out of 168 prisoners were held on final process. From 1822 to 1828 however, 75 debtors were imprisoned on final process and 204 were on mesne process. This would seem to suggest an increased use of arrest on final process, not only in absolute terms but also proportionately. More research is needed to confirm or deny the existence and extent of such a trend.⁷⁰

There was, of course, some overlap between the two types of imprisonment, with a certain number of debtors arrested initially on mesne process, and then again after judgment. Presumably these debtors were mostly genuine insolvents, unable to pay their debts, although some may have been simply unwilling to pay. However, as Lower Canadian law provided for the seizure and sale of both real and moveable property, solvent debtors were less likely to choose to remain in prison rather than pay their debts, especially as Lower Canada had no specific debtors' prisons nor any equivalent to the "Rules".⁷¹

The size of debts and the duration of imprisonment are important features in evaluating the effectiveness of imprisonment for debt and the links (if any) between the discourse concerning this legal procedure and the reality of its operation. The duration of imprisonment was discussed briefly above. Note that very few debtors were imprisoned for more than one year, although these few unfortunates were generally used as examples in the campaigns against imprisonment for debt. In Lower Canada, for instance, the record for imprisonment was held by one Frederick Pearl, an American held in Montreal for just over four and a half years at the behest of creditors in Connecticut. Pearl was an assiduous writer of petitions asking for changes in the bankruptcy and insolvency laws, and his case was discussed in debates in the House of Assembly.⁷² It may well have influenced the legislature in

⁷⁰Limited evidence has been uncovered that supports the interpretation of increased use of imprisonment on final process. In his sampling of the Quebec prison records, J.-M. Fecteau found that 37 of the 165 debtors imprisoned between 1832 and 1834 had been arrested by virtue of *capias ad satisfaciendum*: see "Vers une étude de la crise des appareils de répression au Bas-Canada: La prison de Québec, 1814-1834" (Département d'histoire, Université du Québec à Montréal, 1980) app. E [unpublished].

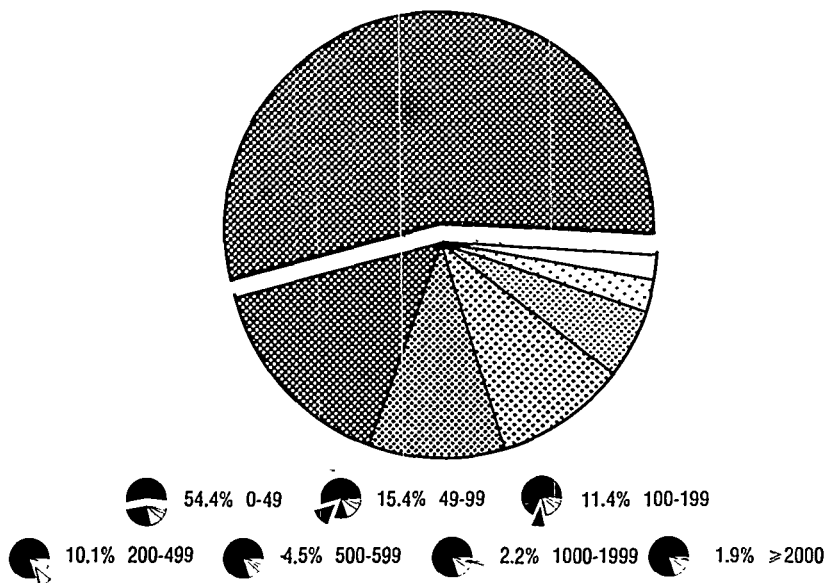
⁷¹In the King's Bench Prison in Southwark and the Fleet Prison in the City of London, the area surrounding the prison for several square miles was known as the "Rules". Debtors could purchase the right to live in the Rules and still be legally considered to be in prison: Innes, *supra*, note 15 at 256; P.H. Haagen, "Eighteenth-century English Society and the Debt Law" in S. Cohen & A. Schull, eds, *Social Control and the State: Historical and Comparative Essays* (Oxford: Martin Roberson, 1983).

⁷²See *Journals of the House of Assembly of the Province of Lower-Canada* at 27 (31 January 1827) and 130 (12 December 1828).

its decision in 1827 to allow debtors on final process to go free on bail within the city limits, provided that they submitted a full list of their property as a safeguard against fraud.⁷³ In any case, Pearl was one of the prisoners who used the act to obtain their release, although that did not stop him from continuing to beg the Assembly to enact bankruptcy legislation.

However, Pearl's case was not truly ideal as a basis for emotionally persuasive arguments against imprisonment for debt, for his debt, at £4700, was also one of the largest in the lists. The most pitiful cases were those of debtors who owed very little, especially when they were confined for long periods of time. What was the profile of the size of debts in Lower Canada? Figures 10 through 14 illustrate the overall number of debtors, grouped into several intervals of debt size for Montreal and Quebec, and also show the distribution of the size of debts over time.⁷⁴

FIGURE 10
SIZE OF DEBTS (IN POUNDS)
MONTREAL, 1794-1828, WRITS



⁷³*An Act for Affording Relief, during a Limited Time, to Insolvent Debtors*, S.L.C. 1827, 7 Geo. 4, c. 7.

⁷⁴The intervals were modelled on those used by Duffy, *supra*, note 15 at 371 (table 2.1).

FIGURE 11
SIZE OF DEBTS (IN POUNOS)
QUEBEC, 1822-1828, WRITS

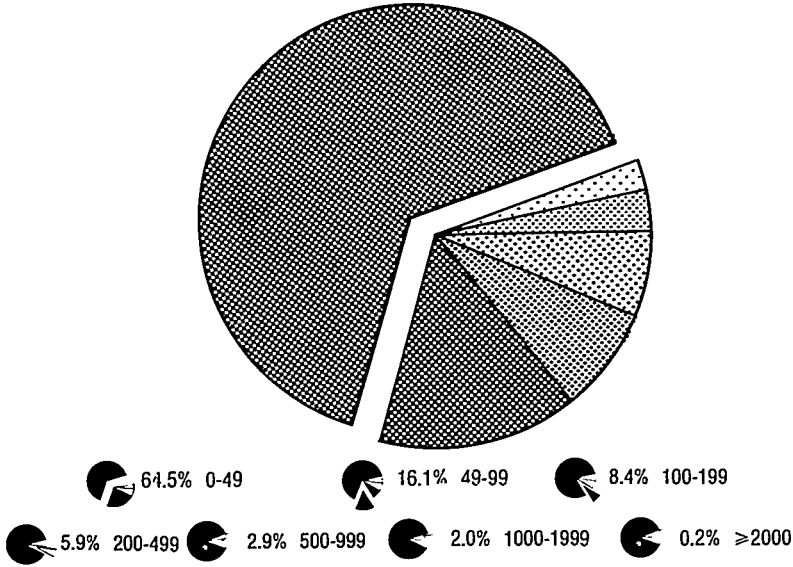


FIGURE 12
SIZE OF DEBTS (IN POUNDS)
MONTREAL, 1794-1828, PRISONERS

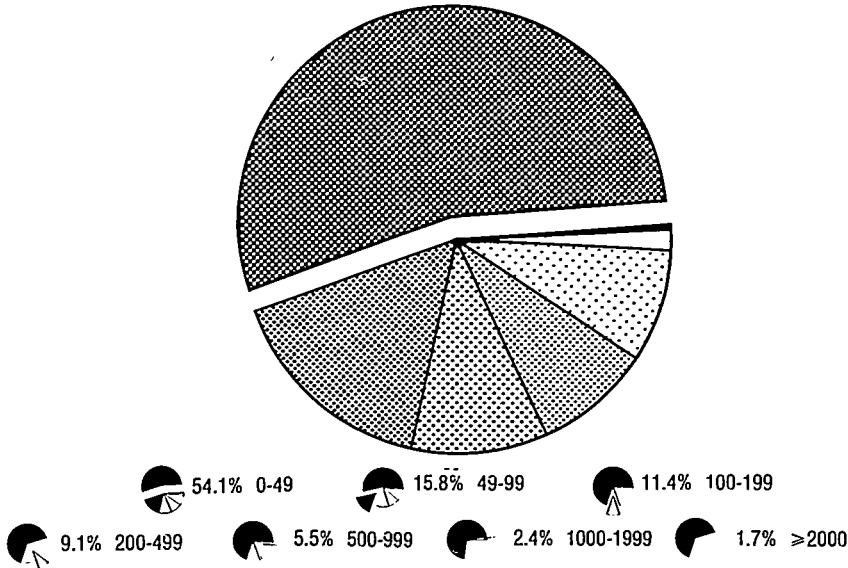


FIGURE 13
DISTRIBUTION OF AMOUNTS (IN POUNDS)
OWED BY IMPRISONED DEBTORS, MONTREAL

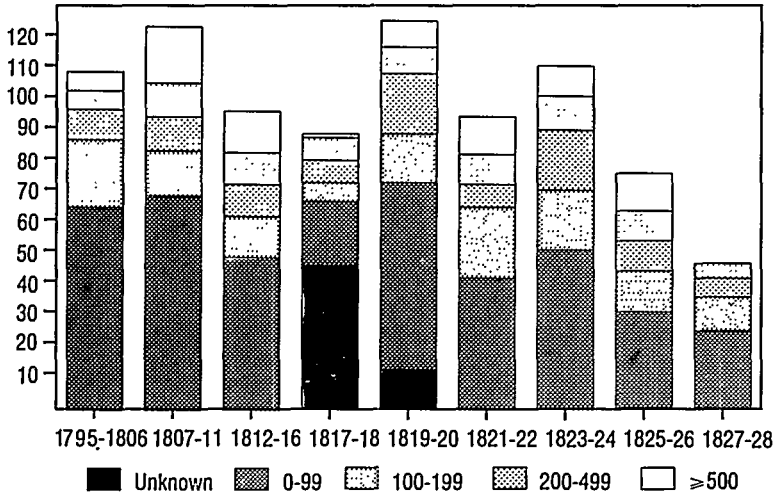
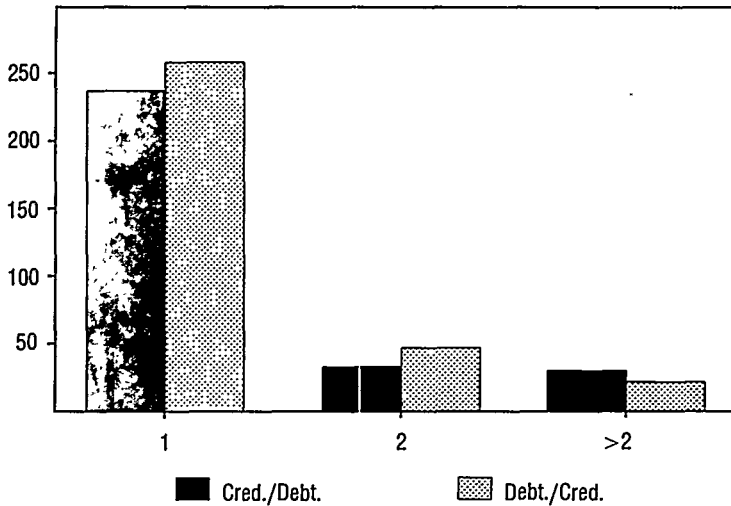


FIGURE 14
MULTIPLE DEBTS
QUEBEC, 1822-1828, WRITS



Clearly, most debts were on the lower range of the scale, over half being for amounts under £50. More than 80% of the debts were under £200, and a little less than 4% were over £1000. One must bear in mind that debtors were not imprisoned for small debts, as the minimum amount at which imprisonment became possible was £10; however, there were a few isolated cases when amounts were under £10, possibly cases on final process where the debtor had been able to reduce his debt to under £10, but not to pay it off entirely. Ten pounds represented a considerable sum of money for the times, when a handsome wage for a highly skilled journeyman was £1 12s. 6p. current per week, or £52 a year (plus room and board),⁷⁵ and the annual stipend of the Chief Justice of the province was £1500.⁷⁶

Generally, the minimum amounts owed by imprisoned debtors were just above the £10 level, while the maximums varied greatly, from a few hundred to several thousand pounds. As Figure 13 shows, there does not appear to be a long-term trend towards higher or lower debt sizes.

The discrepancy between the size of the debt and the length of time the debtor spent in prison was one of the most illogical and offensive aspects of imprisonment for debt, and consequently a sure target for abolitionists.⁷⁷ This discrepancy is highly visible in the sheriffs' lists. Although no statistical analysis was carried out, the lists of prisoners for Montreal and Quebec were sorted by size of debt and time in gaol. In all the time intervals used for Figures 13 and 14, the results of sorting showed no visible link between duration and the size of debts. Large, small or intermediate debts could all equally result in short, medium or long periods of imprisonment. While *An Act for Affording Relief, during a Limited Time, to Insolvent Debtors*⁷⁸ allowed debtors held on final process to get out of prison on bail, those who could not raise bail (most often the completely insolvent debtors) were still left to the mercy of their creditors. As was mentioned earlier, the plight of this group of debtors was alleged to be the main reason for the law of 1849 more or less abolishing imprisonment on final process.

One last aspect of the Lower Canadian experience of imprisonment for debt emerging from an analysis of the sheriffs' returns is the relatively low incidence of multiple debts or of recurrent use of arrest by a creditor.

⁷⁵These amounts come from notarized hiring contracts cited in Sweeny, *supra*, note 62 at 139 and 154.

⁷⁶See *Journals of the House of Assembly of the Province of Lower-Canada*, app. M, no. 16 (31 January 1825).

⁷⁷See, e.g., the petition from the prisoners at Montreal *Journals of the House of Assembly of the Province of Lower-Canada* at 110 (29 November 1931).

⁷⁸*Supra*, note 46.

As Figure 14 shows, the majority of defendants had only one creditor, and the majority of creditors used arrest as a means of debt recovery only once. In Montreal, out of a total of 2 138 debtors, 81% had writs taken out against them by a single creditors, 12.5% had two creditors, and 6.5% had anywhere from three to eight creditors. In Quebec, the comparable proportions were 80%, 11%, and 9%. As for the creditors, on whom we have data only for Quebec City, out of a total of 454 writs, 261 plaintiffs (79%) used this procedure only once, while 47 used it twice (14%) and 23 plaintiffs (7%) were more regular users, with anywhere from three to seven writs issued on their initiative. This data suggests that for most creditors, a recourse to arrest was an exceptional event, rather than a regular part of their arsenal of debt-collecting techniques. Why was this so? Was it less successful a technique than might appear? Or did it suffice to use it only once to make the threat of imprisonment function well on other debtors, in the relatively small communities of Montreal and Quebec prior to 1830? One can only surmise, although it seems clear that most creditors were not regularly using imprisonment for debt as a preferred way of collecting debts through the courts, or as a regular way of speeding up payments from debtors whose capacity to pay was not in doubt.

Conclusion

This analysis of the evolution of the law and of the debate on imprisonment for debt in Lower Canada, as well as an examination of its actual operation, suggest that it was a relatively marginal phenomenon in comparison with the experiences of England and the United States. It appears marginal in terms of the numbers of debtors imprisoned over time, of the numbers of debtors in prison compared to the overall prison population, and of the number in prison at any given moment. Literature on imprisonment for debt in England and in the United States mentions thousands of imprisoned debtors, overcrowded debtor's prisons, and, in England, the dominance of debtors in the overall prison population.⁷⁹ At the time that they submitted their returns to the Assembly, the sherriffs reported only one debtor currently imprisoned in Three-Rivers, five in Montreal, and ten in Quebec. In Quebec city, according to the prison records, debtors only made up about 7% of the prison population from 1814 to 1816, 12% from 1823 to 1825, and 8% from 1823 to 1834.⁸⁰ In spite of obvious differences in the

⁷⁹See Duffy, *supra*, note 15 at 64-70. The average debtor population of the King's Bench in London was 700; the total number of imprisoned debtors in England and Wales in 1818 was approximately 8,238. In 1805, criminal committals were about as frequent as committals for debt, although the relative proportion of criminals rose sharply thereafter, and criminals consistently outnumbered debtors in prison from 1815 on. See Coleman, *supra*, note 6, whose state by state discussion of the American situation makes frequent reference to high levels of arrest and imprisonment, as well as prison crowding.

⁸⁰Fecteau, *supra*, note 70, cites these figures from the records of the Quebec prison.

overall size of populations concerned, the magnitude of the phenomenon in Lower Canada seems to have been of a much lower order than in England or the United States.

Various factors account for this effect. The relative reluctance of Canadian creditors to resort to imprisonment for debt is clearly one of these factors. Also, the broader applicability of seizure and sale, especially against land, as well as the fact that notarized accounts of debts and promissory notes were automatically secured by general hypothecs doubtless account in part for the differences between English and Lower Canadian practice. Imprisonment for debt was less prevalent because it was less necessary or useful. Probably the relative cost of proceedings in ordinary actions of debt was also a factor, although there has not yet been any analysis of court costs in Lower Canada to make comparison possible with the findings of Clinton Francis.⁸¹

The evolution of the law and the use of imprisonment did, however, follow the general pattern seen in the United States and Upper Canada, with low use in the early years of colonization and increasing use with the expansion of commercial activities. Debate on the question of abolishing imprisonment for debt first appeared in Lower Canada in the 1820's. This was a decade when such proposals were very much in the forefront in England and in the United States, although there is little to suggest that the movement in Lower Canada was inspired by similar movements elsewhere. It was in fact rather a mild movement, closely linked to nationalist efforts to bring back the old Canadian procedure of *cession de biens*. This is not surprising, in view of the limited extent to which imprisonment for debt was used for debt recovery in Lower Canada.

To a limited degree, the Lower Canadian experience sheds light on the various interpretations advanced as to the role of imprisonment for debt. In contrast to the English situation described by Paul Haagen in his analysis of the English experience,⁸² there is little or no likelihood that imprisonment for debt might have played a significant role in Lower Canada as an ingredient in supporting patterns of deference and dependence towards the "ruling class" (as a sort of pale reflection of the criminal law). Nor does the process appear to have been demonstrably supported by the internal economic logic of the courts, the judicial "marketing" of a cheap and speedy debt recovery package, such as Clinton Francis found for the English courts.

A potentially more plausible interpretation is the one which sees the gradual movement away from imprisonment for debt towards comprehen-

⁸¹*Supra*, note 17.

⁸²See Haagen, *supra*, note 71 at 235-38.

sive bankruptcy legislation as a result of the depersonalization of credit relations due to the growth of financial institutions in the course of industrialization.⁸³

The first banks in Lower Canada appeared in the decade following the War of 1812, and many of the members of the committee of trade that petitioned for reforms in the law of debt leading to bankruptcy legislation were on the boards of either the Bank of Montreal or the Quebec Bank. The criticisms of imprisonment for debt emerged as part of a campaign for bankruptcy legislation, and general civil imprisonment on final process was abolished exactly one decade after a bankruptcy act was passed. If this interpretation is valid, however, one wonders why some form of imprisonment for debt, at the discretion of the judge rather than of the creditor, carried on well into the twentieth century, in Quebec, Canada, the United States and England.

In the final analysis, it would appear that imprisonment for debt appeared and grew in importance over time in Lower Canada because, as was true elsewhere, it was genuinely effective in many cases, and was perceived by British merchants especially, at least until well into the nineteenth century, as an important last resort in the debt collection process and by its very existence as a support of commercial integrity. A movement for the abolition or, more accurately, for the restriction of imprisonment for debt emerged in a period of economic and demographic growth during which the incidence of imprisonment rose, emphasizing the inequities of civil imprisonment while at the same time undermining its effectiveness; and this occurred in the context of a colony with two national legal traditions, the older of which was hostile to general civil imprisonment.

⁸³See for instance Coleman, *supra*, note 6 at 287-93; and J. Cohen, "The History of Imprisonment for Debt and its Relation to the Development of Discharge in Bankruptcy" (1983) 29 U. Chi. Law School Record 5.

APPENDIX A
LIST OF THE SHERRIFS' RETURNS ON IMPRISONMENT
FOR DEBT PRINTED IN APPENDIX M OF THE JOURNAL OF THE
HOUSE OF ASSEMBLY OF LOWER CANADA (1828)

1. « List of the Writs of Capias ad Respondendum issued out of the Court of King's Bench, for the District of Montreal, directed to the Sheriffs of the said District, between the first day of January One thousand and seven hundred and ninety four, and the twentieth day of October One thousand eight hundred and twenty eight, and the Names of the Persons againts whom such Writs have issued, and the Amounts demanded by each; made in obedience to the Order of His Excellency the Administrator of the Gouvernement. »

(2,755 entries: dates, given and family names of defendants, amounts)

2. « List of the persons arrested under and by virtue of Writs of Capias ad Respondendum, issued out of His Majesty's Court of King's Bench for the District of Montreal, and who have been admitted to Bail by the Sheriff of the said District, between the first day of January, One thousand eight hundred and eleven, and the twentieth day of October, One thousand eight hundred and twenty-eight, made in obedience to the order of His Excellency the Administrator of the Government. »

(682 entries: dates, given and family names of defendants, amount of bail)

3. « List of persons imprisoned for Debt in Gaol of the District of Montreal, in virtue of Writs issued out of His Majesty's Court of King's Bench for the said District, between the first day of January One thousand seven hundred and ninety four, and the twentieth day of October One thousand eight hundred and twenty eight, with the Amount demanded of each and the dates of their comittal imprisonment and discharge, made in obedience to the order of His Excellency the Administrator of the Gouvernement. »

(878 entries: dates jailed and freed, given and family names of defendants, amounts)

4. « List of Persons who have been admited to Bail under the Act 7th Geo. 4th chap. 7th, in the District of Montreal, made in obedience to the order of His Excellency the Administrator of the Gouvernement. »

(4 entries: date of bail, given and family names of the defendants' amounts)

5. « List of the Persons now confined for debt in the gaol of the District of Montreal, the amount demanded of each, made in obedience to the order of His Excellency the Administrator of the Gouvernement. »

(5 entries: date committed, given and family name of defendant, nature of writ, amount)

The above 5 lists were signed, L. Guky, Sheriff.

6. « A Return of Writs of Capias ad Respondendum directed to the Sheriff of the District of Three-Rivers, since the 3d May 1827, (the day the present Sheriff came into office,) to the 20th October 1828. »

(8 entries: date of writ, given and family names of plaintiffs and defendants, dates of committal and release, amounts, remark)

7. « A List of the number who have been taken into Custody on Capias ad Respondendum for debt, and admitted to Bail or imprisoned. »

(2 entries: names)

8. « A Return of Writs of Capias ad Satisfaciendum, for Debts, from the third of March, One thousand eight hundred and twenty-seven, (the day the present Sheriff came into office) to the twentieth of October, One thousand eight hundred and twenty-eight; shewing the number and names of persons who have been confined under Writs of Capias ad Satisfaciendum, for Debt, those who have been admitted to Bail, under the provisions of the Provincial Statute, 7th Geo. IV. CaP. 7. — Shewing the number and names of persons now confined in the Gaol of the District of Three-Rivers, with the cause of their detention, and also shewing the number of those who have received Alimentary Pensions. »

(8 entries: dates of writ, committal, and release, given and family names of plaintiffs and defendants, amount of debt and alimentary pension, remark)

The preceding three lists signed J.G. Ogden, Sheriff.

9. « List of the number of Writs of Capias ad Respondendum issued out of His Majesty's Court of King's Bench, addressed to me between the 23d November 1822 and 20th October 1828, inclusive. »

(454 entries: last names of plaintiffs and defendants, amount)

10. « List of Persons committed to the Common Gaol of the City and District of Quebec, under the authority of Writs of Capias ad Respondendum and Capias ad Satisfaciendum, issued out of the court of King's Bench for the District of Quebec, from thirteenth September, One thousand eight hundred and thirteen, to twenty-second November One thousand eight hundred and twenty-two, as appears by the Register of Commitments of Record in said Gaol. »

(191 entries: first and last name of debtor, dates of arrest and release, nature of writ, amount)

11. « List of Cases wherein the Defendants having been arrested under Writs of Capias ad Respondendum were admitted to Bail on their Arrest, or were imprisoned between the twenty-second November One thousand eight hundred and twenty-two, and twentieth October One thousand eight hundred and twenty-eight. In the following Cases Defendants being arrested, were committed to the Common Gaol of Quebec, and afterwards released in various ways. »

(204 entries: last names of parties)

12. « In the following Cases the Defendants were arrested and being admitted to Bail by me, were released without having been committed to the common Gaol. »

(118 entries: last names of parties)

13. « List of Persons Committed to the Gaol of Quebec, under Writs of Capias ad Satisfaciendum, since twenty-second November One thousand eight hundred and twenty-two, to this date. »

(75 entries: first and last names of defendant and plaintiff, dates committed and released, amount)

14. « List of Persons confined in the Common Gaol of the City and District of Quebec, under the authority of Writs of Capias ad Respondendum and Capias Satisfaciendum, issued out of the Court of King's Bench, for the District of Quebec, at this date. »

(10 entries : first and last names of defendants, date of arrest, amount and nature of writ)

The above six lists were signed Wm. Sewell, Sheriff.