

THE JURISDICTION OF COURTS OF EQUITY TO  
ADMINISTER INSOLVENTS' ESTATES, CON-  
SIDERED IN RELATION TO HISTORICAL  
ANTECEDENTS.\*

The principle that the creditors of a man who has become incapable of paying them all, should share equally in such effects as the debtor can muster together, is a principle of recognized moral right. The idea that some of a man's creditors should receive payment in full, while the rest should lose their whole debt, because the former have been able to run the faster to a judicial tribunal, or have induced the debtor to prefer them to his equal benefactors, is repelling to our sense of justice, or, if you dislike the hackneyed phrase, inconsistent with our ethical thinking. One would expect that this type of thinking would readily address itself to a court of conscience. Yet in both the Roman and the English Law, the remedial development toward equality of distribution to the creditors of an insolvent, took place through other channels of legal progress.

Since the accomplishment of an equal distribution of an insolvent debtor's property presupposes its reduction to a common possession, there must be some form of administration. Such administration seems to have taken place at an early date in Roman Law and to have been inaugurated by the Bankruptcy legislation in England before the antecedents of such a remedy in Chancery were at hand. Still at the present time we find the assets of insolvent corporations being administered in courts of equity by means of receivers. It is the purpose of this paper, first, to enter upon a discussion of the Roman Law and English Bankruptcy Law forms of administration; secondly, to search for the historical setting for administrative jurisdiction over insolvents' estates in

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equity, speculating perhaps on the likelihood of a development along these lines in equity jurisdiction, had the Bankruptcy Acts not intervened; and thirdly, to examine the jurisdiction of the American equity courts over insolvent corporations, hoping to find a true basis for that jurisdiction, and to suggest its possibilities.

## I.

At Roman Law the original type of execution by the creditor against his debtor was against the person. The creditor might sell the debtor into slavery or kill him. While the right to sell into slavery or to kill was abolished by the *lex Poetelia* (313 B. C.), imprisonment remained the sole form of execution known to ancient civil law.<sup>1</sup>

The praetors, however, developed an entirely different method of execution in favor of a judgment creditor, namely, the *venditio bonorum*. This was instituted by a bill brought by the judgment creditor that he and all other creditors who wished to join should be substituted to the property rights of the debtor for the purposes of selling the debtor's estate to satisfy their debts. The recognition of such a bill by the praetor was not out of line with the development of Roman Law. In the first place, when we consider that the Roman Law distinguished between the natural and the juristic person, regarding the latter as the abstract center of attraction of a group of legal rights, and target of a group of legal duties, which the English law regards as inhering in the natural person, we are enabled to view the new form of execution as merely a shift from one against the natural to one against the juristic person. The attachment of infamy to the debtor alike under the old form of personal execution and under the *venditio bonorum* is consonant with this view. In the second place, the fiction of

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1. Buckland, *Textbook of Roman Law*, p. 637, et seq.; Sohm, *Institutes of Roman Law*, Section 55, p. 286, et seq.

heirship, that is, the fiction that after judgment unsatisfied the creditors should be substituted in universal succession to the juristic personality of the debtor, as if the debtor had died, and the creditors were his heirs, made the development easy. Buckland points out that the fiction was not fully carried out;<sup>2</sup> for example the debtor did not undergo a *capitis deminutio*, or change of his juristic personality, so as to be discharged of the debts of the former juristic personality. But it is peculiar to the progress of the law by fiction that the fiction should not be indulged beyond the purposes for which it was invoked.

Gaius describes the institution of *venditio* or *emptio bonorum* as follows:—

“Let us consider now the succession that devolves on us by *emptio bonorum*. It is the estates of insolvent debtors, whether living or dead, that are thus brought to sale. There is sale of the estates of living debtors in the case of those who fraudulently keep out of the way of their creditors and are not defended in their absence; of those who have ceded their effects under the Julian law; and of judgment-debtors after expiry of the period which, partly under the law of the Twelve Tables and partly under the prætor’s edict, is allowed them for procuring the money. . . . .If it be the estate of a living debtor that is being sold, the prætor orders it to be taken and held possession of, and publicly advertised, for thirty continuous days; or if it be the estate of a deceased debtor, for fifteen days. He then orders the creditors to meet, and one of their number to be appointed magister, the party, that is to say, by whom the estate is to be sold; and the sale itself he orders to be carried through in ten days if the estate be that of a living debtor, and in half that time if it be that of one who is dead. He thus orders that the estate of a living debtor shall be adjudged to the purchaser

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2. Buckland, *ibid.*, p. 401.

in forty days, and that of a deceased debtor in twenty days."<sup>3</sup> The method appears to be first applied in the case of the State against its debtors.<sup>4</sup>

It is interesting to note the form of bidding under this institution: succession did not go to the person who bid the highest price for the debtor's assets, but to him who bid the highest dividend on the debtor's liabilities. This shows perhaps as clearly as any one thing that the fundamental idea in back of the institution was the substitution or succession of the emptor to the legal personality of rights and duties of the debtor. The purchaser from the magister was accordingly protected by the heir's civil law actions under the fiction of heirship,<sup>5</sup> as well as by the prætorian action based upon the formula Rutiliana.<sup>6</sup> The latter was one of that group of possessory actions which the prætors invented to protect titles recognized in the *ius gentium*, although not in the civil law, or titles in process of perfection by prescription.

The execution by way of *venditio bonorum*, it should be noticed was invocable as well in the case of deceased debtors as in the case of living debtors; and in instances other than insolvency. It was first and foremost a method of execution, an action in aid of, and to satisfy, judgment, directed against the debtor's property in general, rather than against specific portions of it. Because it was brought in favor of all creditors equally who wished to join in it, its operation was as equitable when applied to insolvent debtors as it was when applied to solvent debtors. In fact, because of the rigor of the execution, it seems to have been necessary in practice only to invoke it, where the debtor was insolvent, and unable to escape that

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3. Gaius, Institutes, III, 77-79.

4. Mommsen, Staatsrecht, I, 178; D. P. R. 1. 203.

5. Gaius, Institutes, IV, 35, Muirhead, Roman Law, Section 71, 2 Ed. p. 340.

6. Gaius, Institutes, III, 80, IV, 35; Buckland, Textbook of Roman Law, p. 401.

rigor. It was by virtue of the very fact that the English form of execution, directed, as it was, against specific property, and in favor of the creditor first bringing action, was inadaptable to cases of insolvency, since some creditors might exhaust the estate to the exclusion of others, that a Bankruptcy Act was necessary. Without going into the merits or demerits of the system, it is clear that the Romans had a system that worked both ways. The English developed a system of execution which worked admirably in the case of solvent debtors, but fell short of complete justice in the case of insolvents. They had, therefore, to develop a new system for insolvents not entirely congruous with Common Law execution. This new system was embodied in the various Bankruptcy Acts.

Before leaving the subject of Roman Law, a later modification of the law of *venditio bonorum*, should be noticed, namely, the *cessio bonorum*. This was an institution created by the lex Junia enacted under Augustus, whereby a debtor might by surrendering or "ceding his goods" voluntarily bring about the execution embodied in the *venditio bonorum* upon himself. Whereas under the previously existing system, execution might still be had against the person, as well as against the juristic personality, a *cessio bonorum* barred the former remedy as to debts already existing at the time of the surrender, and prevented infamy from attaching;<sup>7</sup> and it absolved the juristic personality by providing for a discharge from antecedent debts.<sup>8</sup>

While the English Bankruptcy procedure was more than a type of execution in aid of judgment,—it involved the actual adjudication as well,—it seems that the inadequacy of Common Law execution, effective only in cases of solvency, was the chief inducement for the new remedy in the case of in-

7. Justinian, Institutes 4:6:40; Code 7:71:1; C. 7:75:6; C. 2:11:11; Digest 42:3:4; Sohm, Institutes, Section 55, p. 286 (III Ed.); Buckland, Textbook of Roman Law p. 640; Humphreys on Real Property p. 109.

8. Muirhead, Roman Law, Section 20.

solvent debtors. The preamble of the first English Bankruptcy Act, the 34th Henry VIII, c. 4, (1542-43) is in the terms following:—

“Where divers and sundry persons craftily obtaining into their hands great substance of other men’s goods, do suddenly flee to parts unknown, or keep to their houses, (where execution would not reach them) not minding to pay or restore to any their creditors, their debts or duties, but at their own wills and pleasures consume the substance obtained by the credit of other men, for their own pleasure and delicate living, against all reason, equity and good conscience, be it therefore enacted. . . .”

It was immediately perceived, too, that the only adequate remedy possible in cases of insolvency was one that brought about an equal distribution of the debtor’s assets among his creditors. The Statute of Henry VIII directs that the justices shall order the assets “for the true satisfaction and payment of the said creditors; that is to say, to every of the said creditors, a portion, rate and rate alike, according to the quantity of their debts.”

Blackstone<sup>9</sup> and Spence<sup>10</sup> have both noted the similarities between the Roman and English Laws of Administration in cases of insolvency, the latter expressing the view that the Roman *cessio jure* was the prototype of a similar institution in Scotland, whence it came into England. Certainly the similarity is not only in the finished product of legal evolution, but in the circumstances, causes and incidents of the development itself. For like the *venditio bonorum*, the English Bankruptcy Act of 1542 was not designed for the alleviation of bankrupts, but for the perfecting of creditors’ remedies. The Act itself refers consistently to the bankrupt as an “offender,” and the second Bankruptcy Act, 13th Elizabeth Ch. VII, (1570) laments the increase in the number of

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9. Blackstone, Commentaries, L. II, Ch. 31, p. 473.

10. Spence, Equity Jurisdiction, Vol. I, p. 200.

insolvents "notwithstanding" the Statute of 34th Henry VIII, and purports to be a "better provision for the repression of them." Like the Roman Institution, the administration of a bankrupt's estate in England was concurrent with a personal execution against the debtor. Personal execution continued in England down to 1839 when the 1-2 Vict. Ch. 110 abolished it and substituted an equitable execution system in its place. Apparently the alleviating measures in English Bankruptcy Law were not given the bankrupt as a reward for his voluntary surrender of his estate, for voluntary bankruptcy was not admitted until the Statute 12 and 13 Vict. Ch. 106, whereas discharge had already been introduced by Statutes 5 Anne. Ch. 22, and 5 George I, Ch. 24.

The Bankruptcy Acts were until 1862 by the Statute 24th and 25th Vict. c 134 narrowly confined to traders. Blackstone thought<sup>11</sup> that such a limitation was justified inasmuch as the perils surrounding trade made it much less reprehensible for a trader to become bankrupt, and much more just that he should have the benefits of the Acts. But when we consider that the legislation was originally quasi-criminal and not humanitarian, and there were no benefits for the bankrupt, we must consider Blackstone's view as representing the view of the men who were sustaining the limitation and not that of those who created it. Probably the true reason for the limitation is that the perfection of creditors' rights against traders was essential to the development of commerce, and English law in the Sixteenth and Seventeenth Centuries was answering the needs of England's expanding commerce. However that may be, as previously stated, the bankruptcy system was made general in 1862.

With the enactment of the English Companies Acts of 1844, 1856, 1862, and 1908, providing for the winding up of companies, the statutory administration of the estates of insolvents is made complete in the English Law.

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11. Blackstone, Commentaries, L. II, Ch. 31, p. 475.

## II.

It has been suggested in the early sentences of this paper that the principle of distribution of assets of an insolvent among his creditors in proportion to the respective amounts of their debts is one which would readily appeal to a Court of Conscience such as the courts of equity of England and of this country. To say that a conception has moral appeal is one thing, however, and to say that it has embodied itself as a ground of equitable jurisdiction is another. Moral ideas do not fairly burst into the law as pronouncements of the courts of equity, but owe their appearance to the extensions of well defined antecedents.

We have noticed that distribution of decedents' and insolvents' estates was institutionalized in the Roman Law and that of insolvents' estates also in the English Statute Law. Yet equity did not entirely lose sight of the principle of equal distribution, for an administrative jurisdiction in the case of decedents' estates was developed by Equity during the Seventeenth and Eighteenth Centuries,—this perhaps one of the most constructive achievements of the English Court of Chancery. And in the Nineteenth Century we are confronted with an administrative jurisdiction over the estates of insolvent corporations, and the increasing number of equitable receiverships.

Up to a very recent date, the American Receivership Doctrine has not been associated with the development of creditors' remedies, but has been regarded as springing from that great source of equitable jurisdiction called the Law of Trusts. It had been thought to involve an exercise of the Chancellor's plenary power to administer trust funds. In brief, it was said that when a corporation became insolvent, its assets became a trust fund for the benefit of the creditors of the corporation. And clearly, if the directors of a corporation were to be considered trustees for the creditors as *cestuis que trustent*, then it followed naturally that such

directors would become accountable in a court of equity for the proper administration of the fund, and the court might, for the benefit of the parties, appoint a successor trustee, called a receiver.

The trust fund theory seems to have first made its appearance in American jurisprudence, although in somewhat different garb, in the case of *Wood v. Dummer*,<sup>12</sup> decided by Justice Story in 1824. This was a suit by the holder of certain bank notes, against the stockholders of the bank, to recover liquidation dividends received by the latter. The bank was in process of dissolution pursuant to the termination of its charter, and the dividend had rendered the bank insolvent. Justice Story allowed recovery of the demand, saying:

“To me this point appears so plain upon principles of law, as well as common sense, that I cannot be brought into any doubt, that the charters of our banks make the capital stock a trust fund for the payment of all the debts of the corporation. The bill-holders and other creditors have the first claims upon it; and the stockholders have no rights, until all the other creditors are satisfied. They have the full benefit of all the profits made by the establishment, and cannot take any portion of the fund, until all the other claims on it are extinguished. Their rights are not to the capital stock, but to the residuum after all demands on it are paid. \* \* \*

“If I am right in this position, the principal difficulty in the cause is overcome. If the capital stock is a trust fund, then it may be followed by the creditors into the hands of any persons, having notice of the trust attaching to it.”

Subsequently, the doctrine was applied to justify creditors' suits to recover in respect to unpaid stock subscriptions,<sup>13</sup> and in respect to dividends paid in impairment of

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12. 3 Mason 308.

13. *Sawyer v. Hoag*, 17 Wall. 610. *Handley v. Stutz*, 137 U. S. 366.

capital stock,<sup>14</sup> and to procure the appointment of a receiver of the assets of an insolvent corporation.<sup>15</sup>

While there seems to be considerable point in saying that unpaid stock subscriptions constitute a trust fund for the benefit of creditors, inasmuch as the full par value, or in some of the States, the full subscription price, measures the stockholders' liability to creditors,—yet the trust fund theory has not been favorably received, as applied to corporate assets generally.<sup>16</sup> It is, at first glance, a highly artificial theory. It leads one immediately to inquire by what magic word, or by what swing of a magic wand, title to property passes from the corporation to the directors, as trustees for the creditors, upon the occurrence of the corporation's inability to pay its maturing obligations, or upon the shrinkage of the value of its assets below the amount of its liabilities. Can a corporation insolvent be said to have less a title to its property than a corporation solvent? Furthermore, the theory is pregnant with consequences which its creators hardly intended it to have, and to the accomplishment of which, the courts have never applied it. Thus, it will be readily observed that if the doctrine of tracing the trust funds were rigidly applied to the case of an insolvent corporation, no purchaser of property or recipient of payment from the corporation could be assured of his ability to retain his property or his payment. Insolvency would mean stoppage. And the trust fund theory would defeat its very purpose by rendering less valuable, because non-transferable, the very assets upon which creditors depend for their payment.

It is quite unnecessary, however, for the writer to dilate upon the soundness of the trust fund theory, inasmuch as the Supreme Court of the United States has, for practical pur-

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14. *Bartlett v. Drew*, 57 N. Y. 587.

15. See appellant's brief in *Hollins v. Brierfield Coal Co.*, 150 U. S. 371.

16. See the following notes: 8 Col. L.R. 303-05; 9 H.L.R. 481; 15 H.L.R. 409, 844; 22 H.L.R. 523, 536; 8 Can. L.T. 372.

poses, repudiated the theory as applied to insolvent corporations, in the case of *Hollins v. The Brierfield Coal Company*.<sup>17</sup> The Court in that case used the following expression in reference to the trust fund theory:

“It is rather a trust in the administration of the assets after possession by a court of equity, than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder.”

Certainly, this is tantamount to a statement that the doctrine of trusts cannot be invoked to found the jurisdiction in receivership cases, since the trust relationship does not appear until after the jurisdiction has attached.

After the destruction of the trust fund theory, there is little left to weld the receivership doctrine into consistency with other bodies of the law. The jurisdiction in receivership cases would seem, on the face of it, to have been a branch of the trust doctrine which had become detached from the main stem. It is the chief purpose of this paper to attempt to bring the receivership doctrine into coherence with other equitable jurisdiction on a historical basis, if not a contemporary basis.

Any theory concerning the jurisdiction of a court of equity to administer insolvent estates, would have to comply with three requisites: *First*, it would have to explain just why equity assumed jurisdiction to administer insolvent estates at all; *secondly*, it would have to explain why such equitable jurisdiction was confined to corporations; and *thirdly*, it would have to present legal consistency. The trust fund theory admirably fulfilled the first two purposes, but its legal incongruity probably caused the Supreme Court to repudiate it.

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17. 150 U. S. 371.

## III.

Curiously enough, in dealing with the problem of administration over insolvent estates in equity, more attention has been paid to the nature of the remedy, the receivership, than to the right which it was designed to perfect. Receivers have been employed by courts of equity as custodians of property in the hands of the court, for the benefit of a great variety of interests. The type of receivership now spoken of has as its purpose the protection of the interest of creditors in the debtor's property. It would, therefore, be far from preposterous to view the administration of insolvent estates as an amplification of equitable creditors' remedies. To thus view the phenomenon, it will be necessary to bring into the discussion the original forms of creditors' remedies in equity, the creditors' bills, and it may prove desirable to draw very largely upon the analogy of administration over decedents' estates.

Creditors' bills have been classified as follows: (1), Bills against an executor; (2), Bills to reach equitable assets; (3), Bills to set aside fraudulent conveyances. All three of these classes arose out of the inadequacy of the legal system of judgment and execution to operate under extraordinary circumstances: the first, when the debtor's assets were in the hands of an executor who was not compellable, or at least defectively compellable, to account for them to creditors; the second, when the debtor's property was equitable, or held by such rights as equity alone would recognize; the third, when the debtor's property was in the hands of a vendee or volunteer protected by a good legal title.

Although equity had assumed jurisdiction over the debtor creditor relationship, it does not follow that the equitable remedies had either in the case of deceased or living debtors reached the completeness of which equity was capable. Professor Langdell has shown in his classic essays on Creditors' Bills that the conflicting claims of the creditors of a de-

ceased debtor, the necessity of taking into account the rights of priority creditors in the determination of the rights of simple creditors, and the effort to consolidate the many suits into one suit induced equity to assume the jurisdiction of administering the estate of the deceased debtor; and that subsequently the courts assumed this jurisdiction in favor not only of creditors, but of legatees, and residuary legatees. This system secured equality to all claimants of equal rank, whether the deceased debtor died solvent or insolvent. In the case of living debtors the legal remedies of judgment and execution, and the equitable remedies of creditors' bills for equitable execution, and to set aside fraudulent conveyances, were fairly adequate where the debtor was solvent. But it is believed by the writer that where the debtor is insolvent, the race of creditors of which the legal and equitable systems both admitted, involving as it did the satisfaction of some of the creditors to the exclusion of the rest, and the dissipation of the debtor's property through the wastefulness of many executions to the detriment of unsatisfied creditors as well as the debtor himself, *would have* formed some inducement for equity to assume jurisdiction over insolvents' estates. Completeness of creditors' remedies demanded equal distribution, and distribution, as remarked at the outset of this paper, presupposes administration. As outlined above, the law on this subject took a statutory course in England under the Bankruptcy Acts, and equity did not take jurisdiction. But can it be said that in a class of cases where the Bankruptcy Act was plainly inadequate or unsuitable, and statutory law had failed to keep pace with the needs which this class of cases represented, the equity jurisdiction was not available? If such is the case with corporations, would it seem extraordinary that some jurisdiction in equity like that by way of receiver would arise? It seems entirely possible that the theory just indicated may be found to explain or perhaps to fully justify the American doctrine of receiverships, involving as it does the jurisdiction of equity to administer the

assets of insolvent corporations. In order to substantiate this, it will be necessary to make a comparative study of creditors' bills and of administrative remedies.

In the case of the jurisdiction over bills against executors and administrators, the inadequacy of the remedy at law arose out of the fact that law had no method of compelling the executor or administrator to account. Since the action which the creditor would normally bring against the executor would be debt, an action requiring a jury, the action of account, which was without jury, was unavailable. The only way in which the contemplation of the assets and liabilities of a decedent with a view to the determination of the question of sufficiency of assets to satisfy the plaintiff's claim could be got before the court in case the executor pleaded *plene administravit* was through his affirmative defense.<sup>18</sup> Without going into the perils to the executor which this defense entailed,—a matter which Professor Langdell takes up in his article on Creditors' Bills,<sup>19</sup>—and confining ourselves to the difficulties of the creditor in meeting this defense, we come upon an anomalous rule of evidence. It was always up to the creditor to prove assets, while the executor showed his prior disposition of them in satisfaction of debts of higher order, or of debts of the same order previously recovered. In order to prove assets, the creditor was confronted with an insuperable difficulty. As a rule he had no personal knowledge or means of knowledge of such assets. A bill of discovery to be sure was available.<sup>20</sup> But as we shall see, when equity gave discovery, it used it for its own aggrandizement, and not to patch up the remedy at law. True, the Statute 22-23 Car. II, ch. 10 (1670), commonly known as the Statute of Distributions, vested power in the Spiritual Courts to require an inventory of an executor. But the Courts

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18. Langdell, Brief Survey of Equity Jurisdiction, pp. 133, et seq.

19. Id. Cit.

20. Story, Equity Jurisprudence, Section 735; Com. Dig. Chancery, 2 C. 3; 3 B. 1.

of Common Law repeatedly issued writs of prohibition against the Spiritual Courts, forbidding them to require sufficient and proper inventories, that is, more than mere formal statements.<sup>21</sup>

Spence<sup>22</sup> describes the origin and growth of the creditor's bill against an executor as follows:—

“The jurisdiction of the Ecclesiastical Courts being, as before mentioned, defective in the case of creditors, rendered it necessary for them to resort to the Court of Chancery, which court not only required the executor or administrator to swear to his account, but supplying the defects of the ecclesiastical law, allowed the creditor to contest it. The court also decreed payment of the debt where there were assets and which the Court of Chancery by its process for obtaining discovery, was enabled effectually to ascertain. Suits of this description, and proceedings upon them, are found in the calendars from the reign of Edward VI downwards.” (Citing cases in Cal. vol. 1 p. 93 and Cary 12.)

Professor Langdell<sup>23</sup> describes the procedure leading to the decree in a creditor's suit against an executor as follows:—

“If the executor admits assets in his answer, all that the plaintiff has to do is to prove his debt, whereupon a decree will be made that the executor pay the debt thus proved, and this decree will be enforced by the usual process of contempt. If the executor decline to admit assets in his answer, the only difference at the hearing will be that instead of a decree for immediate payment, a decree will be made that the executor render an account of the testator's estate before a Master. When this has been done, and the Master has made his report to the court, and the report stands confirmed,

21. *Hinton v. Parker*, 8 Mod. 168; *Catchside v. Ovington*, 3 Burr. 1922; *Henderson v. French*, 5 M. & S. 406; *Griffiths v. Anthony*, 5 Ad. & El. 623.

22. Spence, *Equitable Jurisdiction*, Vol. 1, p. 580.

23. Langdell, *Brief Survey*, p. 131-2.

the cause is brought on for a further hearing, and a decree is made that the executor pay to the plaintiff the amount which is found due to him, if the assets found to be in the executor's hands are sufficient for that purpose,—if not, then to the extent of such assets.”

There are usually two questions which arise in connection with the assumption of a jurisdiction in equity. *First*, why did equity assume the jurisdiction? This question is answered when the plain inadequacy of a remedy at law is shown. *Second*, what facilities did equity have for rendering that jurisdiction effective? The first question goes to the inducement, the second, to the capacity. In the instance of a creditor's bill against an executor, equity was able to cure the inadequacy of remedy at law by means of two of its most ancient panaceas, discovery and accounting. The latter, ordinarily an original jurisdiction, is made to subserve equity's present purposes by being auxiliary to the creditor's suit. The former, the bill of discovery seems to have acted as pivot upon which the jurisdiction to give the creditor a complete remedy was turned from law into equity. This is well brought out in the case of *Parker v. Dee*,<sup>24</sup> in the Court of Chancery in 1674. A creditor having first brought an action at law against his debtor's executor, and having been met with the plea of no assets, went into equity asking for discovery. The court not only granted discovery, but gave recovery on the debt. Said the court, retaining the bill,

“As to a dismissal to Law, because the Plaintiff hath a Discovery here, when this court can determine the Matter; it shall not be a Hand Maid to other Courts, nor beget a Suit to be ended elsewhere.”

It should be remembered that this was the bill of an individual creditor not for administration by the court and distribution of assets equally among all the decedent's credi-

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24. 1 Eq. Cas. Abr. 13, pl. 5. 2 Ch. Cas. 201.

tors,—this was a later development,—but for the recovery simply of his own debt.

This case was decided on the very eve of Equity's further extension of its jurisdiction over executors, which jurisdiction, as we shall see, formed the basis of the administration of decedents' estates by the court. I refer, in the present instance, however, to the suit by a legatee, against an executor, for the recovery of his legacy. The inadequacy of the remedy in the Spiritual Courts, which were by the Statute of Distributions,<sup>25</sup> 1670, given jurisdiction over the claims of legatees, was the same inadequacy which affected the claims of creditors. There was no way of effectively meeting the executor's plea of *plene administravit* by compelling him to render a full and proper accounting under oath. And it must be remembered that equity ever used a jurisdictional dragnet. Where a jurisdiction was once assumed, it was extended as far as the grounds for its assumption carried. Thus when equity had come to the assistance of a deceased debtor's creditor because the latter had no effective remedy against the executor, it was characteristic of it to render assistance to the decedent's legatee who was confronted with the same obstacles. If we speak of justification, however, we recur to the question of whether a dragnet method is justifiable. We shall confine ourselves to recording the fact by examining the early authorities.

A bill by a legatee was first allowed by Chancery in the case of *Pamplin v. Green*,<sup>26</sup> 1682, where a demurrer to the bill on the ground that the jurisdiction was in the Ordinary was overruled. The case of *Mathews v. Newby*<sup>27</sup> decided the following year is more interesting. A demurrer being interposed on the same grounds as in *Pamplin v. Green*, the Court in overruling it, reasoned, "that the Spiritual court in that case had but a lame jurisdiction, and there being no negative

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25. 22-23 Car. II, Ch. 10.

26. 2 Ch. Cas. 95.

27. 1 Vern. 133. See also, *Howard v. Howard*, 1 Vern. 134.

words in the act of parliament (22-23 Car. II, ch. 10) the bill for distribution was very proper." A new principle appears in the legatee cases, that of distribution. The ground upon which this principle rested was that a legatee was not entitled to receive his legacy until creditors' claims were satisfied, and had no prior right of satisfaction over legatees of equal rank. This reasoning had no application to the claims of creditors, the satisfaction of which had never in the English law been conditioned upon the satisfaction of other creditors' claims. How they were subsequently forced to yield to such conditions is a topic for later discussion.

Both Story<sup>28</sup> and Langdell<sup>29</sup> regarded the development in the case of legatees as contrary to the Statute of Distributions. But the court, seizing upon the fact that the Statute contained no negative terms, squeezed it a little tighter so that there was not much breath left in it. Professor Langdell says:—

"Suffice it to say that, in thus extending its jurisdiction, equity relied much upon the strong arm of the Court of Chancery (coupled with the weakness and unpopularity of the ecclesiastical courts) and little upon argument."

And it might be remarked that the modern judge who observes that the United States courts in appointing receivers to administer the assets of insolvent corporations are doing something whose justification appears not in the books, might fairly gasp had he lived in 1682 at the things his orthodoxy would not permit him to question today. He would have to yield himself up to the inevitable before the cases of *Vanbrough v. Cock*,<sup>30</sup> 1671, in which Chancery relieved against a sentence of the Spiritual Court, and *Bissel v. Axtell*,<sup>31</sup> 1688,

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28. Story, "Equity Jurisprudence," Section 739.

29. Langdell, Brief Survey, p. 156; Id. Cit. p. 155.

30. 29 Ch. Cas. 200.

31. 2 Vern. 47.

in which Chancery upset an entire distribution by the Ordinary, and, regarding the proceedings there as a nullity, decreed a new account of the whole estate.

The creditor's bill against the personal representative of a deceased debtor was destined to form the basis for a further extension of equitable jurisdiction, that over administration bills. Before noticing these, however, it is our plan to trace the growth of creditors' bills against living debtors, so that we may have before us a sketch of an individual creditor's remedies as developed by a court of equity antecedent to the court's assumption of any jurisdiction of administration and equal distribution.

The type of bill which is commonly denominated as the equitable execution bill, but which, as we shall have occasion to observe later, was an execution bill only in view of its final consummation, appears later in the history of the Chancery Court than either the creditor's bill against executors, or the creditor's bill, to set aside fraudulent conveyances. The original conception of it seems to have been in the legislature rather than in the courts. For it was enacted by Parliament in 1676,<sup>32</sup> as part of the Statute of Frauds, that it should be lawful for the sheriff at the suit of judgment creditors to levy upon "all lands, tenements, rectories, tithes, rents and hereditaments," of which a third person should be "seized or possessed of in trust for him against whom the execution is so sued." The effect of the Statute was to make subject to legal execution such interests as were enforceable in favor of the debtor only in a court of equity, and which had not yet been amenable by that court to the claims of the debtor's creditors. But the interests thus subjected to legal execution were limited to "lands, tenements, rectories, tithes, rents, and hereditaments," of which the third person held the seizin or possession in trust for the debtor. The Statute therefore had no effect upon chattels or chattels real held in

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32. Statute 29 Car. II c. 3, X. (1676).

trust for the debtor, for these were not among the interests enumerated; nor upon reversions, and equities of redemption, of which the trustee did not have the seizin; nor upon implied trusts.

The right thus given by the Statute of Frauds to the creditors of the cestui que trust was the correlative of the right denied by the Court of Chancery to the creditors of the trustee against the property. In the view of the Court of Chancery the trust attached to the res in the hands of any but bona fide purchasers for value without notice of the trust.<sup>33</sup> As the legal estate was thus protected against the claims of creditors of the trustee, it was equally just that the equitable interest should be made available to the creditors of the cestui que trust.<sup>34</sup> It was therefore quite natural that in those cases where the judgment creditor had no execution at law against the equitable estate of his debtor under the Statute of Frauds, that the Court of Chancery would at the judgment creditor's suit give him the same satisfaction against such equitable interest, as he would have been entitled to at law had the estate of his debtor been legal.

Accordingly we find in the latter half of the Seventeenth Century and the first half of the Eighteenth Century a well defined jurisdiction of Chancery to make the equitable assets of a debtor available to satisfy his creditors. In *Smithier v. Lewis* (1686),<sup>35</sup> and *Angell v. Draper* (1686),<sup>36</sup> the plaintiff prayed discovery of personal assets conveyed by his debtor to a trustee, and application of the assets to the satisfaction of the plaintiff's debt. The bill was allowed in the former case, but dismissed in the latter because the plaintiff had not sued out execution at law, a defense which we shall notice a little later. In *King v. Dupine* (1744) the plaintiff, a judgment creditor, obtained the sale of the reversionary interest

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33. *Saunders v. Dehew*, 2 Vern. 271; *Pye v. George*, 1 P. W. 129.

34. Spence, *Equitable Jurisdiction*, Vol. I, p. 40.

35. 1 Vern. 398.

36. 1 Vern. 399.

in shares of stock to satisfy her debt.<sup>37</sup> In *King v. Marissal* (1744),<sup>38</sup> the plaintiff was permitted to redeem the defendant, the mortgagee of plaintiff's judgment debtor. In *Shirley v. Watts* (1744),<sup>39</sup> the same relief was denied because the plaintiff had not sued out execution at law.

Executions against a debtor's interest in choses in action present an anomalous case. Choses in action, though legal in nature, were not assignable at law.<sup>40</sup> Equity, however, regarded an attempted assignment as a contract by the assignor to permit the assignee to use his name for the purpose of recovery, and gave specific performance of the contract.<sup>41</sup> It followed normally that legal execution could not run against an interest which the common law could not transfer, and that it was left to equity to subject choses in action to the claims of creditors.<sup>42</sup> But what if the debtor's interest in the chose in action were itself equitable? In *Horn v. Horn* (1749)<sup>43</sup> Lord Hardwicke intimated that a judgment creditor might obtain satisfaction against the equitable interest of the debtor in a chose in action, a public stock. The intimation, however, was dictum, inasmuch as the creditor had been disqualified by taking out execution against the person of the debtor. The doctrine, however, was repudiated by Lord Thurlow, who said forty such opinions as that in *Horn v. Horn* would not satisfy him,—this in the case of *Dundas v. Dutens*,<sup>44</sup>—and by Lord Manners in *M'Carthy v. Gould*,<sup>45</sup> and *Grogram v. Cooke*.<sup>46</sup> The law was finally settled by the decision of Lord Eldon in *Bank of England v. Lunn*<sup>47</sup>

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37. Reg. Lib. A. 1744, fol. 91, note, 26 English Reports Reprint, p. 760.

38. 3 Atk. 192.

39. 3 Atk. 200.

40. 10 Co. 47.

41. 1 Bouvier 483.

42. *Edgell v. Haywood*, 3 Atk. 352.

43. *Ambler* 79.

44. 2 Cox 240.

45. 1 Ball & B. 390.

46. 1 B. & B. 233.

47. 15 Ves. 577.

to the effect that equitable interests in choses in action were not subject to equitable execution. This effects the result of equity once more following the parallel of the law, that is, inasmuch as a law admitted of no execution against legal choses in action, neither would equity against equitable choses in action. It is regrettable, however, that the Chancellors thus repudiated their control over interests which they had themselves created.

The law in England seemed to have reached the limit of its development with *Horn v. Horn*, so far as Courts of Chancery were concerned. It was not until the Statute of 1 and 2 Victoriae, 110,<sup>48</sup> that equitable execution was made to reach all the debtor's equitable assets, including his equitable interest in choses in action. This Statute abolished execution against the persons of debtors, and gave this rather complete and effective form of execution as a mode of compensation.

Suffice it here to observe that the English development of creditors' bills to reach the debtor's equitable assets, was early recognized and adopted in America by Chancellor Kent in *Spader v. Davis*<sup>49</sup> and *Bayard v. Hoffman*,<sup>50</sup> in which it was held that fraudulently alienated property was subject to execution in equity, whether subject to execution at law under the Statute of 13 Elizabeth, or not. Pomeroy<sup>51</sup> and Bispham<sup>52</sup> have collected a maze of authorities sustaining the jurisdiction of equity over equitable execution bills.

It is to be noted that a clear distinction appears between the creditor's bill against living debtors, and that against the representative of a deceased debtor, in the prerequisites of suit. Only a judgment creditor with execution unsatisfied may bring an equitable execution bill, whereas the simple creditor of a decedent has equitable rights against the executor.

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48. The Statute of 1-2 Victoriae is sometimes known as the Judgment's Act.

49. 5 Johns. Ch. 280.

50. 4 Johns. Ch. 452.

51. Pomeroy, *Equitable Remedies*, Section 879.

52. Bispham, *Principles of Equity*, Section 526, n.

The early cases of *Shirley v. Watts* and *Angell v. Draper*, in which equitable execution was denied because judgment and execution at law had not been had, announce the doctrine that the plaintiff in order to obtain a right of realization in equity must have a property right in the debtor's assets. And this is the classical explanation of the requirement.<sup>53</sup> It seems to the writer, however, that this can at most be an insufficient reason. For assuming that the theory accounts for the requirement of judgment, it does not, of itself at least, account for the requirement of execution, which in theory issues after the property right has attached, and constitutes the first step in a realization of the debt from the debtor's assets under that right. But waiving the sufficiency of the explanation, let us test its soundness in the case of the requirement of judgment. The judgment admittedly creates a lien on the debtor's legal property to the extent of the amount of the judgment. But can it create a property right of any kind whatsoever against the equitable property of the debtor in favor of the creditor, when the law court itself is powerless to render a judgment affecting that property in favor of the debtor himself? It seems to the writer that equity is doing more than enforcing a right of realization against the equitable property of the debtor,—it is creating the equitable right to satisfaction from the equitable property as well as giving the satisfaction.

The more simple and yet, as it appears to us, the more adequate explanation of the prerequisites of judgment and execution unsatisfied to the bringing of a creditor's bill to obtain equitable execution is that of Bispham.<sup>54</sup> This explanation is to the effect that a man must first exhaust his legal remedies, before he seeks equitable relief. Consistently with this view, and inconsistently with the property right theory, priority of invocation of equitable relief, and not

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53. Glenn, *Creditors' Rights*, p. 6.

54. Bispham, *Principles of Equity*, Section 527. See also Cotton, L. J., in *In re Shephard*, 31 Ch. D. 131, 135, and Story on Equity, Section 829.

priority of attachment of judgment liens at law, determines the order of realization of the various creditors' claims.

But the question still remains, why did equity permit the simple creditor to sue the representative of his deceased debtor, and extend its relief to judgment creditors only in the case of living debtors. The answer appears to be that the inadequacy of remedy at law in the former case went to the very establishment of the claim itself, while in the latter case it went only to the right of satisfaction out of the equitable assets. In the former case, the difficulty was absolute, while in the latter case it was contingent upon there being no assets at law. The absence of assets at law was a condition of equity giving its relief, and this must be affirmatively shown by an exhibit of judgment and execution unsatisfied.

The requirement of judgment and execution prior to the bringing of an equitable execution suit was not technically imposing a multiplicity of suits, since the existence of any relief whatsoever in equity was contingent until the legal action was consummated. But it is clear that, if the equity court were endowed with the functions of the law court to render judgment on the claim, in addition to its own functions to subject the debtor's equitable property to execution under the judgment, the procedure would be very much simpler. However, as this involves the substantive, and not the adjective, distinction between law and equity, the dual actions are still necessary under the Judicature Act in England, and the American Codes of Procedure. The English courts have gone so far, however, as to say that under the Judicature Act of 1873,<sup>55</sup> which provides for the concurrent administration of law and equity, the appointment of a receiver in respect of equitable interests in land or personality is equivalent to execution under a writ of *elegit*<sup>56</sup> or *feri facies*<sup>57</sup> against legal interests respectively in land or per-

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55. Statute, 36 & 37 Victoriae, Ch. 66, Section 25 (8).

56. Ex Parte Evans, 13 Ch. Div. 260. Re Pope, 17 Q. B. D. 749.

57. Coney v. Bennett, 29 Ch., D. 993.

sonality. There the suing of execution is considered a "useless and absurd form."

This brings us, almost before our desire, to the discussion of the receivership institution. To those of us who stand at the end of the first quarter of the Twentieth Century the word "receivership" calls forth impressions of huge corporations in embarrassed circumstances being administered in court. But it must be remembered that this receivership has never been exercised in England,—at least on the same foundation as in America,—and that its appearance is of comparatively recent origin. For the time being the writer desires to keep this modern type out of view, and to examine the earlier type of receivership leading up to, and embracing, the receivership employed in the enforcement of the decree of equitable execution.

The antiquity of the receivership institution in the history of the English Court of Chancery has been a matter of comment,<sup>58</sup> it having been accredited to the reign of Edward VI.<sup>59</sup> Spence says that receivers of rents and profits were very common in the reign of Elizabeth,<sup>60</sup> and cites two early cases to the effect. In *Jordan v. Armes* (1588)<sup>61</sup> a receiver of real and personal estate was appointed pending a trial at law determining the title to it. In an Anonymous Case (1590)<sup>62</sup> a receiver of a moiety of the profits of a theater was appointed pending adjudication of the plaintiff's right.

A leading English authority<sup>63</sup> has described a receiver as follows:

"A receiver in an action is an impartial person appointed by the court to collect and receive, pending the proceedings, the rents, issues and profits of land, or the produce of personal

58. 23 Ruling Case Law 32; *Blum v. Girard National Bank*, 248 Pa. St. 148.

59. 23 Ruling Case Law 32.

60. Spence, *Equitable Jurisdiction*, Vol. I, p. 673.

61. Reg. Lib. 5 P. & M. fol. 48.

62. Anonymous, Reg. Lib. A 1590, fol. 109.

63. Kerr, *Receivers*, VI Ed. p. 3.

estate or other things in question, which it does not seem reasonable to the court that either party should collect or receive, or where the party is incompetent to do so, as in the case of an infant. A receiver can only be properly granted for the purpose of getting in and holding or securing funds or other property, which the court at the trial, or in the course of the action, will have the means of distributing amongst, or making over to, the person or persons entitled thereto.”

Cases in which “it does not seem reasonable to the court that either party should collect or receive” the issues of the property embrace those between vendor and purchaser, covenantor and covenantee, life-tenant and remainder-man, tenants in common, partner, mortgagor and mortgagee, and debtor and creditor. Cases “where the party is incompetent” to collect or receive, embrace those where the party is an infant or a lunatic. This grouping is by no means exhaustive, but is intended merely to sketch the setting of the debtor-creditor receivership cases; the reader being referred to the treatment given the subject by Kerr for an exhaustive analysis of it.<sup>64</sup>

While confining ourselves to the receiverships in equitable execution suits, viz., receivers in the case of the simple debtor-creditor relationship, it is nevertheless necessary to bring within the compass of our discussion the receiverships granted at the instance of the mortgagee. Our doing this will have a dual purpose, first, of clearly distinguishing the ground on which the two types respectively rest; secondly, and more remotely, of laying a foundation for certain remarks we shall have to make concerning the development of the modern type of corporate receivership.

There was a well defined doctrine that a junior or equitable mortgagee of property, might, in event that the prior mortgagee were not in possession have a receiver appointed,

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64. Kerr, Receivers, VI Ed. pp. 15-122.

without prejudice to the rights of the first mortgagee to take possession.<sup>65</sup> This doctrine is without application to a prior mortgagee or sole mortgagee, because he had adequate relief at law by entry upon condition broken.<sup>66</sup> Plainly, relief is here granted by virtue of the fact that the plaintiff has a property right. But this ground will not support the appointment of a receiver at the instance of a judgment creditor over the debtor's equitable assets, because the creditor has no property right over those assets. While our discussion of the requirement of judgment and execution to the bringing of an equitable execution bill involved a rejection of the property right theory in deference to something else, an analysis of the subject of receivers in such suits demands this rejection, in order to enable us to distinguish between two types of receivership. It seems to be the undisputed fact that before modern statutory developments the lien of a judgment at law did not extend to equitable assets.<sup>67</sup> A receiver was, therefore, appointed in an equitable execution suit not on the ground on which he was appointed in the mortgagee's suit, namely that the plaintiff had a property right which it was necessary to protect; but on the ground that the property out of which the court was called upon to give the plaintiff satisfaction, ought to be protected pending the decree.

But before going further in our analysis of what the court is doing, let us trace the development of the doctrine of receiverships in equitable execution bills. That the universal method for enforcing decrees in favor of judgment creditors was by way of a receiver,—is by no means true.

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65. *Tansfield v. Irvine*, 2 Russ. 151-2; *Dalmer v. Dashwood*, 2 Cox 383; *Davis v. Duke of Marlborough*, 2 Sw. 137; *Berney v. Sewell*, 1 J. & W. 648; c f. *Spence*, *Equitable Jurisdiction*, Vol. II, p. —, Kerr, *Receivers*, VI Ed. p. 41.

66. *Berney v. Sewell*, 1 J. & W. 648; *Sturch v. Joung*, 5 Beav. 557; *Cremen v. Hawkes*, 2 J. & L. 680.

67. *Scott v. Schooley*, 8 East 467; *Metcalf v. Schooley*, 5 Bos. & Pul.; Especially, *Lyster v. Dolland*, 1 Ves. Jr. 431; 12 Am. and Eng. Encyc. of Law 107, and cases there cited. *Cummings v. Duncan*, 22 N. D. 534.

That it was, however, a frequent practice of the court to appoint a receiver in equitable execution suits seems to be sustained upon an examination of the authorities. The ground usually given for such procedure is that the equitable property is subject to a prior legal title and that the adjustment of rights arising from this circumstance requires the intermediation of the indifferent personality of the receiver. Thus in *Curling v. Marquis Townshend*,<sup>68</sup> Lord Eldon said, "It has long been settled, that, if a judgment creditor takes execution, and finds the estate protected by circumstances respecting a prior title, he may apply for a receiver."

The case of *Curling v. Marquis Townshend*, usually considered a leading case on this subject, presents an interesting state of facts. Plaintiff was a creditor of defendant in the amount of £2000 to secure which defendant gave his bond for £1000, and a post-obit security, charging his expectancy from his father's estate to secure the other £1000. Upon default of payment of the debt thus secured, plaintiff obtained judgment at law, and, since the expectancy had not been realized and execution was returned unsatisfied, plaintiff applied in equity for a charge upon the estate in expectancy to arise out of the post-obit security, and also satisfaction out of the expectancy of the £1000 which was not secured by any charge upon property, and for a receiver of the estates when they should come into existence. The bill was allowed in toto by Lord Eldon on the grounds above given. There is further interest in the case by virtue of the fact that the defendant's father died during the pendency of the bill. Although execution at law might now have been obtainable against the estate, the Chancellor retained the bill. Once more we see equity refusing to relinquish a jurisdiction which had validly attached, even though the peculiar reason for its existence was gone. Another interesting case is that of

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68. 19 Ves. Jr. 628.

*Blanchard v. Cawthorne*,<sup>69</sup> in which a receiver was granted, at the suit of a judgment creditor, of the benefits of the office of master forester, which the debtor held under a royal patent. Here there was a clear inability of legal execution to reach these benefits.

The commentators on receivers are unanimous in the statement that it was the frequent practice in classical English Chancery to grant receivers at the suit of judgment creditors.<sup>70</sup>

The American Cases on the subject, too, are unequivocal. In New York the Court of Errors in *Hadden v. Spader*, (1822)<sup>71</sup> definitely settled the power of Courts of Chancery to assist a judgment and execution creditor in reaching equitable assets. It was a mere piece of codification to embody this remedy in the Revised Statutes of 1829.<sup>72</sup> The normal development of the remedy in equity was not however thereby impeded. Said an early New York Authority<sup>73</sup> on receivers referring to the provisions of R. S. 1829:—

“It will be apparent that such an officer as a receiver must generally be required under the above statute; and the appointment has been of daily occurrence. It has been declared to be a matter of course where the equity of the complaint is not denied upon the hearing of the application.”

In *Osborn v. Heyer* (1831)<sup>74</sup> of two judgment creditors, each filing suit to reach equitable assets, the one had applied for an injunction against the debtor's disposition of the assets, the other for a receiver. It was held that the injunction in the earlier suit should be dissolved in order to permit the

69. 4 Sim. 566.

70. Bennett, Receivers, London 1849, p. 59; High, Receivers, Section 399; Kerr, Receivers, VI. Ed. p. 53; Woodroffe, The Law Relating to Receivers, Calcutta 1919, p. 139; 4 Eng. & Am. Encyc., Law 576; Story on Equity, Section 829.

71. 20 Johns. 554.

72. R. S. of N. Y., First Revision, 1829, Vol. 2, p. 174, Sec. 39.

73. Edwards on Receivers, New York, 1857, p. 398.

74. 2 Paige Ch. 342.

receiver in the second suit to take over the assets. It is not clear whether the creditor in the first suit was to receive a prior satisfaction out of the assets coming into the receiver's hands or not, but the duty of the judgment creditor seeking equitable relief to make immediate application for a receiver is expressly affirmed. In *Bloodgood v. Clark* (1834),<sup>75</sup> the leading case in New York, Chancellor Walworth said:—

“In these cases of creditors' bills where the return of the execution unsatisfied presupposes that the property of the defendant, if any he has, will be misapplied, and entitles the complainant to an injunction in the first instance, it seems to be almost a matter of course to appoint a receiver to collect and preserve the property pending the litigation.”

In *Cagger v. Howard* (1846)<sup>76</sup> the court gives definition to one of its court rules to the effect that the same receiver would be appointed in separate suits brought by separate judgment creditors against the same debtor. Here is something approaching administration and distribution of a fund. Other early New York cases are cited in a note.<sup>77</sup> In Illinois courts, under a statute granting and regulating the bringing of equitable execution suits similar to the New York statute, the New York rule as to receivers is expressly followed.<sup>78</sup>

Two interesting situations, in which creditors' bills operate effectively are presented in the New Jersey case of *Kuhl v. Martin*<sup>79</sup> and the Virginia case of *Smith v. Butcher*.<sup>80</sup> In the former case, a receiver was appointed of property which was being subjected to execution at law, on the theory that its sale upon execution would mean its sacrifice, whereas the sale under the direction of the equity court would prob-

75. 4 Paige Ch. 574.

76. 1 Barb. Ch. 368.

77. *Sylvester v. Reed* (1839), 3 Edw. Ch. 296; *Congdon v. Lee* (1839), 3 Edw. Ch. 304; *Sanford v. Sinclair* (1840), 8 Paige Ch. 372; *Lent v. McQueen* (1857) 15 How. Pr. 131; *Heroy v. Gibson* (1862) 10 Bosw. 591.

78. *Gage v. Smith*, 79 Ill. 219.

79. 26 N. J. Eq. 60.

80. 28 Gratt. 144.

ably bring in sufficient money to satisfy the judgment lien at law with a surplussage to be applied to the plaintiff's claim. In the Virginia case a receiver was appointed at the instance of a judgment creditor over property subject to various liens, in order that their priorities be fixed, and the residue be made available for satisfaction of plaintiff's claim. A Tennessee Statute<sup>81</sup> vested its courts with power to appoint receivers "whenever necessary to the ends of substantial justice," not however without adding, "in a like manner as receivers are appointed by Courts of Chancery." Under such a statute the right of judgment creditors with executions unsatisfied has been affirmed.<sup>82</sup>

We turn once again to the final developments in England of the law of receivers in equitable execution suits. By the Judicature Act of 1873<sup>83</sup> provision for the appointment of receivers was made in the terms following:—

"A Mandamus or an injunction may be granted or a receiver appointed by an interlocutory Order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made."

Suffice it to say that under this Statute, all embracing in its character, receivers have been frequently employed in creditors suits. Numerous cases arising under this act are collected herein.<sup>84\*</sup>

NOTE.—\*Because of the length of this article it has been necessary to publish it in installments. The balance of the article will appear in No. 3, April, 1924.—Ed.

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81. Statutes of Tennessee, 1871, Vol. 2, Section 3768.

82. Johnson v. Tucker, 2 Tenn. Ch. 398.

83. Statutes at Large, 36 & 37 Victoriae, Ch. 66, Sec. 25 (8).

84. Ex Parte Evans, 13 Ch. D. 260; Re Pope, 17 Ch. D. 749; Re Witeley, 56 L. T. 846; Arden v. Arden, 29 Ch. D. 702; In re Shephard, 43 Ch. D. 137; Codogan v. Lyric Theater, 1894, 3 Ch. 338; Morgan v. Hart, 1914, 2 K. B. 183; See also the Irish Practice, 43 Ir. L. T. 233 and cases cited, 43 Ir. L. T. 239 and cases cited, 47 Ir. L. T. 197 and cases cited, 48 Ir. L. T. 159 and cases cited.