

## EXECUTIONS AT COMMON LAW.

The procedure by which the successful party in a civil action is enabled to obtain satisfaction of his judgment from a recalcitrant opponent has a long and interesting history. The common law writs designed for this purpose were formulated at a period when seigniorial and family claims were slowly yielding to the demands of commerce; indeed, so far as lands were concerned, they long represented the limits of concession. But their simplicity of form has stood the test of time, so that while original and *mesne* process has undergone a complete transformation, final process both in England and the United States bears a close resemblance to its mediæval ancestor.

The ancient law differs from the modern in its view of the conduct of a defaulting debtor and his relation to his property. Failure to pay is an offense exposing him at the very early law to private vengeance, to death or slavery. But it is the person of the debtor and his movables, or personal property, that answer for his debts; lands are not sufficiently his own to be reached by his creditors, they belong to the family or tribe rather than the individual—"He who has only immovables is insolvent."<sup>1</sup> Much of the history of final process is summed up in the overthrow of these ideas.

In its most primitive form execution consisted in the seizure of the wrongdoer, *damage feasant* as it were, by his creditor, to whom his body belongs. Indeed the Roman law of the twelve tables, harsh as it may seem, was favorable to the debtor, inasmuch as it enabled him to avert or, at least, postpone his fate. After judgment the debtor was allowed thirty days to satisfy the claim. If he failed the creditor laid hands on him (*manus iniectio*), and brought him before a magistrate. If he could find no surety (*vindex*), his person was adjudged (*addictio*), to the

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<sup>1</sup> German maxim quoted by Brissaud, History of French Private Law, American Law School edition, 582. See also 560 and authorities cited.

plaintiff who could imprison him in his house for sixty days, during which time the amount of the debt was proclaimed on three market days. Then if no one redeemed him, the creditor could sell him as a slave or kill him. If there were several creditors, they could divide him between them and if one cut too much or too little he was not to be accountable.<sup>2</sup> Fortunately there was available that other form of self help, distress (*pignoris capio*), available to the creditor who preferred property to a pound of flesh, and long before the Christian era a procedure not unlike modern bankruptcy was introduced (*Missio in possessionem*). Execution against the person, however, remained as a possible remedy in many cases, although rendered uncommon under the Empire by the frequency of *cessio bonorum*, the voluntary surrender of the debtor's assets, regulated by a law of Julius Caesar.<sup>3</sup>

Early Germanic customs were also severe. The Salic law, t. 58, required the one who owed weregeld to be presented at four successive courts, and, if no one paid for him, he paid with his life. Slavery is the normal fate of the insolvent; in Anglo-Saxon England will be found the wite-theow, reduced to slavery because he cannot pay his debts.<sup>4</sup> But the church is opposed to slavery and, indeed, to the landless money lender a hungry slave would hardly be a profitable investment; before the end of the Frankish period it seems to be generally admitted that the debtor is neither to be killed, mutilated or sold.<sup>5</sup>

An ancient form of self help destined to enjoy a longer history was private distraint by which the creditor seized the chattels of the debtor as security for payment. The purpose of distress, however, was to bring compulsion upon the person distrained, who is to be forced thereby to perform his duty.<sup>6</sup> The distrainer may not appropriate the article seized (*namium*), nor

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<sup>2</sup> "Tertius, inquit, nundinis partis secanto, Si plus minusve secuerunt, se (sine) fraude esto." Aulus Gellius, 20, 1; Poste's Gaius (2nd Ed.), 344, 506; Hammond's introduction to Sandar's Justinian, p. 8.

<sup>3</sup> Caes. Bel. Civ. III, 1; Ferrero II, 236.

<sup>4</sup> Stubb's Const. Hist. Eng. 1, p. 84.

<sup>5</sup> Brissaud, 566.

<sup>6</sup> Bigelow, Hist. Proc. 202; Bradby on Distress, 1.

may he sell it, he keeps it in his custody as a pledge (*vadium*), but not as a satisfaction of the debt. But this method of taking justice into one's own hands even before the Norman conquest has come under restrictions intended to prevent violence, and, is finally subjected to a formal procedure. "No burgess of the town," says the Ipswich custumal, "may distrain another burgess of the same town of his own authority for trespass done or debt due, but must complain to the bailiffs of the town in due form of law."<sup>7</sup> True, a burgess could for some time longer distrain his foreign debtor without official sanction, and the landlord or his bailiff may, in some jurisdictions, still exercise this ancient privilege upon the goods of the tenant, whose rent is in arrear. But in general, English law tended strongly toward the repression of self help by attaching to such action restrictions and formalities that made it perilous, thus inducing a resort to the courts of law.<sup>8</sup> Distress is, however, the normal, and in some proceedings the only method, by which the early courts may compel obedience to their writs short of outlawry; the writ of *distringas* has had a long and useful career, not yet completely closed.

If little is said by the early writers on the common law about final process, it may be for the reason that the really serious procedural problem of the time was to get a dilatory or contumacious party into court at all. Custom forbade that one should be judged in his absence. The defendant was summoned and his *essoins*, or excuses, allowed with infinite patience from term to term, for those were days when no one went on a journey without settling his affairs and making his will. But if the default was inexcusable then the sheriff must endeavor to make him find sureties and as last resort take possession of his property, impound it, as we would still say, as a means of compelling obedience.<sup>9</sup> As for the creditor, he should have taken pledges or sure-

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<sup>7</sup> Ipswich Custumal, c. 42 (1291), Borough Customs, S. S. Vol. 1, p. 109, where see also the customs of Newcastle on Tyne and Bury. Compare Paris Ancienne Coutume, 192, and Bohun's Privilegia Londini (3rd Ed.), 253.

<sup>8</sup> 2 Pollock & Maitland, 572; Maine's Early History of Institutions, 279.

<sup>9</sup> Mirror, Bk. 4, Ch. 8; 2 Reeve's Hist. Eng. Law, 261. "The law wants to be exceedingly fair, but is irritated by contumacy. Instead of saying to

ties in the first instance. In the King's Courts the majority of cases relate to seisin of land and if judgment is for the demandant it is enforceable by the writ of *habere facias seisinam*, commanding the sheriff to deliver seisin, and except that the similar writ in ejectment is for possession, there is little to distinguish Glanville's writ<sup>10</sup> from that in use today. There are also judgments designed to afford specific relief in a manner not unlike that given later in chancery when damages had become the panacea of the common law courts.<sup>11</sup> But in most cases, in the earlier period, the final enforcement of the court's order is by distraint; such continued to be the practice in detinue;<sup>12</sup> such continued to be the practice in the local courts, those repositories of ancient usage, where, in the absence of a special custom to the contrary, execution was only by distress and impounding.<sup>13</sup>

It must not be supposed that because the law moved slowly, the defendant could defy the court with impunity. Amercements were unsparingly inflicted by all the courts, royal and seigniorial; the party in default was amerced, as well as his unfortunate pledges, every defeated litigant in the royal courts, whether the action was real or personal was, as a matter of course, "*in misericordia*" for his false claim or unjust detention. This in Henry II's time was no light matter,<sup>14</sup> it required an article in Magna Charta to establish the principle that amercements were to be "affeered" by the oaths of honest men of the neighborhood<sup>15</sup>

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the defaulter 'I don't care whether you appear or no,' it sets its will against his will. 'But you shall appear.' To this we may add that the emergence and dominance of the semi-criminal action of trespass prevents men from thinking of our personal actions as mere contests between two private persons. The contumacious defendant has broken the peace, is defying justice and must be crushed." 2 Pollock & Maitland, 593.

<sup>10</sup> Compare Glanville, Book 13, Ch. 8, with 2 Annual Practice (1910), p. 112.

<sup>11</sup> Glanville, Book 8, Ch. 5; the Court Baron (S. S.). p. 115.

<sup>12</sup> 3 Blackstone's Commentaries, 413; 2 Annual Practice (1910), p. 113.

<sup>13</sup> 22 Lib. Ass. 72; 4 Hen. VI, 17; Tyre v. Burgh, Noy. 17 (1606); Doe v. Parmeter, 2 Lev. 81 (1673); Simpson v. Merrill, Carth. 52 (1688); Finch, Bk. 4, Ch. 46; Kitchin on Courts Leet (1675), 229. But the writ *de executioni judicii* enabled the sheriff and bailiff to sell. Gilbert on Executions (2nd Ed.), 5; Fitzherbert N. B. 20. And see 3 Blackstone's Commentaries, 14; Act of 10 Geo. III, Ch. 50.

<sup>14</sup> Dial. de Saac., Bk. 2, Ch. 16.

<sup>15</sup> 9 Hen. III, Ch. 14, 1 Stat. at Large, 6.

and it was long before the customary fines, settled by the honest men, passed, owing to changes in the value of the currency, from a petty exaction to a mere phrase in the judgment. Then, when the writ of trespass comes into use in the reign of Henry III, the sheriff may be commanded to take the defendant (*capias*), for he is charged with a breach of the King's peace *vi et armis*. Moreover the *mesne* process by which the defendant is brought into court has in view ultimate security for obedience. Bracton outlined what to his mind at least seemed the orderly process of compulsion: Summons, two attachments, *habeas corpus*, three distrains, the last a seizure by the sheriff of all the lands and chattels "*in manum domini regis*," the officer being answerable for the profits to the Crown, and, lastly, exaction and outlawry; but persons so outlawed, Bracton suggests, ought not to lose life or limb as those outlawed for crimes, but to suffer imprisonment or abjure the realm.<sup>16</sup>

But what was to be done for the plaintiff? Should he lose the effect of his suit while the King enjoyed the profits of the fugitive's property? Business would hardly be drawn into the royal courts on terms that did admit of some advantage to the creditor. Bracton suggests that it would be right to award to the creditor seisin of the chattels, but on looking at the Note Book it will be seen that the King's judges are already finding a way out of the difficulty by directing the sheriff to make the debt out of the sequestered property and return it to court for the benefit of the creditor.<sup>17</sup> A case of the year 1224 from Worcester will illustrate the practice.<sup>18</sup>

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<sup>16</sup> Bracton, f 440; Finalson's Reeve's Hist. Eng. Law, Vol. 2, p. 261. It is pointed out by Pollock & Maitland (Vol. 2, p. 591, note) that the *habeas corpus* between attachment and distress was not such an arrest as took place under the subsequent *capias* by which the sheriff was directed to take and safely keep the defendant. The *habeas corpus*, it is suggested, was a precept to arrest the defendant when court day was approaching in order to bring him before the court. The statutes of Mariebridge, Ch. 12, and Westminster I, Ch. 45, cut out the proceedings between first attachment and grand distress leaving the process as described by Britton, I, 125. The later form of *distringas* contained a clause of *habeas corpus*.

<sup>17</sup> Bracton's Note Book, cases 352, 469, 559, 613, 694, 709, 732, 837, 925.

<sup>18</sup> Bracton's Note Book, Case 900, Vol. 2, p. 694.

The Abbot of Gloucester presented himself on the fourth day<sup>19</sup> against Robert Nel of a plea that he render fifteen marks which he owes to him and unjustly detains as he says, *etc.* And Robert did not come and made several defaults, so that at the last day it was ordered that the sheriff should distrain him by lands and chattels, *etc.*, in that he has withdrawn himself, *etc.* And the sheriff sent word that he has taken his land and chattels into the hands of our Lord the King, to wit: his corn crop of this year and five oxen. Therefore by consideration of the court the sheriff is directed that of the lands and chattels he make the moneys and have them on the octave of St. Martin to render, *etc.*

What the sheriff did and how Robert fared we are not told. If he must sink into the class of broken men, let him be thankful that he is not to be escorted through the streets with derisive horns or condemned, as in France, to wear thereafter the infamous "bonnet vert" of the bankrupt.<sup>20</sup>

In that golden age of writ making the directions to the sheriff will crystalize naturally into common forms. Hence the writ of *levari facias*, whereby the sheriff may seize the defendant's goods and receive the rents and profits of his lands until satisfaction be made to the plaintiff, a writ that soon falls into disuse, except for ecclesiastics,<sup>21</sup> and the writ of *feri facias*, the most familiar and permanent of all writs of execution, by which the sheriff takes and sells the goods and chattels of the defendant until he has raised enough to pay the judgment. But the sheriff is a magnate, or the friend of magnates, who delegates most of this sordid business to bailiffs and deputies. Perhaps he is unwilling to proceed against an influential debtor. Already in Bracton's time a series of writs has been invented to compel him to perform this unwelcomed duty; and, if he fears to enter the franchise of a noble, the *non omittas* clause will be added and he

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<sup>19</sup> The person summoned had three days of grace beyond the day named in the writ. 3 Blackstone's Comm. 278. Ancient Germanic custom required a triple summons, Tacitus, Germ. c. 11; Lex Salica, 50, 2; 74. The venerable *quarto die post* is still respected in Pennsylvania, 1 Tr. & H. Pr. (5th Ed.), §275.

<sup>20</sup> Brissaud, §412.

<sup>21</sup> 3 Blackstone's Comm. 418. In Pennsylvania a statutory writ, devised in 1705 for the sale of mortgaged land, is called a *levari facias*, but has little resemblance to the common law writ.

may then go with sufficient knights and free men of the county. But he must not disturb the house peace by breaking outer doors, for the banished Hearth God still protects his neglected altar.<sup>22</sup> If he be minded to keep the goods himself, returning covinously that they are unsold for want of buyers, the *venditioni exponas* issues and sell he must, he cannot even keep the goods and return the amount of the debt.<sup>23</sup> But centuries will pass before the sale must be at public auction, for the high-sheriff is not obliged to cry the wares, and, if the parties would have an auctioneer, they must pay for him.

So far the law has protected real property from seizure or sale by the judgment creditor. A precocious individualism will, in time, give to the English property owner greater powers of disposition, as against his family, than are enjoyed by his continental neighbor,<sup>24</sup> but the feudal principles of land tenure are too deeply ingrained to permit landed estates to be regarded as assets for debts. The lord is not to have a stranger thrust into the fief against his will.<sup>25</sup> As would be expected the first departure from the old law is by the merchant class in respect to their burghage tenements. It was not uncommon for debtors to appear in a court of record, or in chancery, and there acknowledge a writing obligatory which would be enrolled as a record of the court, in other words, a recognizance upon which an ordinary execution might issue after default.<sup>26</sup> In the famous statutes of *Acton Burnell* and *de Mercatoribus*<sup>27</sup> Edward I gave recognition

<sup>22</sup> Wilda, *Strafrecht*, 241; *Semayne's Case*, 5 Co. 91 (1605).

<sup>23</sup> *Waller v. Weedale*, Noy. 107 (1604).

<sup>24</sup> The custom of *retrait lignager*, common enough on the continent, *Brisaud*, §221, is rare in England, 1 P. & M. 632.

<sup>25</sup> The Jewish money lender could not do homage or fealty, as the privilege of swearing on the Pentateuch was not extended to the ceremony of investiture. *Select Pleas of Jewish Exchequer* (S. S.) xiii.

<sup>26</sup> At common law if the conusee did not take out execution within a year, he was obliged to bring suit. The Statute Westm. II, c. 45, gave a *scire facias*. 2 Co. Inst. 468.

<sup>27</sup> 11 Edw. I and 13 Edw. I, St. 3 (1283-1285), see *Jenk's Edward I*, 1 *Select Essays Anglo Amer. Leg. Hist.* 140. The *Mirror*, Bk. 5, Ch. 7, attacks the new Statute of Merchants on the ground that imprisonment except for "forcenous judgment" is a sin. See further the Act of 23 Hen. VIII, c. 6, providing for recognizances in the nature of statutes staple.

to the new principles of commercialism by extending the power to take recognizances to the mayors and city officials, and providing an expeditious procedure by which the debtor, if he failed to pay, could be imprisoned and his chattels and "burgage" tenements delivered to him to be sold. If the sale was not effected within a certain time, then all his goods and lands were to be delivered to the creditor at a reasonable appraisement, or extent, until out of issues the debt was paid. Somewhat later the *Statute of the Staple*<sup>28</sup> conferred similar powers on mayors of staple towns and provided that on default, body, lands and goods could be taken under one writ, the *extendi facias*, and the land delivered (*liberate*), at its appraised value. These remedies were used not only by the merchants for whom they were intended but by all classes of society until a more flexible procedure and modern methods of securing commercial credit had rendered them obsolete. But the *extendi facias* has American cousins. Land in New England is "extended" to the creditor at an appraisal. In Massachusetts final process is, in form, directed against the goods, lands and person of the debtor.

But burgesses are not alone in seeking credit; the land owner is a borrower and the high rate of interest he is charged shows how slightly the personal liability of the debtor is regarded as security for payment; the ties of kinship and homage must yield to the mercantile spirit of the age, and land, to a limited extent at least, must be subjected to the claims of the judgment creditor. In 1285<sup>29</sup> it is enacted that "when debt is recovered or acknowledged in the King's Court, or damages awarded, it shall be, from henceforth in the election of him that sueth for such debt or damages to have a writ of *feri facias* unto the sheriff for to levy the debt of the lands and goods, or that the sheriff shall deliver to

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<sup>28</sup> 27 Edw. III, St. 2, Ch. 9; Fitzherbert's *Natura Brevium*, 131; Bacon's *Abridgment*, Executions B. 1. By a Statute of 33 Hen. VIII, c. 39, obligations to the King are to have the same remedy. But the King's name having been used in private actions for purposes of fraud, the Statute of 57 Geo. III, c. 17, provided that the *extent in aid* should not issue unless the amount due the King was endorsed and if collected was to be paid over to his majesty's use.

<sup>29</sup> Statute of Westminster II (13 Edw. I), St. 1, Ch. 18, 1 Stat. of Realm, 82.



him all the chattels of the debtor, saving only his oxen and beasts of his plow, and the one-half of his land, until the debt be levied upon a reasonable price or extent." It is not improbable that Parliament, in drafting this statute, borrowed at least some ideas from the practice of the English Jewry whose legal affairs were supervised, through the Royal Exchequer, by specially appointed justices. Early in Edward I's reign it is stated that "According to the assize and statutes of the King's Jewry, his Jews ought to have one moiety of the lands, rents and chattels of their Christian debtors until they shall have received their debts."<sup>30</sup> If the conjecture is true, then, in a sense, the writ of *elegit* may be a memento of the mediaeval Jewry banished from England in 1290.<sup>31</sup>

Under the writ of *elegit*, if the debtor's goods were insufficient, it was the sheriff's duty to take an inquisition by jury to value, or extend, the freehold,<sup>32</sup> lands of the debtor and then one-half of such lands were to be delivered by metes and bounds to the creditor<sup>33</sup> until out of the rents and profits, at the yearly value found, the debt was levied, or the debtor's interest expired. Upon the entry of the return of the inquisition upon the records of the court depended the creditor's title as tenant by *elegit*.<sup>34</sup> But there is this further difficulty; the sheriff delivers merely what is called legal possession, if actual possession is conceded, well and good, otherwise the creditor gets merely a right of entry, that is, a right to bring ejectment to obtain possession<sup>35</sup> in which action the judgment roll, *elegit* and inquisition will be evidence of his title. On the other hand, as an incident to right to have the

<sup>30</sup> 1 Maddox History of Exchequer, 247, quoting a roll of 3-4 Edw. I, 1 P. & M. 458. See Statutes of Jewry, 1 Stat. of Realm, 221.

<sup>31</sup> Select Pleas of Jewish Exchequer (S. S.) xi.

<sup>32</sup> Copyhold lands were not liable to be taken on *elegit* until the Act of 1 & 2 Vict. C, 110, §11.

<sup>33</sup> Co. Litt. 289 b., 3 Bl. Comm. 418, Somery v. Buster, Y. B. Edw. II (S. S.), 125 (1308-09); Den. v. Abington, 2 Dougl. 473 (1780); Fenny v. Durrant, 1 B. & Ald. 40 (1817); Hele v. Bexley, 17 Beav. 14 (1853). The sheriff must deliver at the value fixed by the inquest. Comyrs v. Brandling, 1 Brownlow, 38 (1614).

<sup>34</sup> Fulwood's Case, 4 Co. 74a (1591).

<sup>35</sup> Jefferson v. Dawson, 3 Keb. 243 (1673); 2 Tidds Pr. (9th Ed.) 1036.

*elegit*, the judgment becomes a general lien on the land of the debtor, which also attaches to land acquired after the judgment, until the lien expires through failure to execute process, or satisfaction is obtained.<sup>36</sup>

The Statute of Westminster II marked the limits of concession which the landed families were willing to make to the creditor of the freehold tenant. There was little further development in the law of executions against property. The *feri facias* did not reach choses in action<sup>37</sup> and the creditor was compelled to go to chancery or the legislature for relief. By the Statute of Frauds<sup>38</sup> the interest of a *cestui que trust* in lands was made liable to execution, but the statute was narrowly construed.<sup>39</sup> Only in the nineteenth century and then with great caution did the English Parliament adopt a new policy toward the alienation of land for debts. An act of 1838<sup>40</sup> extended the writ of *elegit* to the whole of the debtor's land, and the Judgment Act of 1864<sup>41</sup> provided that where land had actually been delivered to a creditor under an *elegit*, he might apply to the Chancery Division of the High Court for an order for a sale of his debtor's interest in the land. But while executions against property were thus restricted, a series of acts extended the *capias ad respondendum* over the field of contract,<sup>42</sup> and, since "where *capias* lies

<sup>36</sup> Y. B. 30 Edw. III, 24; *Finch v. Earl of Winchelsea*, 1 P. Wms. 277 (1715); *Brace v. Duchess of Marlborough*, 2 P. Wms. 491 (1808); *Conrad v. Ins. Co.*, 1 Peters, 386 (U. S. 1828), *Sudgen on Vendors* (8th Amer. Ed.), Vol. 2, p. 156. Most American courts follow the common law rule, but there are exceptions. In some States where judgments are not a lien the same result is attained by attachment on mesne process.

<sup>37</sup> Co. Litt. 290 b, *Francis v. Nash*, Temp. Hardw. 55 (1755); *Denton v. Livingston*, 9 Johns. 96 (N. Y. 1812); *Freeman on Executions* (3rd Ed.), §112.

<sup>38</sup> 29 Charles II, Ch. 3, §10.

<sup>39</sup> *King v. Ballett*, 2 Vern. 248 (1691); *Doe v. Greenhill*, 4 B. & Ald. 690 (1821). As the statute did not extend to the provinces, the American law on this subject varies greatly.

<sup>40</sup> Act of 1 & 2 Vict., Ch. 110, §11. Goods are excluded from the writ by the Bankruptcy Act of 1883, §146.

<sup>41</sup> 27 & 28 Vict., Ch. 112, §4. *In re Duke of Newcastle*, L. R. 8 Eq. 700 (1869); *In re Harrison*, L. R. (1899), 1 Ch. D. 465.

<sup>42</sup> By the Statutes of Marlebridge (52 Hen. III), c. 23, and Westminster II (13 Edw. I), c. 11 in account; by 25 Edw. III, c. 17 in debt and detainue; by 19 Hen. VII, c. 9 in all actions on the case. See Hale's discourse on the King's Bench, Hargreave's Law Tracts, 359.

in process, there after judgment, *capias ad satisfaciendum* lies,"<sup>43</sup> imprisonment for debt gained a new lease of life with all its horrible and grotesque incidents, so familiar in the pages of Dickens, until in the nineteenth century it was suppressed, or almost suppressed, for the *capias* still exists in an attenuated form, and, sharp practitioners have also found it possible to collect debts by committals for contempt in proceedings supplemental to execution.

How much of the common and statute law of England the colonists brought with them to North America is a matter of doubt and dispute which time has only further obscured.<sup>44</sup> At the least, they were welcome to make use of so much of the ancient and ponderous machinery as was suited to their needs. Debts did not disappear in the Western Utopia, so *feri facias*, *capias* and *elegit* crossed the Atlantic in pursuit of the improvident. Of these writs the first two still flourish, frequently, it is true, in a code disguise. But although there are scattered instances of its early use, and although aristocratic Virginia<sup>45</sup> kept it long, the *elegit* was too feeble a remedy to survive. The colonists, as is usually the case in new communities, needed capital for the development of their country and land was their principal asset; the merchants of Great Britain trading with the plantations complained of the difficulties they encountered in proving, recovering and levying debts due them. Accordingly, in 1732 it was enacted by Parliament that "the houses, lands, negroes, and other hereditaments and real estates" within the plantations in America should be chargeable with all just debts and demands owing to his Majesty or any of his subjects and should be subject to like remedies for seizing, extending, selling and disposing of the same towards the satisfaction of such debts as personal

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<sup>43</sup> Harbert's Case, 3 Co. 11 b. (1584); Y. B. 43 Edw. III, 1; Y. B. 2 Hen. IV, 6; Ognell v. Paston, 2 Leon. 84 (1586); Kintzel v. Olsen, 73 Atl. Rep. 962 (N. J. 1909).

<sup>44</sup> English Common Law in American Colonies, by P. S. Reinsch; Extension of English Statutes to the Plantations, by S. L. Sioussat, Select Essays in Anglo-American Legal History, Vol. 1, p. 367, 416.

<sup>45</sup> 1 Rev. Code. Va. (1819), Ch. 134, where the earlier acts are referred to. See also Barbour v. Breckenridge, 4 Bibb. 548 (Ky. 1819).

estate.<sup>46</sup> In the words of Chancellor Bland, who has luminously discussed this subject: "It followed as a necessary consequence, that upon a judgment against the debtor himself his lands might be taken and sold by a *feri facias*, and in order that the writ itself should express this new extension of the authority it gave, the words 'lands and tenements' were inserted so as expressly to command the levy to be made 'of the goods and chattels, lands and tenements' of the defendant."<sup>47</sup> The same learned jurist adds, that while the statute speaks only of "debts, duties and demands," it was always construed to extend to all cases where the plaintiff recovered a judgment for a sum of money and thereby became a creditor of the defendant, although the foundation of the claim was not a pecuniary claim but a mere trespass or personal injury.

But while the Statute of George II provided for the sale of real estate on execution throughout all the colonies it did not originate this practice. In Massachusetts, the provincial act of 1696 enacted that all the lands and tenements of the debtor should stand charged with the payment of his just debts and should be liable to be taken in execution for the satisfaction of the same,<sup>48</sup> and in 1701 the General Court adopted a writ of execution against the goods, lands and person of the debtor that has never been substantially departed from.<sup>49</sup> According to the practice, as settled by the acts of 1716 and 1719,<sup>50</sup> which, with some variations, is followed in other New England States, the land levied on is viewed and valued by three appraisers and a sufficient quantity set off by metes and bounds to satisfy the execution. The debtor may redeem within one year after the levy by paying

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<sup>46</sup> 5 George II, Ch. 7, §4.

<sup>47</sup> *Coombs v. Jordan*, 3 Bland, 284 (Md. 1831). See further *Jones v. Jones*, 1 Bland, 443 (Md. 1827); *Bank of Utica v. Mersereau*, 3 Barb. 528 (N. Y. 1848). Virginia is said to have rejected this section of the statute as an encroachment upon her sovereign rights. *Coombs v. Jordan*, *supra*.

<sup>48</sup> 5 Dane's Abridgment, 23. A still earlier act of 1647 authorized the attachment of lands. *Laws of Massachusetts Colony* (1672), p. 7.

<sup>49</sup> Act of May 28, 1701; *Laws of the Province of Massachusetts Bay* (1742), p. 139; *Hoar v. Tilden*, 178 Mass. 157 (1901).

<sup>50</sup> *Gordon v. Lewis*, 1 Sumn. 529 (U. S. C. C. 1834), *Rev. L. Mass.* (1902), Ch. 178.

the debt with interest, as well as expenses and repairs, receiving credit for the rents and profits.

In Pennsylvania, at the first assembly held at Chester, December 7, 1682, it was enacted that lands should be liable for debts except when there was legal issue and then all the goods and one-half of the land only.<sup>51</sup> But the statute that is the true basis of the Pennsylvania practice is that of January 12, 1705-6,<sup>52</sup> which provided that where land was levied on, if a sheriff's inquest found that the clear profits would in seven years satisfy the debt, the land was to be delivered to the creditor until the debt was satisfied, but if the inquest found that the profits would be insufficient for such purpose, then the land should be sold on a writ of *venditioni exponas*. Subsequent legislation has not materially altered this procedure<sup>53</sup> although it is customary to-day to hold the inquest in a somewhat perfunctory manner and to condemn the land, if counsel so direct.

The legislation in each State has its own history and peculiarities but there are certain general tendencies that may be briefly noted.<sup>54</sup> (A requirement prevalent in most of the States is that the creditor resort in the first instance to the personal property of the debtor and look to the real estate only where the personalty is insufficient.) But in Illinois<sup>55</sup> personal property shall be last taken, a rule reminiscent of the pioneer days when the prairie was more easily acquired than the plough. In many States, in imitation of the early New England practice, the debtor is allowed a period for redemption, the purchaser in the meanwhile receiving a certificate of sale and only receiving a sheriff's deed

<sup>51</sup> Charter Laws of Province of Pennsylvania, 120. There was a similar provision in Penn's laws agreed upon in England "except that the liability of land in case of issue was limited to one-third." *Id.* 100. An explanatory act of 1688 provided for a suspension of execution for one year after judgment as to the plantation on which the debtor was chiefly seated, and this was incorporated in the Act of Nov. 27, 1700, 2 Pa. Stat. at Large, 53.

<sup>52</sup> 2 Pa. Stat. at Large, 244.

<sup>53</sup> 2 Pepper & Lewis's Digest (2nd Ed.), 3453, *et seq.* The inquest, originally twelve men is by an Act of May 10, 1881, P. L. 13, reduced to six.

<sup>54</sup> 4 Kent's Commentaries, \*429; Washburn on Real Property, \*462, editions prior to the fifth.

<sup>55</sup> 4 Ill. Stat. Ann. 6757; *Pitts v. Magie*, 24 Ill. 610 (1860).

when the period has expired and the title has become absolute. The exemption of specific articles from levy and sale, unknown to the common law, is universal, but the statutes vary in liberality. In some of the agricultural communities homestead exemptions frequently amount to immunity from execution, a reversion to family right.

As to the conduct of the sale, that is a matter in which the sheriff and his bondsmen are chiefly concerned; he acts or refrains from action according as he is indemnified or sued; in other respects the essentials are a flag, a bell, a seasoned bailiff and a bidder bold enough to buy a lawsuit, for the doctrine of *caveat emptor* is literally applied. While receiver's sales and bankruptcy sales are conducted under decrees framed to meet the exigencies of the particular case, nowhere has there been any real effort made to work out the problems connected with sales on execution with a view toward assuring an unimpeachable title to the purchaser, and thereby preventing the needless sacrifice of property.

There are few titles or interests today that cannot be applied, in some manner, to the claims of creditors, but the procedure by which this is accomplished is too often dilatory and imperfect. The problems connected with final process have not received the same attention as those connected with the earlier stages of an action, for the excellent reason that external criticism has been mainly directed to the law's delays before judgment, on the assumption that the defendant, if he loses, will pay; if not, it will be at best a game of hide and seek. In England the reforms based on the Judicature Act of 1873 have not touched the ancient writs of execution.<sup>56</sup> In the United States the statutory writs based on the ancient writs have in many jurisdictions inherited mediaeval limitations and technicalities, and, where the early legislation has been supplemented by special enactments designed to meet particular difficulties, such for example as those arising out of the nature of choses in action, the result is a patchwork system with equity as a last resort. There is no practical reason

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<sup>56</sup> Rules of the Supreme Court, Order xliii, rule 1. A judgment no longer operates as a charge on land unless a writ or order "for the purpose of enforcing it" is registered in the land registry office. Act 63 & 64 Vict. (1900), Ch. 26.

for more than one form of final process; there is no good reason why all the rights of parties and claimants, legal and equitable, should not be worked out under the direction of the court, in the execution of such process, and there is no inherent reason why a title acquired at sheriff's sale should be of all titles perhaps one of the most doubtful.

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