

THE EARLY HISTORY OF BANKRUPTCY LAW.

The history of the law of bankruptcy should appeal equally to the sociologist, investigating the status of the debtor class throughout the ages; to the political economist, studying the development of trade and credit; and to the jurist, striving to penetrate the gloom enshrouding the origin and the growth of creditors' legal rights and remedies. Despite the wide range of interest that one would expect the subject to command, one seeks in vain for adequate treatment of the various systems of bankruptcy prevalent at different times and in different places, and of their relationship to one another.

Paul Huvelin's bibliographical sketch¹ discloses the dearth of historical research in this branch of jurisprudence. We find that general works on the history of law and procedure make scant mention of the history of bankruptcy.² Commercial law treatises are likewise disappointing.³ Individual systems, such as the Roman,⁴ the Italian,⁵ the French,⁶ and the German,⁷ have been treated historically with more or less success; and the relation of the German law to some of the other systems

¹ "L'Histoire du Droit Commercial" (1904), xxxiii, pp. 109-110.

² Scarcely any notice is taken of bankruptcy in the following collections of historical essays and treatises: The Evolution of Law Series, compiled by Albert Kocourek and John H. Wigmore; The Continental Legal History Series, published by the Association of American Law Schools; and Select Essays in Anglo-American Legal History, compiled and edited by a committee of the Association of American Law Schools.

³ Goldschmidt's classic work, "*Universalgeschichte des Handelsrechts*," does not treat of bankruptcy, because in Germany bankruptcy is not regarded merely as part of the commercial law, the nontrader as well as the trader being subject to its jurisdiction. *Infra*, note 10.

⁴ Bethmann-Hollweg, "*Der Civilprozess des gemeinen Rechts in gerichtlicher Entwicklung*," in Vol. II of "*Der römische Civilprozess*" (1865), pp. 667-699; Edward Poste, "*Elements of Roman Law by Gaius*" (1871), pp. 277-285; J. B. Moyle, "*Imperatoris Iustiniani Institutionum*" (1903), Excurses X.

⁵ Pertile, "*Storia del diritto Italiano*" (1893-1896), Vol. VI, pp. 878-915; Lattes, "*Diritto commerciale nella Legislazione statutaria*," p. 308 ff.; Straccha, "*Tractatus de conturbatoribus sive decoctoribus*" (1553).

⁶ Percerou, "*Des Faillites et Banqueroutes*" (1907).

⁷ Seuffert, "*Deutsches Konkursprozessrecht*" (1899); Endemann, "*Das deutsche Konkursverfahren*" (1889).

has been given with characteristic skill and erudition by Josef Kohler, whose *Lehrbuch des Konkursrechts*, published in 1891, is still the most valuable single contribution to the study of comparative and historical bankruptcy law.

Those who have written on English and American bankruptcy legislation have uniformly considered an historical treatment of the subject as unnecessary, uninteresting, or impossible.⁸ In nearly every case they have been actuated by one of two motives, either to present to the practitioner the rules of bankruptcy in force at the date of writing, or to attempt to reform the system then prevalent by introducing some new regulations. They have rarely, if ever, been prompted to write of bankruptcy by the desire to add to the knowledge of the past.

A study of the history of bankruptcy that will seek to discover basic principles underlying historic facts, though of doubtful value to the practitioner, will, it is hoped, be kindly received by students of legal science.

BANKRUPTCY AS AN INSTITUTION OF HISTORICAL AND COMPARATIVE JURISPRUDENCE.

It is well nigh impossible to define bankruptcy as an institution of jurisprudence in terms that will apply with equal accuracy to the various systems that have been in force among different peoples and in different periods. In some systems, for instance, tradesmen only are subject to the law;⁹ in others, all debtors are included.¹⁰ Again, the discharge of the honest insolvent has come to be regarded as the all important feature of some bankruptcy statutes;¹¹ in others, as satisfactory in the

⁸ William Cooke, "A Compendious Treatise of the Bankrupt Law" (1778); p. 1; Edward Jenks, "A Short History of English Law" (1912), p. 382.

⁹ The Latin countries, Italy, France and Spain (the last named until 1881), limit the application of bankruptcy to commercial debtors exclusively. Dunscomb, "Bankruptcy—A Study in Comparative Law" (1893), p. 15.

¹⁰ Bankruptcy extended to all debtors in Roman, Jewish and Germanic law. In England, prior to 1570 and since 1861, the law applies to all debtors; during the period comprised between the dates mentioned, only tradesmen could be put into bankruptcy.

¹¹ In Germany and Austria, as well as in England and America, the liberation of the honest insolvent from antecedent liability is an important

final analysis, the release of the debtor is unknown.¹² It is, therefore, obvious that the definition of bankruptcy usually given by authors treating specifically of one system would not be a correct description of the term as used in all other systems.

All bankruptcy law, however, no matter when or where devised and enacted, has at least two general objects in view. It aims, first, to secure an equitable division of the insolvent debtor's property among all his creditors, and, in the second place, to prevent on the part of the insolvent debtor conduct detrimental to the interests of his creditors. In other words, bankruptcy law seeks to protect the creditors, first, from one another and, secondly, from their debtor. A third object, the protection of the honest debtor from his creditors, by means of the discharge, is sought to be attained in some of the systems of bankruptcy, but this is by no means a fundamental feature of the law.

(1) COLLECTIVE EXECUTION.

The laws that have for their object the protection of the creditors from one another seek to prevent any one of the creditors from obtaining more than his proportionate share of the debtor's assets. A special process of collective execution is devised, a process directed against all of the property of the debtor, resorted to for the common benefit and at the common expense of all the creditors.

There are two necessary antecedents before this special procedure of collective execution need be invoked: (a) insol-

element of bankruptcy, Dunscomb, p. 114. This is not exclusively a modern innovation; in the Islamic law and among some of the Oceanic peoples, notably in the Undang-Undang, all the debts are extinguished. Herman Post, "*Grundriss der Ethnologischen Jurisprudenz*," Vol. II, p. 577.

"The Roman, Jewish, French, Belgian, Spanish and Italian systems, among others, do not discharge the bankrupt. Some writers see in the Jewish Sabbatical Year of Release something analogous to a bankruptcy law. As a matter of fact, the Mosaic discharge was intended to apply to all debtors, whether solvent or insolvent, honest or dishonest, after the lapse of a certain number of years. As a further matter of historic fact, the Sabbatical Year rarely served the purpose of discharging debtors, ingenious means to evade the law being constantly resorted to. Cf. Nathan Isaacs, "The Law and the Law of Change," 65 UNIV. OF PA. L. REV., p. 750 (1917).

veny, actual or apparent, of the debtor, and (b) plurality, actual or potential, of the creditors.

(a) *Insolvency*. If the debtor has enough assets to meet all his debts, there is no need to seek special regulation to protect the creditors from one another. Each creditor may proceed individually against the debtor's property without in any way jeopardizing the chances of the other creditors of obtaining satisfaction of their claims, and the principle of priority can safely and properly be allowed to control. While this seems to be the general principle of all systems of execution process, there is one notable exception. In Roman Law, until the Empire, each creditor proceeded against the entire estate of the debtor, whether he be insolvent or not. It is probable, nevertheless, that insolvency usually existed where the Roman *missio in bona* was granted by the Praetor, for the personal dishonor that was the concomitant of this process would preclude the possibility of a debtor voluntarily permitting the creditors to resort to the *missio*, unless he were unable to prevent it. In other systems of law, it is well established that in the absence of an allegation of insolvency, each creditor attaches for himself separately.

The principle of priority is found to be unjust when the debtor is unable to pay all his creditors in full, or does certain acts which indicate an inability to discharge his obligations in full.¹³ The principle of contribution is adopted, and the loss due to insolvency is placed upon all the creditors.¹⁴ The basis of this change in execution process is social and economic; it is essentially the basis of all insurance.

(b) *Plurality of Creditors*. If a creditor be alone in the field, there is obviously no need of regulations to protect the claimant from himself. A plurality of creditors, actual or potential, therefore, is at the bottom of every bankruptcy process. To

¹³ Cessation of payment is regarded as sufficient indication of insolvency in the Italian and most of the European systems. In the Roman, Jewish, Scandinavian, English and American systems, certain acts must be committed by the debtor before he will be adjudicated a bankrupt.

¹⁴ The distribution of the assets is either in proportion to the amounts of the claims or equally. *Infra*, p. 233.

this day, some systems require more than one creditor to institute bankruptcy proceedings,¹⁵ although a potential plurality is generally considered sufficient.¹⁶

(2) FRAUD ON CREDITORS.

The laws that seek to protect the creditors from their debtor by preventing fraud on his part are frequently independent of those seeking to protect the creditors from one another by making an equitable distribution of the debtor's property. In English law, for instance, fraudulent conveyances were dealt with by Parliament much earlier than the *pro rata* distribution among creditors was provided for. These are substantive laws, either civil or criminal; they deal with title to property fraudulently transferred, or they define the crimes against trade and credit, and establish penalties therefor. The fraud must be such as to render the debtor either actually or apparently insolvent, for otherwise it cannot react to the detriment of the creditors. It is immaterial, however, whether there be only one creditor or many creditors; in either case, laws must vitiate fraudulent transfers and punish the defrauders.

(3) MANAGEMENT OF ESTATE.

In order to work out these two general objects of bankruptcy, it is necessary to devise and establish a systematic method of managing the debtor's estate during the pendency of the process. Some agency must be given control over all the property of the debtor, which is seized summarily and *in limine*, and must be given authority to prevent and set aside fraudulent transfers of property, and to collect, manage and distribute all the assets. The management of the estate is differently regulated in different systems. In China, for instance, the control of the estate is entirely in the hands of the creditors themselves; they attach,

¹⁵ Hungarian *Konkursordnung*, Sec. 87; United States Bankruptcy Act of 1898, Sec. 59, b.

¹⁶ English Bankruptcy Act of 1883, Sec. 5; see also *Re Hecquard*, 24 Q. B. D. 71 (C. A.), (Eng. 1889).

liquidate and distribute all the debtor's possessions within reach without the intervention of any official authority.¹⁷ In mediaeval Jewish law, on the other hand, duly constituted officials administered the estate, without any intervention on the part of the creditors. The great volume of bankruptcy legislation in England is due to the conflict between, and the alternate predominance of one or the other of, these two theories as to the management of the bankrupt estate,—private management or management by the creditors, and diametrically opposed to it, public management or management by the state.

In our inquiry into the early history of bankruptcy, emphasis will be laid upon the three topics cursorily outlined: the origin and development of collective execution and distribution; the prevention of the fraudulent conduct of the debtor; and the various methods of controlling the bankrupt and of managing his estate.

DEBTOR AND CREDITOR IN PRIMITIVE SOCIETY.

In very primitive society there are no laws preventing fraud of debtors or regulating the distribution of a debtor's estate among his several creditors, for the reason that, generally speaking, debtors and creditors are unknown in the early stages of social evolution. Credit is an institution that lives by virtue of man's confidence in his fellow-man's good faith, and good faith and the primitive man are strangers.¹⁸ *Graeca fides* is typical of the condition prevalent among all primitive peoples. It is natural, therefore, that under such circumstances payment should have been uniformly contemporaneous with the delivery of goods, that credit sales and indebtedness should have been practically unknown.

¹⁷ Alexander, "*Konkursgesetze aller Länder der Erde*" (1892), p. 368.

¹⁸ Maine, "Ancient Law," p. 303: "No trustworthy primitive record can be read without perceiving that the habit of mind which induces us to make good a promise is as yet imperfectly developed, and that acts of flagrant perfidy are often mentioned without blame and sometimes described with approbation. In the Homeric literature, for instance, the deceitful cunning of Ulysses appears as a virtue of the same rank with the prudence of Nestor, the constancy of Hector, and the gallantry of Achilles."

By force of economic necessity, suspension of payment was gradually introduced; but for a very long time, indebtedness was regarded as an anomaly, as a special privilege, as a perversion of the traditional and customary method of dealing. A contract executed by only one of the contracting parties was regarded as an incomplete conveyance.¹⁹ The creditor who had performed his part of the transaction had little cause to fear default on his debtor's part. Public opinion provided two sanctions, each of them extremely powerful, by which the debtor was compelled to perform his part of the contract, which the ancients thought ought never to have been postponed. One sanction was religious in character; the other was the peculiarly severe form of the primitive procedure of execution.

Typical illustrations of the religious sanction are the practice of "sitting d'harna," the usual procedure throughout India of old and still in vogue in Nepaul, and the similar practice of "fasting on" a person resorted to in ancient Ireland. In both, the creditor placed himself before the debtor's doorway, there to remain until the debt was paid. The expected payment was seldom delayed, for public opinion would have punished instantly and severely the debtor who allowed his creditor to become exhausted or to die of starvation before his door.²⁰ In Egypt, another species of spiritual sanction compelled payment by the debtor. From the earliest time, it seems to have been almost a universal custom for the debtor to pledge the body of his nearest deceased relative, specially that of his father.²¹ In case of default of payment, the creditor was given the right to remove the mummy, and the tomb was closed against any interment by the debtor. The effect of such a pledge was evidently moral and spiritual, being enforced rather by the sentiment of the community than by the law.²²

A more direct means of compelling payment in ancient days

¹⁹ Maine, "Ancient Law," p. 311.

²⁰ Gabriel Tarde, "Evolution of Procedure," in "Primitive and Ancient Legal Institutions," p. 700.

²¹ Herodotus, II, 136.

²² See William H. Loyd. "The Surety," 66 UNIV. OF PA. L. REV. 40 (1918).

was the extremely severe treatment accorded defaulting debtors, whether fraudulent or honest. In Hindu law, for instance, execution in civil cases was a matter simply of self-help. The creditor could seize the person of his debtor and compel him to labor for him. Actual violence might also be resorted to by the creditor; he could kill or maim the debtor, confine his wife, sons or cattle, or besiege him in his home.²³ This is typical of primitive law generally.²⁴

We find in the Code of Hammurabi²⁵ that the insolvent debtor was regularly sold into slavery. It also frequently happened that the debtor's kinsmen would be sold into bondage in order to pay off his obligations. Where this theory of joint liability among the members of families or of the social group obtained, bankruptcy legislation was not needed, for all the members of the group would usually be able to liquidate the debt in one way or another.²⁶

Whether slavery for simple debt was known among the ancient Hebrews is mooted. On the one hand, a number of Biblical references are cited to prove that slavery for debt did exist.²⁷ On the other hand, it is probable that at least from the time when the Israelites came in contact with Egypt, personal servitude for debt was unknown.²⁸ In the land of the Pharaohs, from the days of Bocchoris certainly (772-729 B. C.), and per-

* *Mans* VIII, 48 ff. "By whatever means a creditor may be able to obtain possession of his property, even by those means may he force the debtor and make him pay. By moral suasion, a suit at law, by artful management, or by the customary proceeding" (i. e., by killing the debtor's wife, children, or cattle, or by the creditor's fasting, sitting at the debtor's door), "a creditor may receive property loaned; and, fifthly, by force."

* Herman Post, "*Grundriss der ethnologischen Jurisprudenz*," Vol. II, Sec. 162, pp. 576-577.

* Secs. 115, 116. The wording of the latter section indicates that probably in Hammurabi's day the right of enslavement among the Babylonians was limited to merchant debtors only.

* Compare the English legislation applying to the Lombards, where the debts of one of the group were chargeable to all its members. Statute of 25 Edw. III (1350).

* II Kings, 4, 1; Isaiah, 50, 1; St. Matthew, 18, 25. Mayer, "*Rechte der Israeliten, Athener und Römer*," II, p. 42; Michaelis, "*Mosaisches Recht*," II, p. 351; III, pp. 38 and 50.

* See Exodus, 22, 2, which seems to indicate that slavery was resorted to only in the case of the thief who did not return the stolen property to his victim.

haps much earlier, it was established that in the case of debt, the debtor's property, and not his person, might be attached.²⁹ The Egyptians regarded the claim of the state to the debtor's person as superior to that of the creditor, for the state might at any time require the debtor's service, in peace as an official or laborer, in war as a soldier. Solon, we are told, was influenced by this Egyptian law, when he put an end to the traditional Athenian practice of enslaving freemen who were unable to pay their debts.

In the law of Rome, as set forth in the Twelve Tables (B. C. 451-450), the borrower was said to be *nexus* to his creditor, *i. e.*, his own person was pledged for the repayment of the loan.³⁰ If the borrower failed to fulfill his obligation, the creditor might arrest him by *manus injectio*, by the "laying on of hands," a mode of execution which proceeded directly and with inexorable rigor against the person of the debtor. After having thrice publicly invited some one to come forward and pay the debt, the creditor might, in default of any one appearing, and after the lapse of sixty days, regard the debtor as his slave, and might either kill him or sell him into a foreign country.³¹ The old proverb, "He who cannot pay with his purse pays with his skin,"³² was literally applied in Roman law. Not only freedom and honor, but life itself was at the mercy of the creditor. The earliest provision dealing with collective execution is found in the Twelve Tables; it is there decreed that if several creditors have claims upon the same debtor, they might cut the debtor's body into pieces.

So long as execution was directed against the person, rather than the property, of the debtor, and so long as the religious and primitive sanctions prevailed, there was obviously little need for the introduction of bankruptcy as a distinct system of jurisprudence.

²⁹ On the authority of Diodorus, I, 79, Reveillout, "*Cours de Droit Egyptien*," p. 42.

³⁰ According to Kohler, "Shakespeare," p. 9, the debtor's immediate family and dependents, as well as the debtor himself, were answerable.

³¹ Cf. Russian law, *Prawda ruskaja*, xxiii; Post, "*Ethnologischen Jurisprudenz*," p. 576.

³² Brissaud, "French Private Law," p. 564.

TRANSITION FROM EXECUTION AGAINST THE PERSON TO
EXECUTION AGAINST PROPERTY.

In course of time, execution for debt came to be directed against the property of the debtor rather than his person. It is hardly likely that this transition indicates that the religious sanction had lost its pristine potency or that execution against the person had come to be regarded as barbaric. The change from the one form of execution to the other, slow and gradual as it was, is an instance of the general evolution of legal process from the stage where retaliation is the end in view to the stage where compensation is the chief desideratum.

In most systems of jurisprudence, the development of proprietary execution was a natural one. The ancient Jewish³³ and Germanic notion, for instance, of the execution against the person was that the body of the debtor was a pledge or security for the payment of the debt. It is perfectly natural that in course of time the Jewish and Germanic people should come to look upon each portion of the debtor's property as a pledge or security for the debt. Here the transition was from execution against the person to execution against a particular portion of the debtor's property seized by an individual creditor for the benefit of himself alone.

In the Roman law we can very clearly perceive the evolution of proprietary execution step by step,³⁴ but we find that underlying this evolution there is an abstract and rather vague notion of execution as conceived by the Roman jurisconsults. They regarded the person of the debtor not merely as a pledge for the

³³ Whether or not execution against the person was prevalent in the Biblical period, it is certain, at any rate, that in the Talmudic Era there is scarcely anything left of the institution. Auerbach, "*Judisches Obligationenrecht*," I, p. 168; Bloch, "*Civilprozessordnung nach mosaisch rabbinischer Rechte*," p. 94.

³⁴ In 326 B. C. the old *manus injectio* was modified and mitigated by a *lex Poetelia*, but execution against the person continued for about two centuries. Execution against the debtor's property was first employed only in the case of debts owed to the State. If a man were condemned upon a criminal charge to pay a pecuniary penalty, and refused or was unable to pay, the praetor would grant possession of his estate to the quaestors, who sold it to the highest bidder (*sector*). It was not until about 105 B. C. that a praetor named Publius Rutilius introduced proprietary execution for the satisfaction of private debt.

payment of the debt: "it is the person, they said, who is *obligated*, and it is the person to whom the creditor *must* look to be paid; there is no execution except personal execution, and it is for the debtor to say whether he will save himself by sacrificing his property."³⁵ To them, the seizure of the debtor's body, which was primarily responsible for the debt, was the seizure of his total legal personality. The transition in Roman procedure was from execution against the person to execution against the debtor's estate in its entirety, to the sale of what was known as his universal succession, for the benefit of as many creditors as cared to avail themselves thereof.

Thus, there were evolved two systems of proprietary execution: individual proprietary execution, and collective or entire proprietary execution.

INDIVIDUAL PROPRIETARY EXECUTION.

Where execution is directed by individual creditors against specific portions of the debtor's estate, the problem that arises when there are several creditors and an estate that is insolvent was solved, at first, by having the creditors paid in a definite and specified order. In Jewish law, for instance, nearly all creditors were paid in the order of time in which their claims were created,³⁶ each *Shtar*, or bond attested by two witnesses, operating from its date as a mortgage lien on the debtor's property.³⁷ In the Germanic system, the creditors were ranked according to the order of time in which their executions were levied, while in some other systems of law the ranking of the creditors is largely determined by the nature of the subject-matter of their claims.³⁸

³⁵ Moyle, p. 564.

³⁶ In the Indian system of *Yajnavalkya*, II, 41, priority is also made to depend upon priority in time, the debtor being compelled to pay the creditor in the order in which the debts were contracted, provided a Brahman be paid first and after him the king. Post, "*Ethnologischen Jurisprudenz*," p. 576. According to Attic law, secured creditors are prior to all other creditors and priority in time among secured creditors is priority in right. Meier and Schoman, "*Der Attische Prozess*," p. 511.

³⁷ Originally this applied to the debtor's real estate only; but in the Middle Ages, when Jews were landless, priority among bondholders was extended to such personalty as might be in the debtor's hands at the time of insolvency.

³⁸ Thus, in Japanese law, there are as many as fifteen different classes

Where there are several creditors of the same rank, the most natural rule would be to divide the property *pro rata* among all the creditors. This is the general practice. Jewish law, however, evolved an anomalous plan of distribution. Where there were several creditors, who had no *Shtaroth*, and therefore no liens, or where there were several *Shtaroth* bearing the same date, the estate of the debtor was divided not *pro rata*, but *equally*, it being, of course, provided that no creditor should receive more than the amount of his claim. Thus, if there were three creditors, A with a claim for \$300, B for \$200, and C for \$100, and if the debtor's estate were worth only \$300, A, B and C would each receive \$100. If the estate amounted to \$500, A, B and C would first each receive \$100, and then A and B would receive an additional \$100 each. In this way, a higher percentage of the smaller, as compared with the larger, debts were paid in full.³⁹ The source of this peculiar method of distribution is found in the Talmud,⁴⁰ where the Rabbis decided that if a man dies leaving an estate worth only \$300, in all, and leaves surviving him three widows, one with a dower claim of \$300, another of \$200, and the third of \$100, the widows should share equally, and not *pro rata*, in the estate of their common spouse.

Where, as in Jewish law, the individual creditor had general mortgage liens depending upon the date of their obligations, thanks to which they escaped any principle of contribution, they had little interest in organizing a real *concursum creditorum*. Thus, it was not until about the sixteenth century of the Common Era that the Jews established a bankruptcy process, and then only for the Jews dwelling in Poland.⁴¹ For a similar reason, in French law, from the very beginning, non-tradesmen were not subject to bankruptcy process and contribution. Creditors of persons not engaged in trade usually had notarial deeds, and thus had a lien on the debtor's property.⁴²

of creditors, depending on the nature of their claims. J. E. de Becker, "Civil Code of Japan," Vol. I, Chap. VIII.

³⁹ *Shulhan Aruk, Hoshen Mishpat*, 104, 10.

⁴⁰ *Kethuboth*, x. 4, 93a.

⁴¹ *Infra*, p. 249.

⁴² Brissaud, "French Private Law," pp. 563, 564.

Where, on the other hand, the principle of priority of execution prevailed, which, in the case of the insolvent debtor, made payment the prize of a race of diligence and fostered fraud and collusion, a system of bankruptcy became a pressing necessity. Selfish individualism which impelled each creditor to anticipate and outwit his fellows, and to rescue whatever he could for himself alone, gave way, by force of an enlightened sense of justice, to co-operation and contribution among all the creditors.

GENERAL PROPRIETARY EXECUTION.

The process of general execution against the debtor's property introduced into Roman law by Rutilius was called *bonorum emptio* or *venditio*. Whether the debtor was solvent or insolvent, whether there were many creditors or there was but one creditor, the proceeding was the same, leading to a sale of the entire estate of the debtor for the benefit of his creditors. The *bonorum venditio* was only granted when the debtor had committed one of several acts.⁴³ These acts, which might be termed acts of bankruptcy, were (a) absconding (*latitans*) or hiding from creditors,⁴⁴ (b) leaving a judgment unsatisfied for thirty days, and (c) admitting, without discharging, a debt, and taking no steps to pay it.

The creditor or creditors were granted by the Praetor a *missio in possessionem*, equivalent to the English "receiving order." In other words, they were put into possession of the debtor's estate. Then, at fixed intervals, followed three decrees: the first publicly advertised the sale and gave notice to the non-petitioning creditors to put in their claims; the second authorized the creditors to choose from among themselves a *magister*, equivalent to our trustee, to superintend the sale; and the last enabled them to publish the conditions under which the sale would take place. After a third interval, the estate, or *universitas juris*, of the debtor was put up to auction, and knocked down to the highest bidder (*bonorum emptor*), i. e., to the person who offered the

⁴³ Gaius, iii, 78.

⁴⁴ Cf. *Cic. Verr.*, ii, 24, s. 59. Compare the Pennsylvania statute of June 13, 1836, relating to domestic attachment.

creditors the highest percentage on their claims,⁴⁵ the creditors being paid *pro rata*.

It is of interest to note that a somewhat analogous arrangement can be seen in the Oceanic system of the Undang-Undang, where the principal creditor pays the other creditors in proportion to their claims and keeps the whole of the debtor's estate and also takes possession of the debtor's person as a pledge.⁴⁶ So also in Attic law, the debtor gave up his entire estate, which was probably auctioned off *en bloc*.⁴⁷

To revert to our discussion of the Roman execution process, we find that the *bonorum venditio* was gradually superseded by the *bonorum distractio*. Under one of the earlier emperors, a *senatus consultum* was passed,⁴⁸ by which it was provided that where a bankrupt was of senatorial rank, and the creditors assented, instead of the estate being sold *en bloc* (*bonorum venditio*), a *curator bonorum* should be appointed by the magistrate for the purpose of disposing of the assets piecemeal and in lots, and paying the creditors *pro rata* out of the proceeds. Probably from this *senatus consultum* came the *bonorum distractio*, the ordinary execution process in Justinian's time.⁴⁹ The creditors, or some of them, applied to the magistrate for a *missio in bona*, as in the *venditio*, but the estate was not sold by a *magister* chosen by the creditors, but by a *curator*, chosen by the Praetor, whose duty it was to dispose of, not the universal succession of the debtor, but the several objects of which his estate was composed, and to pay the creditors *pro rata* out of the proceeds.

The *venditio* and the *distractio*, and not the *cessio bonorum*, constituted the Roman system of bankruptcy process, a system that is in fact the origin and fountain-head of all bankruptcy systems.

⁴⁵ Under the bankruptcy act now in force in the United States, in some districts trustee sales are similarly conducted, the estate being sold out *in toto* to the person offering to pay the creditors the highest percentage on their claims.

⁴⁶ Post, "*Ethnologischen Jurisprudenz*," p. 577.

⁴⁷ Post, "*Ethnologischen Jurisprudenz*," p. 578.

⁴⁸ This *senatus consultum* is mentioned in Dig. 27, 10, 5 and 9.

⁴⁹ Institutes, Bk. ii, 19, 1.

A bankruptcy process of more limited application in Roman law was what was known as the *actio tributoria*. Where the master gave his slave a *peculium* in order that he might carry on a mercantile business with it, and the venture was a failure, then the commercial creditors of the slave might institute the *actio tributoria* against the slave's master. The creditors demanded to have the *merx peculiaris* (*i. e.*, the property invested in the business) distributed among themselves in proportion to their respective claims. The division was made by the *dominus*, who was treated as an ordinary creditor, and therefore could not deduct debts owing to himself in full, though he had the privilege of paying all his own claims *pro rata*, whether arising out of the business or not.⁵⁰

The *actio tributoria* lay against the *dominus* to compel the distribution or to bring it under judicial review, if any creditor was dissatisfied with it. If the slave had his *peculium* engaged in different business ventures, they were kept apart, the creditors in each being entitled to satisfaction only out of the capital embarked in that one upon which their debts arose. We have here perhaps the earliest instance of bankruptcy confined to tradesmen and trade debts.⁵¹

PREVENTION OF FRAUD IN ANCIENT LAW.

In ancient systems of law, insolvency *per se* was looked upon as something irregular and fraudulent, whether the debtor was actually honest or dishonest. Gradually public opinion came to discriminate between the unfortunate insolvent and the felonious bankrupt. In the Code of Hammurabi, for instance, the life and the freedom of the debtor made insolvent by misfortune were protected from the creditors,⁵² and in the Islamic law we find that the honest but unfortunate debtor was allowed a definite amount as an exemption.⁵³

⁵⁰ Dig., 14, 4, 5, 6 and 7.

⁵¹ But see *supra*, note 25, as to Code of Hammurabi, Sec. 116.

⁵² Code of Hammurabi, Secs. 116, 117.

⁵³ Post, "*Ethnologischen Jurisprudenz*," p. 579. So also in the Dekkan, the innocent debtor is allowed an exemption. Kohler, "*Zeitschrift für Vergleichende Rechtswissenschaft*," viii, p. 126.

The Romans clung tenaciously to the conception that infamy attached to the debtor whose estate had been sold to the *bonorum emptor*.⁵⁴ In consequence of a *lex Julia*, probably not promulgated before Augustus's time, the debtor whose insolvency was not due to his own fault was permitted to make a *cessio bonorum*. This was more in the nature of a voluntary composition with creditors. By adopting this course, the debtor escaped liability to arrest and imprisonment, which bankrupts proper incurred if the *missio in bona* produced no results. Moreover, the honest debtor who made *cessio* did not become *infamis*, and he was allowed to retain so much of his after acquired property as was necessary for his subsistence (*beneficium competentiae*).⁵⁵

The *cessio*, however, was a very tardy and complicated sort of procedure.⁵⁶ Sequestration to an assignee (*curator*) in favor of creditors, the *curator* being chosen by consent between the insolvent and his creditors, was one mode of settlement frequently resorted to in the case of honest insolvency. The debtor might also apply to the emperor for an order requiring the creditors to choose by a vote whether they would proceed at once to a surrender and sale of the estate, taking their chances as to how far the available assets would go, or whether they would allow their debtor a period not exceeding five years in which to pay.

These alternative processes were available to the innocent insolvent only. In this way Roman law indirectly punished the fraudulent debtor, for he could not have the privilege granted to the honest insolvent.

Religious fears and scruples were often employed as preventives of fraud. Excommunication was the means resorted to by the Assyrians thousands of years before the Common Era.⁵⁷

⁵⁴ *Supra*, p. 235.

⁵⁵ It is to be noted, however, that the debtor remained still liable for the unpaid balance on again attaining wealth. Gaius, 2, Sec. 155. Another inconvenience of the *missio*, evaded by *cessio*, was the obligation to which one against whom immission had once issued was exposed of giving security for fulfilment of the judgment in every suit which might thereafter be brought against him.

⁵⁶ Sheldon Amos, "Roman Civil Law," p. 193.

⁵⁷ Kohler, "Shakespeare," p. 64.

In Jewish law,⁵⁸ the execution process commenced with a writ issued by the court,⁵⁹ which was in the nature of a ban of excommunication against the debtor,⁶⁰ and the creditors also had the right to demand the proclamation of the ban of excommunication against all who knew and did not inform them of any fraudulent conduct on the part of the debtor.⁶¹

In Roman law, aside from these more or less indirect means of encouraging honesty and penalizing fraud, elaborate provisions for vitiating fraudulent transfers of property belonging to insolvent debtors were framed. Any act or forbearance by which a debtor diminished the amount of his property divisible among his creditors was held to be in fraud of creditors. If the transfer was without consideration, the act was rescinded, even if the grantee were wholly innocent. If the grantee had notice of the fraud, the transfer was rescinded, even if it were with valuable consideration. The creditors had, as against fraudulent alienation by their debtor, including the wrongful payment of one or some of them in full when he was aware of his insolvency, the following remedies: (1) an *actio Pauliana in personam*;⁶² (2) an *interdictum fraudatorium*;⁶³ (3) an *actio in factum*, available against a *bona fide* alienee;⁶⁴ (4) the *integrum restitutio*,⁶⁵ with a view to an action *in rem*. As one of the most lucid and authoritative writers on Roman law says: "The relation between these remedies, and the precise purpose for which they were respectively employed, are so variously represented by the commentator that it is impossible to go further into the question."⁶⁶

⁵⁸ Cf. The excommunication *ob debita* of the Middle Ages, *infra*, note 72.

⁵⁹ Called the *Petihak* (opening), *Hoshen Mishpat*, 98, 5. *Infra*, p. 248.

⁶⁰ The ban of excommunication was for a period of ninety days.

⁶¹ *Hoshen Mishpat*, 100, 1.

⁶² Dig., 22, 1, 38, 4.

⁶³ Dig., 36, 1, 69, 1.

⁶⁴ Dig., 42, 8, 10, pr.

⁶⁵ Mentioned in Inst., IV, 6, 6.

⁶⁶ Moyle, p. 545.

MANAGEMENT OF THE DEBTOR'S ESTATE.

While self-help is no doubt the very earliest method of execution, in some communities the conception of self-help does not cling so tenaciously as it does in others.

In Roman law, self-help and private redress prevailed because of the force of tradition. The *legis actio, per manus injectionem*, for instance, is historically a form of private force. Indeed, the ancient civil procedure of most peoples is nothing more than a form of self-help sanctioned by the law.⁶⁷ It was not until the days of Marcus Aurelius that self-help by creditors was rendered penal among the Romans.⁶⁸

The effect of the Praetorian *missio in bona* was to confer on the creditors who obtained it a private right to sell the entire estate of the debtor, and the *magister* was one of the creditors whom his co-creditors elected as their "master" to exercise this right on their behalf. If after the election of the *magister*, but before the sale had been actually carried out, another creditor also obtained a *missio in bona*, this other creditor, who of course had taken no part in electing the *magister*, ranked independently side by side with the *magister*, and had the same rights. The *magister* was merely the agent of the particular creditors who had elected him; he was in no sense a public officer entrusted by the Praetor with the conduct of the bankrupt's affairs.

Under the *distractio bonorum*, the case was different. Here, the Praetor committed the management of the debtor's estate to a *curator*, whose duty it was to dispose of the estate in separate lots and pay the creditors *pro rata* out of the proceeds. Under this system, the bankrupt was not dispossessed of his whole property. The creditors were paid not by the *bonorum emptor*, but by the debtor himself, through the medium of the *curator*.

The old *magister* was never anything more than a creditor acting exclusively in the selfish interests of himself and his electors, whereas the *curator*, appointed by the Praetor, repre-

⁶⁷ Ledlie, "Sohm's Institutes of Roman Law," p. 252.

⁶⁸ The "*decretum divi Marci*," Ledlie, p. 237.

sented to a limited extent the principle of the public interest which requires that bankruptcy proceedings shall be conducted on a uniform plan and that *all* the creditors shall obtain an equitable satisfaction of their claims. As Degenkolb points out, however, the *curator* never attained the position of a public officer charged with the conduct of a state-regulated procedure in bankruptcy.⁶⁹

In very early Jewish law, on the other hand, we find restrictions on the right of self-help,⁷⁰ and in the rabbinical law we find scarcely any vestige of it, execution being public and official.⁷¹

BANKRUPTCY IN THE MIDDLE AGES.

In Europe during the early Middle Ages we find the laws relating to the relation of debtor and creditor to have been peculiarly similar to those of the most primitive period. Execution directed against the person of the debtor became prevalent once more; credit trade again became unusual, and the religious sanctions wielded their pristine force and potency.⁷²

EARLY ITALIAN LAW.⁷³

In Italy, however, the institutions that had their origin in Roman jurisprudence, among them the regulations governing insolvency, never entirely disappeared. As Savigny, in his "History of Roman Law in the Middle Ages," points out, the Italians, even when subject to barbarian and to Langobard rule, did not lose all of their ancient rights, the Roman Commune was never completely destroyed, and the revival of the Italian repub-

⁶⁹ Degenkolb, "*Magister und Curator im Altrömischen Concurs*" (1897), cited by Ledlie, p. 304.

⁷⁰ Deut., 24, 10 and 11.

⁷¹ *Infra*, p. 248.

⁷² Formulae of excommunication *ob debita* are found in a book of forms printed in Rome about 1479, without date or title. In fact, debtors submitted in advance to excommunication in case they should not carry out their engagements. The consequences of excommunication in the Middle Ages were refusal of religious burial and incapacity to appear in court. Brissaud, "French Private Law," p. 561.

⁷³ The development of bankruptcy in Italy is treated in histories of the process of executions, such as Briegleb's "*Geschichte des Exekutivprozesses*," also in general histories of law, as Pertile's "*Storia del Diritto Italiano*," VI, pp. 878-915, and also in special works, such as the chapters devoted to bankruptcy by Lattes in his "*Diritto Commerciale*," Chap. VI, pp. 308-350.

lies and of Roman law was merely a renewal of old institutions and laws which had, in reality, enjoyed an uninterrupted continuity.

It is in the Italian cities that the old Roman system of private liquidation of the estates of insolvents is revived. Elaborate regulations concerning bankruptcy can be traced as far back as 1313, and a compendious text-book on the Italian system was written in 1553 by Benevenuto Straccha, a lawyer of Ancona.

Several important features were introduced by the Italians, among the most important being the principle that the mere stopping of payment constitutes an act of bankruptcy.⁷⁴ The doctrine that suspension of payment by the debtor renders him subject to bankruptcy process was adopted in all of the Italian cities, and has become prevalent in many modern European systems.⁷⁵

Another important innovation of the Italian system is the principle that the *proximus decoctioni* is equivalent to the *decoctus*. The bankruptcy was dated back for a certain length of time, and all acts done by the debtor while on the verge of insolvency were rendered void or voidable.⁷⁶ Our own four months' period prior to bankruptcy is a direct descendant of this Italian principle.

As to the management and control of the bankrupt's estate, in nearly all of the Italian cities, the creditors themselves elected a *magistratus*, who appointed a *curator*, the latter having the management of the estate and representing the bankrupt,⁷⁷ and the appointment of creditors' committees of three or four, vested with full powers, was not unusual.⁷⁸ The creditors *sua auctoritate* took possession of the bankrupt's person and property; liquidation was private, not public.⁷⁹

⁷⁴ Straccha, "*De Decoctoribus*," II, 1.

⁷⁵ *Supra*, note 13.

⁷⁶ Kohler, "*Lehrbuch des Konkursrechts*," p. 195. Numerous statutes, for instance, provided that the creditors whose claims originated during the last week before the bankruptcy got nothing. Ferrara, II, c. 24.

⁷⁷ The representative of the creditors might occasionally be appointed by the court. Ferrara, II, c. 24.

⁷⁸ Straccha, "*De Decoctoribus*," VII, 24.

⁷⁹ *Statuti della Mercanzia di Brescia*, c. 92, 94.

Not only did the creditors, as distinguished from the state, control the estate, but the majority of the creditors could control the minority. We find numerous provisions that the *major pars* decides, the majority being either in number or in interest.⁸⁰ The *concordat*, or composition, in which the majority prevailed over the minority of the creditors, was peculiarly an Italian institution. The majority might compel the minority to surrender their debts and to replace the debtor in charge of his affairs. In Genoa, a majority of three-fifths in voluntary, and seven-eighths in involuntary bankruptcy, was required. The composition had to be publicly registered, so that the interests of all creditors would be safeguarded.⁸¹ Every encouragement was given to the debtor and creditors to agree upon a composition,—no distribution was to be made for eight months, in order to afford the creditors an opportunity to reach an agreement.

The statutes of the various cities did not all agree as to whether the bankrupt had to be a tradesman,⁸² and there were also different provisions as to the number of creditors required to institute the proceedings and as to the mode of proving the existence of the debts and the fact of non-payment.⁸³ Some of the cities allowed bankruptcy only when the debts amounted to a certain sum,⁸⁴ a limitation apparently unknown in ancient law.

The Italian bankrupt was usually treated very severely. *Fal-liti sunt fraudatores*⁸⁵ was the accepted doctrine. Insulting and reviling procedures were ordinary, such as carrying a *biretum album* or a *beretta virida*.⁸⁶ Occasionally the bankrupt who had

⁸⁰ Genoa, II, c. 33, but the bankrupt's wife, children and other near relatives could not vote. Cf. Sec. 59 *e* of the Act of 1898.

⁸¹ Ferrara, II, c. 135.

⁸² Pertile, "*Storia del Diritto Italiano*," VI, p. 887.

⁸³ In Ferrara (*Statuta Urbis Ferrariæ Reformata*, 1567, II, c. 24), two creditors were required to swear that the debtor had suspended payment, and this had to be confirmed by four other witnesses. See also the *Statuta Brixiae*, 1313, II, c. 277 (*Monumenta Historiæ Patriæ*, XVI, p. 1793).

⁸⁴ Genoa, Statutes, II, c. 32, Ed. 1567, required the debts to total at least 500 *librae*.

⁸⁵ Straccha, "*De Decoctoribus*," III, 19; Casaregis, "*Discursus Legales*," 209, 46; "*decoctor ergo fraudator*."

⁸⁶ Kohler's "Shakespeare," p. 48.

absconded was given a safe conduct if he were needed back,⁸⁷ but more frequently the insolvent debtor was tortured in order to force him to expose his property.⁸⁸ These statutes were not penal in their nature; they were simply inquisitorial.

A creditor who made a false claim was severely punished.⁸⁹ He who claimed more than he was entitled to receive forfeited his entire claim, and persons who aided the bankrupt in concealing assets were frequently penalized by being compelled to pay in full the bankrupt's debts.⁹⁰

EARLY GERMAN LAW.

In German law, the principle of priority was very strongly intrenched from earliest times. In some districts, indeed, it was the law as late as the seventeenth century that the creditor who seized an absconding debtor's property could satisfy his own claim regardless of the claims of the other creditors.⁹¹

The first signs of the weakening of the principle of priority are noticeable in the Hanseatic Towns, Lubeck, Hamburg and Bremen.⁹² As Kohler points out, the introduction of equality among creditors into German law was due to Italian influence, a fact indicated by the many features common to both systems.⁹²

EARLY FRENCH LAW.

In France, the Germanic principle of priority was introduced at an early date. In the old Coutumes of Alais, in the first half of the thirteenth century, we find: "*totz les pretz, per rons dels deutes, vengutz em paga als crezedors*," which in Olim's translation is interpreted to mean that the creditors were satisfied in the

⁸⁷ Padua, III, rubr. 4, c. 6.

⁸⁸ Straccha, "*De Decoctoribus*," VII, 2; VIII, 10.

⁸⁹ Ferrara, II, c. 24.

⁹⁰ *Statuti della Mercanzia di Brescia*, c. 95.

⁹¹ Stobbe, "*Zur Geschichte des älteren deutschen Konkursprozesses*" (1888), p. 9.

⁹² Stobbe, pp. 17, 19, 30.

⁹³ Kohler, p. 33. The composition of creditors, a purely Italian institution, was well recognized in Lubeck. "*Lubisches Urkundenbuch*," II, 1, No. 124.

order of the date the debts were contracted.⁹⁴ The Germanic theory that the first execution creditor should precede all subsequent creditors became firmly embedded in comparatively early French law.⁹⁵ An exception was recognized, however, in the case of insolvency as early as the fourteenth century,⁹⁶ and in the *Coutumes of Paris of 1510*, it is expressly provided that *en matiere de deconfiture chacun creancier vient à contribution*.⁹⁷

In Lyon, the foremost trade center of France, which in the sixteenth century experienced a great influx of Italians, the Ordinance of Francis I, dated October 10, 1536, is of special interest. Fundamentally the law of Lyon was the same as that of Italy.⁹⁸ The creditors met, elected one or more *deputés*, and appointed also a *procurator* to conduct trials. The *deputés* were like our modern trustees and receivers, and the *procurator* like our referee. The Declaration of December 23, 1699, provided that in the case of a *moratorium*, the creditors might appoint *directeurs* or *syndics* to supervise the debtor's dealings.

The innocent bankrupt could negotiate with his creditors, and the composition had to be homologated by the court if it had the consent of the majority of the creditors. The debtor, however, had to make full disclosure of all his possessions and business transactions "*à peyne d'être pendu et étranglé par la gorge*."⁹⁹

EARLY DUTCH LAW.

Handvesten given by the Dutch counts to their towns between 1245 and 1412 provided that if the debtor was unable to pay his creditors he should be handed over to the latter until such time as the debt was paid.¹⁰⁰ It was not until about the beginning of the sixteenth century that bankruptcy was introduced into Holland.¹⁰¹

⁹⁴ Olim III 2, p. 1487.

⁹⁵ *Coutume de Paris*, of 1580, a. 178; no doubt due to Frankish influence.

⁹⁶ Brodeau, "*Coustume de Paris*," II, p. 552.

⁹⁷ A. 196. So also in the *Coutume de Paris* of 1580, a. 179.

⁹⁸ *Ordonnance de Commerce* of 1673, Tit. XI, consisting of 13 articles, embodies the salient principles of Italian bankruptcy.

⁹⁹ Percerou, "*Des Faillites et Banqueroutes*," p. 16 ff.

¹⁰⁰ Wessels, "*History of Roman-Dutch Law*," p. 218.

¹⁰¹ *Cessio bonorum* is not mentioned in the "*Instructien van den Hove*

The first legislation in Holland dealing specifically with bankruptcy was enacted in 1531 by Charles V of Spain;¹⁰² and the Perpetual Edict of the 4th of October, 1540, one of the great consolidation acts of the Spanish King, stated in its preamble that it was promulgated in order to check the heresy that was creeping into the provinces, to remedy the expense connected with law suits, and to provide for a pure administration of justice, which would deal equally with rich and poor. The preamble went on to point out the great impulse trade had received, and that, in order to guard and foster that trade, debtors must be compelled to pay their debts and must be prevented from evading their liabilities by flight. The ordinance then provided that all persons who absented themselves from their ordinary residences with the object of defrauding their creditors were to be regarded as common thieves, and if caught might be summarily dealt with and publicly hanged. Persons who aided and abetted the fugitive were to be held liable for the payment of all the debts, and unless they paid in full they might be imprisoned or otherwise punished. Article 3 declared all contracts with fugitive bankrupts, and all sales or alienations made by them, void if prejudicial to creditors. Those who left the country in order to avoid paying their debts were to be punished even if they paid their creditors in full, and even if the creditors all agreed to grant the offenders freedom from punishment.¹⁰³ This is most significant, indicating that bankruptcy was not regarded as a private matter of concern to the creditors exclusively, but as something of vital importance to the entire community, a matter in which the public interest transcended the interest of the creditors.

EARLY SPANISH LAW.

The principle of self-help of creditors and of private control of the debtor and his property found no favor in Spain. The

van Holland" (Rules of Court) of 1462, though reference is made thereto in the "*Instructie*" of 1531. It was the law at Leyden in 1501, at Rotterdam in 1519, and at Briel in 1521.

¹⁰² Van de Water, "*Groot Placaatboek . . . der Stad Utrecht*," I, p. 415.

¹⁰³ Wessels, "*History of Roman-Dutch Law*," p. 218 ff.

creditors derived their rights from the tribunal of justice. Into the hands of the law the debtor's estate had to be placed, and the judges were required to see to its disposition and to the distribution of the proceeds. Judicial liquidation of the bankrupt's estate alone was tolerated. Whatever was taken from the debtor's estate by the self-help of the creditors had to be returned.¹⁰⁴

The *Ley de Siete Partidas*¹⁰⁵ borrowed the *cessio bonorum* from Roman law, but the tribunal of justice had the sole and exclusive control and management of the debtor's estate. If a person became insolvent, he was imprisoned until he made a *cessio*.¹⁰⁶ As a corollary of the decree that a *cessio* could be coerced through imprisonment, it became universally accepted that until the bankrupt's case was all cleared up, the person who made a *cessio* should languish in jail. This was legally sanctioned in the famous *ley* of July 18, 1590.¹⁰⁷

To evade the very severe provisions of this law, a new institution was developed in Spain which, through Salgado de Samoja in his *Labyrinthus Creditorum*, published about 1663, influenced greatly the bankruptcy systems of all countries. Under the provisions of this Spanish system, the debtor placed his estate into the custody of the judicial tribunal for the benefit of his creditors.¹⁰⁸ The tribunal appointed an *administrator*. It is true that the approval of a majority of the creditors was required to validate the *administrator's* appointment, but it is equally true that that official was an organ of the law and was absolutely powerless, except in so far as the court expressly granted him the authority to act.¹⁰⁹ The debtor retained the title to his

¹⁰⁴ Laws of 1447, 1469 and 1473. *Novissima Recopilacion de las leyes des Espana* (Paris, 1846), XI, 34, 1, 4 and 5. It is, however, provided that the creditor, when there is no judge at hand, who seizes the absconding debtor himself and takes away his possessions, may keep as much as will satisfy his claim, because what he thus acquires is acquired at the risk of his life. *Ley de Siete Partidas*, V, 15, 1, 10.

¹⁰⁵ V. 15, I, 1 and 2.

¹⁰⁶ V. 15, I, 4.

¹⁰⁷ *Novissima Recopilacion de las leyes de Espana*, XI, 32, 1, 7.

¹⁰⁸ *Labyrinthus Creditorum*, I, 13.

¹⁰⁹ *Labyrinthus Creditorum*, III, 8, vo. 1. Cf. Sec. 2, subsection 17 of Act of 1898, where it is provided that the creditors should recommend, but the court appoint, the trustee.

property; he still had the *dominium*. The creditors had what was vaguely and indefinitely called a "*jus et interesse considerabile*." The public tribunal practically had the sole control over the debtor and his estate.

MEDIAEVAL JEWISH LAW.

Semitic law was perhaps the original source from which the Spanish system derived and adopted public and administrative liquidation, its most striking characteristic. That Moorish and Jewish laws and customs affected Spanish jurisprudence is not surprising, in view of the centuries of Moorish domination and the unusual personal influence wielded by Jews in mediaeval Spain.

In Morocco to the present day, the liquidation of the estate of an insolvent debtor, the proof of claims, and the final distribution are all effected through administrative authority.¹¹⁰ So, too, in the ancient Semitic system of the Hanefites, the Kadhi attached the insolvent's estate on the petition of the creditors.¹¹¹

In Jewish law, public and judicial liquidation prevailed. All execution commenced with the *Petihah*, which was a writ issued by the *Beth Din*, or judicial tribunal, on petition of a creditor. This writ was in the nature of a ban of excommunication on the debtor for ninety days.¹¹² The debtor could avoid the effect of the ban and the other proceedings by coming forward and surrendering all his property, taking for himself his exemptions.¹¹³ In order to make this assignment or *cessio*, he had to take a rabbinical oath that he had no other property, that he had made no fraudulent transfers, and that he would apply his future earnings, beyond what was necessary for his simple needs, to the payment of his debts.¹¹⁴ It is interesting to note in this connection the similarity of the Spanish customary law to the Jewish

¹¹⁰ Alexander, "*Konkursgesetze*," p. 401.

¹¹¹ Post, "*Ethnologischen Jurisprudenz*," p. 578.

¹¹² *Supra*, p. 239.

¹¹³ *Hoshen Mishpat*, 91.

¹¹⁴ Oliver, "*Historia Del Derecho en Cataluna*," IV, p. 30.

law. According to the *costumbres* of Tortosa (thirteenth century), the debtor who desired to make a *cessio* had to present himself before a tribunal, submit his sworn declaration of insolvency, and swear that of his future possessions he would satisfy all his creditors.¹¹⁵ Jewish law provided further that if there were several creditors, it was not necessary to make a separate oath for each; one general oath sufficed for all,¹¹⁶—an indication that something partaking of the nature of a *concursum creditorum* was known to the Jews of the Middle Ages.

A rather elaborate system of bankruptcy regulations was enacted and promulgated by the Jewish Council of the Four Lands, in Poland.¹¹⁷ The following¹¹⁸ are a few of its provisions:

"(1) As soon as it shall become known that one has become a *Boreach* (bankrupt), called in Germany a *Baal Pletah*, the *Beth Din* (rabbinical court) of his locality shall immediately give public notice to all persons not to accept any portion of the bankrupt's estate. If anything should be transferred from the estate, the transfer is a nullity, and the property must be returned, so that all creditors, no matter in which city or country they may reside, may share equally, in accordance with the established law.¹¹⁸ The estate shall in the meantime remain in the custody of the *Beth Din* until the next fair shall be held.

"(2) As soon as it shall become known that one has become a *Boreach*, the Elders of the community shall immediately take over all his possessions; shall compel him and his wife to take oath that he has no other property and that they have not concealed anything; shall, within thirty days, turn over to the *Neeman* ('trustee') all of the debtor's personal or real estate, and also his synagogue pew; shall record in the official archives the transfer of the title to the *Neeman*; and the *Neeman* shall dispose of the entire estate within six months after the bankruptcy and turn over the proceeds to the creditors.

"(4) If within three months after the marriage of the debtor's daughter, the debtor become bankrupt, the son-in-law must return for the benefit of the creditors the dowry he had received. If the

¹¹⁵ *Hoshen Mishpat*, 99.

¹¹⁶ The Council of Four Lands (*Waad Arba Arazoth*) was the central body of Jewish autonomy in Poland from the middle of the sixteenth to that of the eighteenth century. This body had extensive legislative, administrative, judicial and religious authority.

¹¹⁷ Extract from the *Pincus* (official archives) of the Council of the Four Lands, found in an old rabbinical treatise entitled "*Sefer Mamar Kadishin*," published in 1776.

¹¹⁸ *Supra*, p. 234.

bankruptcy occur a year after the marriage, the creditors shall not get any portion of the dowry.

"(5) All wearing apparel furnished by the bankrupt for his wife during the entire year prior to his bankruptcy must be disposed of for the benefit of the creditors. . . .

"(7) When the ban of excommunication is pronounced in the synagogue against the bankrupt, his family shall also be present.

"(8) He who receives property from the bankrupt at a fair held in the bankrupt's city, within three months prior to the bankruptcy, must return it to the creditors, but he who receives the property at a fair held in a city in which the bankrupt does not reside, even though bankruptcy follows within three months thereafter, need not return it. . . .

"(16) No one should have any dealings with a bankrupt after his bankruptcy; he who does deal with the bankrupt can have no legal redress as to such transactions."

Louis Edward Levinthal.

Law School, University of Pennsylvania.