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ENFORCEMENT OF MONEY JUDGMENTS IN EARLY AMERICAN HISTORY

Stefan A. Riesenfeld*

THE history of the enforcement of money judgments in the United States during the colonial period and the early days of statehood has never been explored in depth. The only modern account is the brief discussion in R. Millar's *Civil Procedure of the Trial Court in Historical Perspective*.¹ Yet, in view of the recent and long overdue concern with the protection of debtors against unnecessarily harsh and oppressive direct² collection remedies, a study of the early efforts designed to shield debtors from excessive and wasteful deprivations of their property is not without interest, especially as the record is rich in experimentation with different alleviating devices.

Of course, the colonies always remained conscious of their English background. This, however, did not close the door to the development of indigenous institutions or departures from the rigors of common law procedures. The colonial responses to the problems associated with the enforcement of money judgments were dictated by local needs or values and subject to numerous legislative changes.³ The colonists insisted on and never surrendered their claim to a system of administration of justice that was suitable to their own conditions and policies and capable of adaptation by individual acts and large-scale revision.⁴

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1. R. MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE*, ch. 24, esp. § 2 (1952). See also Riesenfeld, *Collection of Money Judgments in American Law—A Historical Inventory and a Prospectus*, 42 IOWA L. REV. 155 (1955).

2. The term "direct collection remedies" is used because of the exclusion from this Article of the indirect collection remedy of imprisonment for debt.

3. See Goebel, *King's Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416 (1931) [hereinafter Goebel] for the importance of the local ingredient in early colonial law.

4. This right to individual action, however, did not prevent the wholesale borrowing of acts and codes from sister colonies. See Riesenfeld, *Law-Making and Legislative Precedent in American Legal History*, 33 MINN. L. REV. 103 (1949) [hereinafter *Law-Making and Legislative Precedent*].

On the other hand, additional modifications were introduced by parliamentary statutes in the mother country. These were specifically designed to overcome difficulties experienced by residents in Great Britain because of the inappropriateness of some common law procedures to the economic and institutional conditions in the colonies. Perhaps the most important example is the much misunderstood Act of 1732 for the More Easy Recovery of Debts in His Majesty's Plantations and Colonies in America.⁵ Section 4 of the Act provided that

the houses, lands, negroes and other hereditaments and real estate . . . shall be liable to and chargeable with all just debts, duties and demands of what nature or kind soever owing . . . to his Majesty, or any of his subjects, and shall and may be assets for the satisfaction thereof, in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings and process, in any Court of law or equity in any of the said Plantations respectively, for seizing, extending, selling or disposing of any such houses, lands, negroes and other hereditaments and real estate, toward the satisfaction of such debts, duties and demands, and in like manner as personal estates in any of said Plantations respectively are seized, extended, sold or disposed of, for the satisfaction of debts.⁶

In other words, the statute subjected real estate in the colonies (1) to liability for *all* just debts in the manner that existed in England only with respect to debts created by bonds and other specialties,⁷ and (2) to the same colonial procedures governing execution as were applicable to personal property. Thus, the first branch of the section was particularly important with respect to the collection of debts after the debtor's demise, while the second branch of the section was especially material with respect to real property owned by living debtors.⁸ The statute raised a host of complicated problems relating to priorities and proper procedures caused by its curtailment of the privileged status of real estate under common law. It was the object of lengthy and learned arguments, by courts and by counsel, especially in early cases adjudicated in Maryland and the

5. 5 Geo. 2, c. 7.

6. 5 Geo. 2, c. 7, § 4.

7. See note 15 *infra*.

8. See Chancellor Bland's elaborate opinions in *Coombs v. Jordan*, 3 Bla. Ch. 284 (Md. 1831); *Tessier v. Wyse*, 3 Bla. Ch. 28 (Md. 1830). See also *D'Urpley v. Nelson*, 4 McCord 129 n.a. (S.C. Const. Ct. 1803); *Martin v. Latta*, 4 McCord 128 (S.C. Ct. App. 1826); *Bell v. Hill*, 2 N.C. 85, 1 Hay 72 (2d ed. W. Battle 1794) (arguments of counsel); *Baker v. Webb*, 2 N.C. 55, 1 Hay 43 (2d ed. W. Battle 1794) (arguments of counsel).

two Carolinas.⁹ A number of colonies, however, had long anticipated all or at least some of the changes brought about by the statute, and, as a result, to that extent no particular changes in existing local practice were necessary.¹⁰ In essence, the statute opened other collection remedies with respect to land than existed under the writ of *elegit*, which was predicated upon the existence of large estates in land yielding sufficient annual rents and profits. The statute did not make execution sales of land mandatory, but merely prescribed equal treatment for real and personal property. Nevertheless, some colonies gradually departed from the scheme of the statute and at least one ignored it outright.¹¹ The true picture can only be seen after a detailed study of the legislation in each of the colonies and the early states. This is the aim and method of the following discussion.

I. THE BACKGROUND OF ENGLISH LAW

The two principal collection remedies of judgment creditors under the classical English system were the writs *fieri facias* and *elegit*. *Fieri facias* was a judicial writ, developed in the formative days of the common law, whose origins and early scope are still shrouded in mystery.¹² At any rate, it came to have the form of a command to the sheriff, ordering him to raise the amount specified in the judgment from the "goods and chattels" of the judgment debtor, by the seizure and sale thereof. Freehold estates owned by the judgment debtor could not be reached by the writ of *fieri facias*.¹³ The proper procedure for seeking satisfaction of the judgment from real property owned by the debtor was the procurement and service

9. See authorities cited in note 8 *supra*.

10. In Connecticut, the Act of 1732 was thought to necessitate only a provision that would permit the sale of land by the administrator or a person appointed for that purpose in case the personal estate was insufficient to pay the decedent's debts. 7 Conn. Col. Pub. Rec. 441-44 (C. Hoadley ed. 1873).

11. See text accompanying notes 152-69 *infra*; note 312 *infra* and accompanying text.

12. Early forms of the writ commanded the sheriff to raise a specified sum from the lands and chattels (*de terris et catallis*) of the debtor and not from the goods and chattels (*de bonis et cattallis*) as was customary in later days. See Statute of Westminster II, 13 Ed. 1, c. 18 (1285), 1 Stat. Realm 71, 82 (1810); *A Register of Judicial Writs 'J'*, No. 65, in EARLY REGISTERS OF WRITS, 87 SELDEN Soc. 325 (E. De Haas & G. Hall ed. 1970). Coke explained the language of the statute by noting that "here under these words [*fieri facias*] is also the writ of *levari facias* included." E. COKE, INSTITUTES OF THE LAWS OF ENGLAND, pt. 2, Westm. 2, ch. 18 n.4, at 395 (6th ed. 1681). This is an oversimplification.

13. For the classical exposition of the traditional scope of the writs of *fieri facias* and *elegit* between the sixteenth and eighteenth centuries, see G. GILBERT, LAW OF EXECUTIONS 9, 13, 32 (1763) [hereinafter G. GILBERT].

of the writ of *elegit*, created by the Statute of Westminster II in 1285.¹⁴ This writ enabled the judgment debtor to obtain a term of years in one half of the debtor's lands for a period appraised to be long enough to satisfy the judgment debt from the rents and profits of the land thus "extended."¹⁵

The subjection of real estate to the reach of judgment creditors resulted in the recognition of a new interest in land: the judgment lien. The Statute of Westminster II was construed to entitle the judgment creditor to a term for years in one half of the real property of the judgment debtor from the time of the judgment.¹⁶ Hence, the judgment was said to "bind" the lands or to create a "lien" thereon from that date.¹⁷ Since at common law, judgments related back to the first day of the term in which they were recovered, that date determined priorities between judgment creditors and purchasers as well as between judgment creditors *inter se*; in other words, all judgments recovered during the same term created liens of equal rank.¹⁸ This rule was qualified in the interest of subsequent purchasers by two later statutes. The Statute of Frauds prescribed that

such Judgments as against Purchasers bona fide for valuable consideration of Lands, Tenements or Hereditaments to be charged thereby shall in consideration of Law be Judgments only from such time as they shall be so signed and shall not relate to the first day of the Term whereof they are entered or the day of the Return of the Original or filing the Bail any Law Usage of Course of any Court to the contrary not withstanding.¹⁹

The protection of purchasers against latent judgment liens was enhanced by the Statute for the Better Discovery of Judgments

14. 13 Ed. 1, c. 18 (1285), 1 Stat. Realm 82 (1810).

15. The rules governing the delivery of the term *per rationabile extentum*, either at a value in gross or at an annual value, are set forth in G. GILBERT, *supra* note 13, at 33-35. There was a question whether and under what circumstances an heir could invoke the limitation to one half of the lands with respect to the real estate coming to him by descent. It was finally settled in this fashion: an *elegit*, issued upon *scire facias* against an heir upon a judgment against, or a recognizance executed by, the ancestor, could be extended only upon half of the inherited lands; conversely, an *elegit* issued upon a judgment in debt against an heir upon a bond by the ancestor binding the heir, was a "special" *elegit* and could be extended on all the inherited land. *Jefferson v. Morton*, 85 Eng. Rep. 540, 85 Eng. Rep. 575 (K.B. 1670); *Bowyer v. Rivet*, 79 Eng. Rep. 1252, 81 Eng. Rep. 264, 81 Eng. Rep. 1151, 82 Eng. Rep. 45 (K.B. 1625); *Harbert's Case*, 76 Eng. Rep. 647 (Ex. 1584); *Luson's Case*, 73 Eng. Rep. 174 (K.B. 1553).

16. G. GILBERT, *supra* note 13, at 37, 55-56.

17. *Id.* at 55-56. Gilbert uses the term "lien" at 56.

18. See G. GILBERT, *supra* note 13, at 56; 2 W. TIDD'S PRACTICE, 850, 852, 856 (3d ed. 1803) for a discussion of the priority problem.

19. 29 Car. 2, c. 3, § 14 (1677), 5 Stat. Realm 839, 841 (1819).

in the Courts of Kings Bench, Common Pleas and Exchequer at Westminster.²⁰ It provided that

no Judgment not docketed and entered in the Books as aforesaid shall affect any Lands or Tenements as to Purchasers or Mortgagees or have any preference against Heirs Executors or Administrators in their Administration of their Ancestors Testators or Intestates Estates.²¹

The priorities between judgment creditors *inter se* were not affected by these enactments. It has been suggested, however, that, as between judgment creditors of equal rank, the first one to have the writ of *elegit* served thereby acquired priority.²² It was in this posture that the English practice became received in a number of the American colonies.

II. THE NEW ENGLAND COLONIES

A. *The Early Colonial Period*

The traditional practice of the common law courts never gained a foothold in toto in the New England colonies.²³ The reasons for that departure were twofold: First, the early law of New England in general more resembled the local customs in the homeland, including those of the English boroughs, than the King's law.²⁴ And second, the scarcity of money and the easy accessibility of land made the English collection remedies particularly ill suited to their purpose.

Hence, rather than selling chattels seized under a writ of *fiery facias* and extending a term for years on land taken under the writ of *elegit*, the New England colonists generally found transfer of chattels and land to the creditor in full ownership a more convenient method of execution. Yet, these new methods failed to gain a firm acceptance immediately, and the colonial days showed considerable vacillations between public sale and transfer to the creditor, with respect to both chattels and land. Moreover, the colonists sought to temper the power of the creditor to appropriate the whole fee

20. 4 W. & M., c. 20 (1692), 6 Stat. Realm 412 (1819).

21. 4 W. & M., c. 20, § 2 (1692), 6 Stat. Realm 412 (1819).

22. G. GILBERT, *supra* note 13, at 56.

23. Developments in the law of the New England colonies are broken into two parts because of the absorption of certain colonies and because of the changes in the structure of colonial government occurring at the end of the seventeenth century.

24. See Goebel, *supra* note 3; Riesenfeld, *The Formative Era of American Public Assistance Law*, 43 CALIF. L. REV. 175, 200-03 (1955); *Law-Making and Legislative Precedent*, *supra* note 4.

to the satisfaction of his debt by the introduction of the right to redeem from the sale or the setoff to the creditor. These changes were accompanied by modification of the rules governing the service of the standard writs of execution, or by alteration of the standard form of the writ of *feri facias* and abolition of *elegit*, or by a combination of these approaches. Massachusetts and the other New England colonies, with the exception of Connecticut, never adopted the system of dual writs of execution practiced in England, but developed, instead, a unified writ of execution to be levied on the debtor's estate,²⁵ while other colonies changed their methods of execution and the forms of the writs employed for that purpose only gradually. The following discussion will furnish the details for this summary.

1. *New Plymouth*

The first code of laws of the oldest New England colony was compiled in 1636.²⁶ It included no orders relating to execution except for a provision originally enacted in 1633 that permitted the sale of lands purchased by a deceased debtor if the goods and chattels in his estate were insufficient to satisfy his creditors.²⁷ The first orders relating to execution were enacted in 1644²⁸ and 1645.²⁹ All executions issued out of the General Court or the Court of Assistants were to be served by the marshal, who replaced the former messenger.³⁰ The marshal was to seize goods and chattels and to deliver them to the creditor in payment of his debt. If the value of the chattels taken exceeded the amount of the debt, the creditor was to repay the balance to the debtor. The Act of 1644 gave the debtor the choice to sell the goods at a price higher than their appraised value within six days after their seizure, but this option was eliminated in 1645 and detailed rules on the appraisal procedures were added. Whether execution against real property was permitted re-

25. See text accompanying note 51 *infra*.

26. 11 New Plymouth Col. Rec., Laws, 1623-1682, at 6 (D. Pulsifer ed. 1861), *THE COMPACT WITH THE CHARTER AND THE LAWS OF THE COLONY OF NEW PLYMOUTH* 1 (W. Brigham ed. 1836) [hereinafter *NEW PLYMOUTH COL. COMPACT, CHARTER & LAWS*].

27. Act of June 2, 1633, 11 New Plymouth Col. Rec. 15 (D. Pulsifer ed. 1861), *NEW PLYMOUTH COL. COMPACT, CHARTER & LAWS* 33 (W. Brigham ed. 1836).

28. Act of March 3, 1644, 11 New Plymouth Col. Rec. 44-45 (D. Pulsifer ed. 1861), *NEW PLYMOUTH COL. COMPACT, CHARTER & LAWS* 78 (W. Brigham ed. 1836).

29. Act of June 4, 1645, 11 New Plymouth Col. Rec. 45 (D. Pulsifer ed. 1861), *NEW PLYMOUTH COL. COMPACT, CHARTER & LAWS* 79 (W. Brigham ed. 1836).

30. Act of June 4, 1645, 11 New Plymouth Col. Rec. 45 (D. Pulsifer ed. 1861), *NEW PLYMOUTH COL. COMPACT, CHARTER & LAWS* 79 (W. Brigham ed. 1836). The office of messenger, which preceded that of the marshal, was defined in the Codification of 1636, 11 New Plymouth Col. Rec. 18 (D. Pulsifer ed. 1861), *NEW PLYMOUTH COL. COMPACT, CHARTER & LAWS* 48 (W. Brigham ed. 1836).

mained unspecified. The Statute of 1645 was slightly revised and re-enacted in 1655, and incorporated in the revised code of 1658.³¹

The recodification of 1671³² amplified and clarified the existing provisions. It expressly provided that an execution could be levied on land, but only if no nonexempt goods and chattels could be found.³³ Apparently, land was also to be transferred to the creditor at an appraised value. An order enacted in 1673 expressly provided procedures for the appraisal of goods and other estates levied upon by distress or execution.³⁴ Moreover, although the statute relating to the liability of decedents' lands for their debts prescribed a sale thereof,³⁵ in practice, the marshal assigned them to judgment creditors according to recorded returns of that period.³⁶

Since debts were to be paid in the species agreed upon,³⁷ creditors desired execution sales by public auction rather than forced acquisition of the chattels levied upon. As a result, an Act of 1679³⁸ prescribed this mode of execution for chattels, but it was repealed in 1681,³⁹ and the former method of seizure, appraisal, and transfer to the creditor was restored.

The revision of 1685⁴⁰ retained the governing provisions⁴¹ and prescribed that creditors acquired the same title to the lands levied

31. New Plymouth Col. Gen. Laws & Liberties of 1658, in 11 New Plymouth Col. Rec. 94 (D. Pulsifer ed. 1861).

32. New Plymouth Col. Gen. Laws of 1671, in NEW PLYMOUTH COL. COMPACT, CHARTER & LAWS 240 (W. Brigham ed. 1836). The revised laws of 1671 were printed in 1672.

33. New Plymouth Col. Gen. Laws of 1671, ch. 4, § 19, ch. 7, § 6, in NEW PLYMOUTH COL. COMPACT, CHARTER & LAWS 256, 265 (W. Brigham ed. 1836).

34. Act of July 4, 1673, 11 New Plymouth Col. Rec. 234 (D. Pulsifer ed. 1861), NEW PLYMOUTH COL. COMPACT, CHARTER & LAWS 168 (W. Brigham ed. 1836).

35. New Plymouth Col. Gen. Laws of 1671, ch. 10, § 7, in NEW PLYMOUTH COL. COMPACT, CHARTER & LAWS 282 (W. Brigham ed. 1836). See text accompanying note 27 *supra*.

36. 6 New Plymouth Col. Rec., Court Orders, 1678-1691, at 79-80 (N. Shurtleff ed. 1856).

37. New Plymouth Col. Gen. Laws of 1671, ch. 4, § 22, in NEW PLYMOUTH COL. COMPACT, CHARTER & LAWS 256 (W. Brigham ed. 1836); Act of June 7, 1666, 11 New Plymouth Col. Rec. 216 (D. Pulsifer ed. 1861), NEW PLYMOUTH COL. COMPACT, CHARTER & LAWS 149 (W. Brigham ed. 1836).

38. Act of July 3, 1679, 11 New Plymouth Col. Rec. 249, 250 (D. Pulsifer ed. 1861), NEW PLYMOUTH COL. COMPACT, CHARTER & LAWS 191 (W. Brigham ed. 1836).

39. Act of July 7, 1681, 11 New Plymouth Col. Rec. 250-51 (D. Pulsifer ed. 1861), NEW PLYMOUTH COL. COMPACT, CHARTER & LAWS 191 (W. Brigham ed. 1836).

40. New Plymouth Col. Gen. Laws of 1685. A printed copy of these laws is in the Harvard Law School library. A microfilm copy is in Records of the United States, Massachusetts B.1, Reel 1.

41. New Plymouth Col. Gen. Laws of 1685, ch. 2, § 19 (Actions), ch. 13 (Marshals and Constables, Directions).

upon as the debtor held at the time of the seizure.⁴² When the colony lost its separate existence in 1691, the law of Massachusetts replaced that of New Plymouth without causing substantial change in the existing practice.

2. Massachusetts

Massachusetts was in fact the first New England colony to regulate execution. A resolve of 1640⁴³ specifically declared that execution sales did not produce sufficient proceeds owing to the scarcity of money, and therefore prescribed that chattels and land should be given to the creditor at an appraised value, land to be taken only if there were insufficient chattels to satisfy the judgment. In 1647 the procedure was regulated in greater detail, although the basic scheme remained unchanged.⁴⁴ This order was incorporated in the codification of 1648 *sub voce* "Levies."⁴⁵ A record of 1653 of proceedings in the General Court⁴⁶ illustrates the practice. In 1654 it was specifically enacted that contracts for money, corn, cattle, or fish were to be paid in kind, and if the debtor failed to make such payment, the creditor was entitled either to imprison the debtor or to take upon execution such goods, houses, and lands as shall be to his satisfaction, any law, custom, or usage to the contrary notwithstanding.⁴⁷ The codification of 1660 incorporated the relevant rules under the headings of "Marshal" and "Payments,"⁴⁸ and the revision of 1672 continued these provisions.⁴⁹ An order of 1675 amplified the law relating to execution against lands and houses by providing that, upon recording, the delivery of the houses and land to the creditor or a person designated by him should operate as a legal assurance to him

42. New Plymouth Col. Gen. Laws of 1685, ch. 12, § 5:

It is ordered that all houses, lands and hereditaments that have been or shall be levied or distrained and delivered in execution, according to law, and possession orderly given by any marshall, or constable or any of their deputies that levied the same, and is returned and recorded, shall be and remain to the party to whom delivered, and his heirs and assigns as good an estate as it was to the person from whom taken or recovered.

43. Act of Oct. 7, 1640, 1 Records of the Governor and Company of the Massachusetts Bay in New England, 1628-1641, at 307 (N. Shurtleff ed. 1853) [hereinafter Mass. Bay Rec.].

44. Act of Nov. 11, 1647, 2 Mass. Bay Rec., 1642-1648, at 205 (N. Shurtleff ed. 1853).

45. The Laws and Liberties of Massachusetts, 1648, at 34 (M. Farrand ed. 1929).

46. 3 Mass. Bay Rec., 1644-1657, at 305 (N. Shurtleff ed. 1854).

47. Act of Aug. 22, 1654, 3 Mass. Bay Rec. 354, 4 Mass. Bay Rec., 1650-1660, pt. 1, at 197 (N. Shurtleff ed. 1854).

48. Mass. Col. Laws of 1660, at 172-74, 183 (W. Whitmore ed. 1889) (supplements to 1672).

49. Mass. Col. Laws of 1672, at 102, 120 (W. Whitmore ed. 1890) (supplements through 1686) (including a change of the Statute of 1654 made in 1670).

and his heirs forever.⁵⁰ In 1685 an official form of the writ of execution was prescribed.⁵¹

3. *Connecticut*

During the first decade of its history, Connecticut followed to a substantial degree the enactments of the parent colony of the Massachusetts Bay. Thus, in 1641 it adopted a resolve similar to that of its neighbor, which had prescribed the transfer of the debtor's chattels or land to the execution creditor or to a person designated by him at an appraised value in satisfaction of the judgment.⁵² In contrast to the Massachusetts model, however, the Connecticut Act applied only to goods. Execution against lands was regulated in 1647⁵³ in the context of an Act against fraudulent conveyances. The Act enabled creditors suspecting that their debtor did not have sufficient personal property to cover his debts to enter a caveat against his lands and, upon recovery of a judgment against him, to take out an extent against such lands. Pursuant to the extent the sheriff, with the aid of two neighbors, was to appraise the land and sell it outright "if the debt so required,"⁵⁴ or to lease it at a reasonable rental to the creditor or to a third person in full or partial satisfaction of the debt. The caveat protected the creditor against a subsequent conveyance and gave him priority vis-à-vis other creditors if his debt was due at the time of the entry of the caveat.⁵⁵ If, at the next term, it appeared that the land was not sufficient to pay all debts, the court was to order distribution of the debtor's estate among the creditors with due regard for the priority obtained by caveats. If, however, the debtor was known to be insolvent before the entry of the first caveat, the creditors were to share pro rata in the estate or its proceeds.⁵⁶ Obviously, this regulation showed the imprint of

50. Mass. Col. Laws of 1672, at 220 (W. Whitmore ed. 1889).

51. Mass. Col. Laws of 1672, at 320 (W. Whitmore ed. 1889). See 1 RECORDS OF THE COURT OF ASSISTANCE OF THE COLONY OF THE MASSACHUSETTS BAY, 1630-1692, at 389-91 (J. Noble ed. 1901) for an example of the practice of that time.

52. Order of Nov. 9, 1641, 1 Conn. Col. Pub. Rec., 1636-1663, at 69 (J. Trumbull ed. 1850).

53. Order of May 25, 1647, 1 Conn. Col. Pub. Rec. 151-53 (J. Trumbull ed. 1850).

54. 1 Conn. Col. Pub. Rec. 152 (J. Trumbull ed. 1850).

55. 1 Conn. Col. Pub. Rec. 152-53 (J. Trumbull ed. 1850).

56. For early examples of insolvency proceedings with pro rata distribution of the estate to the creditors, see Records of the Particular Court of Connecticut, 1639-1663, in 22 COLLECTIONS OF THE CONNECTICUT HISTORICAL SOCIETY 17, 22, 31, 92 (Insolvency Proceedings in the matter of Thomas Marshfield, 1643-1650), 114 (Insolvency Proceedings in the matter of John Webb, 1652) (1928) [hereinafter Records of Particular Court of Connecticut].

the English practice under the *elegit* and amounted to the creation of a lien resulting from the caveat and the judgment.

Both the Act of 1641 and the Act of 1647 were inserted by Ludlow in his celebrated Code of Laws of 1650,⁵⁷ which was, in the main, a reproduction of the Massachusetts code of 1648. In addition, the Code of 1650 included a verbatim copy of the title on Levies⁵⁸ contained in the Massachusetts model.⁵⁹ This provision authorized levies on land "according to law."⁶⁰

In 1655 the General Court resolved that it would repeal the order of 1641 and permit a marshal's sale of goods levied upon without appraisal.⁶¹ Apparently, this order was never adopted. In the codification of Connecticut law of 1672⁶² (compiled after the issuance of the new charter in 1662 and the union with New Haven in 1665), the titles on "caveats entered," "executions," and "levies" were incorporated with only minor changes from the Code of 1650.

In 1676⁶³ execution sales of "estates" levied upon were authorized in case the estate was indivisible and appraised at a value greater than the judgment debt plus charges. In that situation, the debtor had a grace period of six days to make a private sale; after that time the officer was to sell the estate at public auction. Apparently, the order included estates in land. In 1682⁶⁴ execution was subjected to a comprehensive new regime. All goods or real estate levied upon under an execution were sold at public auction, but land was not levied upon if the debtor had sufficient personal property to satisfy the execution. Moreover, the debtor had sixty days to redeem the property from the levy. In 1685 the colony repealed the Act of 1682 to the extent that it authorized execution sale of land and returned to the system of transferring it at an appraised value to the creditor or to a party designated by him.⁶⁵ This remained the law until the interruption of the charter government

57. 1 Conn. Col. Pub. Rec. 509, 518 (caveats entered), 525 (executions) (J. Trumbull ed. 1850).

58. 1 Conn. Col. Pub. Rec. 537 (J. Trumbull ed. 1850).

59. See text accompanying notes 43-45 *supra*.

60. For early examples of execution against real estate, see Records of the Particular Court of Connecticut 125 (Matter of Chapman, 1654), 147 (Morrice v. Rowell, 1655). It is not clear whether the estate was sold or set off to the creditor.

61. Order of March 7, 1655, 1 Conn. Col. Pub. Rec. 273 (J. Trumbull ed. 1850).

62. Conn. Gen. Laws and Liberties 11, 23, 39 (1672, *reprinted* 1865).

63. Order of May 19, 1676, 2 Conn. Col. Pub. Rec., 1665-1678, at 313 (J. Trumbull ed. 1852).

64. Order of Oct. 12, 1682, 3 Conn. Col. Pub. Rec., 1678-1689, at 105, 109, 110 (J. Trumbull ed. 1852).

65. Order of May 22, 1685, 3 Conn. Col. Pub. Rec. 175 (J. Trumbull ed. 1852).

by Governor Andro's usurpation of the legislative powers following the establishment of the ill-fated Domain of New England in 1685.

4. *New Haven and Rhode Island*

In the short-lived Colony of New Haven (1639-1665), the law of execution was incorporated under the caption "Marshall" in the Code of 1655.⁶⁶ The provisions were closely patterned after the corresponding provisions under the caption "Levies" in the Massachusetts Laws and Liberties of 1648.⁶⁷

In contrast, Rhode Island was the New England colony that preserved the greatest degree of independence from the Massachusetts model. In the first codification of 1647,⁶⁸ as well as in the revision of 1663,⁶⁹ the process of execution was regulated under the caption "Debts." It was provided that there should be no imprisonment for debt but that the debtor's "goods, lands or debts" be seized for the payment thereof. It appears that the assets were originally to be assigned to the creditor at an appraised value, for a subsequent resolve imposed a duty on the inhabitants of the colony to serve as appraiser.⁷⁰ In 1666, however, an Act for Regulating the Proceedings on Executions and Distraints on Goods and Chattels,⁷¹ which provided for the sale of goods and chattels and granted the debtor a ten-day redemption period prior to the sale, was passed. Execution against land was not included in that Act. The law remained in that form until the beginning of the eighteenth century.

B. *Later Colonial Period*

1. *Massachusetts*

In 1692 Massachusetts revised and recodified its laws relating to execution. One act introduced the common law doctrine of dormancy and required a revivor by means of the writ of *scire facias* prior to the issuance of an execution upon judgments, if execution thereon had not been taken out during the year following judgment.⁷²

66. New Haven's Settling in New England and Some Laws for Government, in New Haven Col. Rec., 1653-1665, at 562, 600 (C. Hoadly ed. 1858).

67. See text accompanying notes 43-45 *supra*.

68. 1 R.I. Col. Rec., 1636-1663, at 180 (J. Bartlett ed. 1858).

69. R.I. Rev. of 1663, at 17 (On microfilm at University of California, Berkeley, Law School).

70. Order of June 29, 1655, 1 R.I. Col. Rec. 320 (J. Bartlett ed. 1858).

71. R.I. Acts & Resolves, 1719, at 21 (S. Rider ed. 1895).

72. Act for Affirming of Former Judgments and Providing for Executions of 1692, ch. 24, §§ 2-3, 1 Mass. Bay Prov. Acts & Resolves, 1692-1714, 60 (1869).

Another act made lands and tenements held in fee simple liable to execution and assured good title thereto "to the party for whom they are so taken,"⁷³ as well as to his heirs and assigns. The law, having been disallowed by the Privy Council, was re-enacted in 1696 (with appropriate provisions for debts owed to the Crown).⁷⁴ As of 1713, debtors who lost lands and tenements upon execution were granted the right to redeem their property from the creditors or tenants in possession within one year following the levy, upon payment of the full sum for which it was taken plus the necessary charges, with credit given for rents and profits received.⁷⁵ Further refinements were added in 1716 by providing for the case where land was not subject to division and of greater value than the judgment debt.⁷⁶ In such case the creditor was entitled to the rents and profits of the land until the debt was satisfied. Because of certain defects in draftsmanship, the law was replaced by a similar act in 1719.⁷⁷ The law remained substantially unaltered until 1784 when a new act was passed⁷⁸ which retained the old system, but provided expressly for levy on interests held in co-ownership and regulated the redemption procedure in greater detail.

2. Connecticut

Several years after resumption of the charter government in 1689, Connecticut, in 1695, abolished execution sales by public auction, which had been regulated by the Act of 1682,⁷⁹ even for chattels, and reverted to the method of delivery upon appraisal.⁸⁰ The rules for valuation were revised the following year.⁸¹ The Revision of the Laws of 1702, however, in the title "Execution,"⁸² again changed the system and, in effect, restored the status of the law

73. Act for Making of Lands and Tenements Liable to the Payment of Debts of 1692, ch. 29, § 1, 1 Mass. Bay Prov. Acts & Resolves 68, 69 (1869).

74. Act for Making of Lands and Tenements Liable to the Payment of Debts of 1696, ch. 10, 1 Mass. Bay Prov. Acts & Resolves 254 (1869).

75. Act of March 25, 1713, ch. 8, § 1, 1 Mass. Bay Prov. Acts & Resolves 703 (1869).

76. Act of June 19, 1716, ch. 3, § 3, 2 Mass. Bay Prov. Acts & Resolves, 1715-1741, at 42 (1874).

77. Act of Nov. 25, 1719, ch. 9, 2 Mass. Bay Prov. Acts & Resolves 150 (1874).

78. Act Directing the Issuing, Extending and Serving of Executions of 1784, ch. 33, 1 Mass. Laws 168 (1807).

79. See text accompanying note 64 *supra*.

80. Order of May 9, 1695, 4 Conn. Col. Pub. Rec., 1689-1706, at 141 (C. Hoadly ed. 1868).

81. Order of Oct. 8, 1696, 4 Conn. Col. Pub. Rec. 177 (C. Hoadly ed. 1868).

82. Conn. Acts & Laws of 1702, at 32 (1901).

of 1685.⁸³ Chattels levied upon were to be sold at public auction subject to a right of redemption, which could be exercised within twenty days after the sale.⁸⁴ Lands were to be appraised by three men and transferred to the party for whom they were taken, much in the fashion of the Massachusetts Act of 1696.⁸⁵ In 1711 a further revision took place.⁸⁶ The new Act provided for execution against chattels by means of a sale at public auction without any right of redemption after such sale and continued the practice of execution against the debtor's lands held in fee by means of transfer in fee to the levying creditor at a value determined by three appraisers. The law was deemed to be consistent with the celebrated British Act of 1732, which subjected colonial lands to execution in the manner prescribed for chattels.⁸⁷ Except for refinements relating to the selection of the three appraisers and the recordation of the execution,⁸⁸ it remained the governing statute for well over a century.

3. Rhode Island

During the eighteenth century, Rhode Island re-extended execution to the debtor's real estate, though only when neither his body nor his personal property could be found. The real estate was to be sold at public auction held after public notification for a period of three months following the levy. The pertinent provisions were originally enacted in 1736⁸⁹ and, with subsequent amendments, recodified in the revision of 1767.⁹⁰ They were carried over into the revision of 1798.⁹¹

4. New Hampshire

New Hampshire law traditionally followed the pattern of Massachusetts legislation. The provisions of the so-called Cutt Code

83. See text accompanying notes 63-65 *supra*.

84. The redemption provisions were changed the following year, Order of May 27, 1703, 4 Conn. Col. Pub. Rec. 411 (C. Hoadly ed. 1868).

85. See text accompanying note 74 *supra*.

86. Act Directing How Officers Shall Proceed in Levying Executions of 1711, 5 Conn. Col. Pub. Rec., 1706-1716, at 223-25 (C. Hoadly ed. 1870).

87. 7 Conn. Col. Pub. Rec. 443 (C. Hoadly ed. 1873). Although, strictly speaking, Connecticut law did not comply with the mandates of the British Act of 1732, the Connecticut legislature changed the existing law only with respect to the administration of decedents' estates. See note 10 *supra*.

88. Act of Oct. 1766, 12 Conn. Col. Pub. Rec., 1762-1767, at 499 (C. Hoadly ed. 1881).

89. Act for Making the Real Estate of Persons That Have Left This Colony Liable to the Payment of Debts of 1736, R.I. Laws of 1745, at 192.

90. R.I. Acts & Laws of 1767, at 13.

91. R.I. Laws of 1798, at 204.

relating to levies of executions (contained in the rules pertaining to "Marshals")⁹² were copied almost literally from the parallel sections of the Massachusetts Code of 1660.⁹³ It seems, however, that the New Hampshire provisions only related to goods and envisaged delivery to the creditor in satisfaction of his claim.⁹⁴ Lands and tenements were made liable to execution by an Act of 1714,⁹⁵ which was a literal copy of the Massachusetts Act of 1696 except that it permitted redemption of land taken on execution for a period of seven years rather than only for a period of one year as provided in the comparable Massachusetts Act of 1713.⁹⁶ The Act of 1714 was repealed in 1717⁹⁷ because of the excessive redemption period and replaced in 1718⁹⁸ by an Act which granted redemption rights only for a period of one year. The 1718 enactment also incorporated the intervening Massachusetts Act of 1716,⁹⁹ which set out the proper procedure in case the value of the land exceeded the debt, and the rules for the selection of appraisers. The New Hampshire law was revised and recodified without substantial changes by an Act of 1791.¹⁰⁰

This survey shows that the New England colonies never adopted the writ of *elegit* as such. While land was subject to the writ of execution in most colonies, it was ordinarily not sold at a public sale, but, rather, was set off to the creditor at an appraised value. Judgments did not create liens on land, except in Connecticut. Priority between competing creditors was determined on the basis of the recording or the return of the execution.¹⁰¹

92. Act of Oct. 11, 1680, 1 N.H. Prov. Laws, 1679-1702, at 29-31 (A. Batchellor ed. 1904).

93. See text accompanying note 48 *supra*.

94. Execution sales of chattels were introduced as late as 1773, Act of May 27, 1773, ch. 3, 3 N.H. Prov. Laws, 1745-1774, at 597 (H. Metcalf ed. 1915).

95. Act for Making Lands and Tenements Liable for the Payment of Debts of 1714, ch. 6, 2 N.H. Prov. Laws, 1702-1745, at 126 (A. Batchellor ed. 1913).

96. See text accompanying notes 73-75 *supra*.

97. Order of Jan. 25, 1717, 2 N.H. Prov. Laws 247 (A. Batchellor ed. 1913).

98. Act for Making Lands and Tenements Liable for Debts of 1718, ch. 20, 2 N.H. Prov. Laws 282 (A. Batchellor ed. 1913).

99. See text accompanying note 76 *supra*.

100. Act Subjecting Lands and Tenements to the Payment of Debts and Directing the Mode of Levying Executions on Real and Personal Estates, ch. 80, 5 N.H. Prov. Laws, 1784-1792, at 701 (H. Metcalf ed. 1916).

101. *Tapliff v. Davis*, 1 Root 556 (Conn. 1793). See also *Prescott v. Pettee*, 20 Mass. (3 Pick.) 331 (1825).

III. THE MIDDLE COLONIES

A. *New York*

The famous Duke of York Laws¹⁰² included several rules relating to execution under the captions "Appraisement" and "Attachment and Summons." According to these provisions, goods were seized upon execution and after appraisal delivered to the creditor in satisfaction of his judgment.¹⁰³ Land was subject to attachment,¹⁰⁴ but it was not specified how it should be dealt with upon execution. An Act of the New York legislative assembly of 1683¹⁰⁵ filled the gap. It provided for levy on goods and chattels and sale thereof at public auction, as well as for levy by extent on the judgment debtor's land. The extent was for a term until satisfaction of the judgment debt and not in fee. This implemented the provision in a prior act of the same year that a man's land was not subject to sale on execution but only to extent for a term.¹⁰⁶

After its acquisition of statehood in 1787, New York passed a statute which subjected lands and tenements to sale on execution and provided, in addition, that with respect to purchasers and mortgagees no judgment should affect lands until filing of the judgment roll and docketing of the judgment.¹⁰⁷ In other words, the judgment thereupon became the lien.

B. *New Jersey*

New Jersey enacted its first act relating to execution against land in 1679, by providing that a debtor, on execution, may convey real estate, except lands held in fee tail, to his creditor and his heirs and assigns in satisfaction of the judgment.¹⁰⁸ After the division of the government in 1682, the legislative assembly for East New Jersey in

102. See 1 N.Y. Col. Laws, 1664-1675, at xi-xii (1894).

103. Duke of York's Laws, 1664-1675, in 1 N.Y. Col. Laws 12, 76 (1894).

104. Duke of York's Laws, 1664-1675, in 1 N.Y. Col. Laws 15 (1894).

105. Act for the Due Regulation and Proceedings on Execution of 1683, ch. 12, 1 N.Y. Col. Laws 134-36 (1894).

106. Charter of Liberties and Privileges of 1683, ch. 1, 1 N.Y. Col. Laws 111, 114 (1894).

107. Act for Making Lands and Tenements Liable To Be Sold by Executions for Debt, and for the More Easy Discovery of Judgments, and the Better Security and Relief of Purchasers and Creditors of 1787, ch. 56, [1787] N.Y. Laws 108-10.

108. Act for the Satisfying of an Execution of 1679, N.J. Prov. Grants, Concessions, Original Constitutions & Acts Passed during the Proprietary Governments 136 (A. Leaming & J. Spicer ed. 1751) [hereinafter N.J. Prov. Acts]. Failure of the debtor to convey his lands made him subject to imprisonment. *Id.*

1683 passed an Act for Due Regulation of Execution,¹⁰⁹ which provided for the sheriff's delivery to the creditor of the debtor's lands, goods, and chattels at an appraised value, and imposed upon the creditor a duty to return any excess either in goods as appraised or in money. The debtor had the right to redeem his property upon payment of his obligation within six weeks. West New Jersey likewise passed an act¹¹⁰ making land subject to the payment of debts but did not specify the procedure to be followed. After the establishment of the provincial government in 1702, another Act, passed in 1743, regulated execution against real estate in greater detail.¹¹¹ Execution in general was to be accomplished by public auction upon a writ of *feri facias*, but execution against land was permitted only in the absence of sufficient personal estate.¹¹² The judgment debtor had the right to designate the lands to be sold on execution,¹¹³ and the purchaser at the execution sale was to get title free and clear of all other judgments and recognizances.¹¹⁴ Priority between execution creditors *inter se* was determined in the same fashion as in the case of executions against chattels.¹¹⁵ The act did, however, declare that the title of the purchaser at the execution sale was to be determined as of the date of the judgment.¹¹⁶ Hence, in a limited fashion a judgment created a lien on the land from its date against subsequent grantees. The Act of 1743 with an amendment of 1779,¹¹⁷ relating to the disability of sheriff's prior to the execution of the deed caused by death or desertion to the enemy, remained in force until 1799, except for a brief interval in 1786 during which the state reverted to the method of transfer of the goods, chattels, and land levied upon at an appraised value.¹¹⁸ An Act of 1799 continued the

109. Ch. 3, N.J. Prov. Acts 253 (A. Leaming & J. Spicer ed. 1751).

110. Act for Preventing Fraud, Deceit and Collusions Between Debtor and Creditor of 1682, N.J. Prov. Acts 447 (A. Leaming & J. Spicer ed. 1751).

111. Act Subjecting Real Estate to the Payment of Debts of 1743, N.J. Prov. Acts, 1703-1752, at 279-81 (S. Nevill ed. 1752).

112. Ch. 76, § 3, N.J. Prov. Acts 280 (S. Nevill ed. 1752).

113. Ch. 76, § 5, N.J. Prov. Acts 280 (S. Nevill ed. 1752).

114. Ch. 76, § 7, N.J. Prov. Acts 280 (S. Nevill ed. 1752).

115. Ch. 76, § 11, N.J. Prov. Acts 282 (S. Nevill ed. 1752). At common law the writ of *feri facias* bound the goods of the judgment debtor from its issuance date (*teste*). The English Act for Preventing Frauds and Perjuries, 29 Car. 2, c. 3, § 15 (1677), postponed the binding effect until delivery of the writ to the sheriff, thereby determining the priority among creditors *inter se* according to that time. Apparently, the statute of 29 Car. 2, c. 3, applied in colonial New Jersey. See N.J. CONST. OF 1776, § 22; E. BROWN, *BRITISH STATUTES IN AMERICAN LAW, 1776-1836*, at 76 (1964).

116. Ch. 76, § 6, N.J. Prov. Acts 280 (S. Nevill ed. 1752).

117. Act of June 8, 1779, ch. 28, [1779] N.J. Acts 68.

118. Act To Direct the Mode and Proceedings on Writs of *Fieri Facias* and for Trans-

system of 1743 but made clear that a judgment "affected and bound" real estate from the time of its entry on the minutes or records of the court, that priority of execution creditors *inter se* was determined according to the date of delivery of the writ to the sheriff, and that the purchaser at the execution sale acquired title free and clear of judgments and recognizances upon which no execution had been taken out and levied.¹¹⁹

C. Pennsylvania

Pennsylvania enacted laws rendering land liable to the payment of debts from the incipency of the proprietary government under William Penn. It was agreed in England in 1682 that lands should be liable to execution, but no more than one third thereof if legal issue existed.¹²⁰ The pertinent provision was included in the Pennsylvania Body of Laws enacted in 1682.¹²¹ The provision was later explained and altered by an Act of 1688, which eliminated the quantitative restrictions, postponed the sale of the debtor's homestead by one year, and required appraisal prior to the sale.¹²² Chattels were likewise subject to appraisal before a public sale.¹²³ If they could not be sold at the appraised value, the creditor was obligated to take them at such value.¹²⁴ The law pertaining to chattels was re-enacted in 1700¹²⁵ and remained on the books until 1810.¹²⁶ The law permitting execution sales of land was likewise re-enacted in that year, with the proviso that a creditor was obligated to take only part of the land if it were appraised at a higher value than the debt.¹²⁷ The

ferring of Lands and Chattels for the Payment of Debts of March 23, 1786, ch. 151, [1786] N.J. Acts 282; Act To Repeal Act of March 23, 1786, ch. 181, [1786] N.J. Acts 374.

119. Act Making Lands Liable To Be Sold for the Payment of Debts of 1799, ch. 772, §§ 2-4, 13, [1799] N.J. Acts 483, 486.

120. Charter to William Penn and Laws of the Province of Pennsylvania, 1682-1700, at 100 (J. Linn ed. 1879) [hereinafter Penn. Prov. Laws].

121. Ch. 51, Penn. Prov. Laws 120 (J. Linn ed. 1879).

122. Act of March 10, 1688, ch. 189, Penn. Prov. Laws 180 (J. Linn ed. 1879). The law was re-enacted in 1693. PETITION OF RIGHT, ch. 80, in Penn. Prov. Laws 188, 217 (J. Linn ed. 1879). A similar law was enacted in 1700. Act for the Taking of Land in Execution for the Payment of Debts of 1700, ch. 48, Penn. Laws 7 (J. Bioren ed. 1810).

123. Act of May 10, 1684, ch. 168, Penn. Prov. Laws 172, 215 (J. Linn ed. 1879).

124. Amendment of 1696, ch. 10, Penn. Prov. Laws 228 (J. Linn ed. 1879).

125. Act for the Appraisalment of Goods of 1700, ch. 39, 2 Penn. Stat. 45 (J. Mitchell & H. Flanders ed. 1896).

126. Act of March 20, 1810, ch. 3239, 5 Penn. Laws, 1808-1812, at 156 (J. Bioren ed. 1812).

127. Act for Taking Lands in Execution for the Payment of Debts Where the Sheriff Cannot Come at Other Effects To Satisfy the Same of 1700, ch. 47, 2 Penn. Stat., 1700-1712, at 53 (J. Mitchell & H. Flanders ed. 1896). See the corresponding form of the writ of execution prescribed in the Act for Establishing Courts of Judicature of

law relating to execution against lands was extensively refined and revised by an Act of 1706,¹²⁸ which introduced a rather complex system. Lands likely to yield rents or profits sufficient to pay off the debt within seven years were subject to the writ of *elegit* rather than writs entailing a sale.¹²⁹ If it turned out that the rents and profits were not sufficient to pay off the judgment debt or if other creditors recovered judgments against the same debtor, sale was permitted under the writ *venditioni exponas*.¹³⁰ Lands not likely to yield sufficient rents and profits could be seized and sold under a writ of *levari facias*.¹³¹ If no buyer could be found the creditor was entitled to a conveyance of the real estate to him in fee simple under a writ of *liberari facias*.¹³² This statute, in effect, resulted in the adoption of the doctrine of a judgment lien in the province.¹³³ The law in this respect was clarified and limited by the Act for Prevention of Frauds and Perjuries of 1771,¹³⁴ which specified that, as against bona fide purchasers for value, judgments should not relate back to the first day of the term but should be a charge on realty only upon being signed and entered.

D. Delaware

Delaware followed the law of Pennsylvania¹³⁵ in this field. Thus the Pennsylvania laws of 1682,¹³⁶ 1688,¹³⁷ 1694,¹³⁸ and 1700¹³⁹ relating

1701, 2 Penn. Stat. 148, 155 (J. Mitchell & H. Flanders ed. 1896). Both acts were subsequently disallowed by the Queen.

128. Act for Taking Lands in Execution for Payment of Debts of 1706, ch. 152, 2 Penn. Stat. 244 (J. Mitchell & H. Flanders ed. 1896). See the short-lived Act for Establishing Courts of Judicature of 1710, ch. 168, 2 Penn. Stat. 301, 325; Act for Establishing Courts of Judicature of 1715, ch. 214, 3 Penn. Stat., 1712-1774, 80 (J. Mitchell & H. Flanders ed. 1896) making the English practice relating to *elegit*, *levari facias*, or *feri facias* applicable in Pennsylvania. The principal act was passed after having been "debated by paragraphs and, after some amendments." 1 Penn. Arch., 8th Ser., 523 (G. MacKinney ed. 1931).

129. Ch. 152, § 1, 2 Penn. Stat. 244 (J. Mitchell & H. Flanders ed. 1896).

130. Ch. 152, § 1, 2 Penn. Stat. 244-45 (J. Mitchell & H. Flanders ed. 1896).

131. Ch. 152, § 2, 2 Penn. Stat. 245 (J. Mitchell & H. Flanders ed. 1896).

132. Ch. 152, § 2, 2 Penn. Stat. 246 (J. Mitchell & H. Flanders ed. 1896).

133. Cf. text accompanying notes 16-17 *supra*.

134. Ch. 669, § 3, 8 Penn. Stat. 259 (J. Mitchell & H. Flanders ed. 1902).

135. See text accompanying notes 121-34 *supra* for a discussion of the particular Pennsylvania laws.

136. Act of How Lands and Goods Shall Pay Debts of 1682, § 51, 1 Del. Laws, 1700-1797, App. 11 (1797).

137. Act of Lands Liable To Pay Debts of 1688, § 189, 1 Del. Laws, App. 18 (1797).

138. Act About Taking Land in Execution for Debts of 1694, § 5, 1 Del. Laws, App. 22 (1797).

139. Act for Taking Lands in Execution for the Payment of Debts of 1700, 1 Del. Laws, App. 36 (1797).

to the taking of land in execution for the payment of debts applied also in Delaware. The same was true with respect to the law requiring appraisal of goods taken in execution.¹⁴⁰ Most importantly, the Pennsylvania law of 1706 regulating execution against land was adopted by Delaware at some time between 1726 and 1736.¹⁴¹ However, Delaware did not enact Pennsylvania's law of 1771 governing judgment liens in the form adopted in that state, but it did provide flatly that a judgment would bind lands (even with respect to competing creditors) only upon entering or signing.¹⁴²

It is interesting to note that the British Act of 1732 did not result in a direct statutory change in Pennsylvania or Delaware. Nevertheless, it caused the writ of *levari facias* to become obsolete and resulted in that writ's replacement by the writ of *feri facias*, even without a change of its form.¹⁴³

IV. SOUTHERN COLONIES

A. Virginia

Like the other colonies, Virginia, during its long colonial period, made many experiments with collection procedures. Provisions regulating the appraisal of goods taken in execution were passed in rapid succession in 1641¹⁴⁴ and 1643,¹⁴⁵ and in the revisions of 1658¹⁴⁶ and 1662.¹⁴⁷ The latter—which were identical with the chapter on that subject found in the Duke of York Laws of 1664¹⁴⁸—were the most specific. They prescribed that goods seized be delivered to the execution creditor at an appraised value in satisfaction of all or part of the debtor's liability. A similar rule was made applicable to debtors imprisoned for the nonpayment of debts contracted in money or tobacco.¹⁴⁹ The procedure for enforcing money judgments

140. Act for the Appraisement of Goods Taken in Execution, [1741] Del. Laws 54.

141. Act for Taking Lands in Execution for Payment of Debts of 1741, [1741] Del. Laws 55.

142. Act Concerning the Lien of Judgments and Executions of 1829, ch. 126, 7 Del. Laws 249 (1829).

143. *Andrew's Lessee v. Fleming*, 2 U.S. (2 Dall.) 93 (1786).

144. The text of this act is not in print but is referred to in the subsequent Act of 1643.

145. Act 30 of 1643, 1 Va. Laws 259 (2d ed. W. Hening 1823).

146. Act 19 for Appraisement upon Execution of 1658, 1 Va. Laws 442 (2d ed. W. Hening 1823).

147. Act 48 for Appraisement of Goods of 1662, 2 Va. Laws 80 (2d ed. W. Hening 1823).

148. Duke of York's Laws, 1665-1675, "Appraisement of Goods," in 1 N.Y. Col. Laws 12 (1894). See text accompanying notes 102-04 *supra*.

149. Act 11 Permitting Persons Under Executions To Redeem Their Bodies with

out of real estate was not specifically regulated, and remained so even after the recodification of the law of execution adopted in 1705.¹⁵⁰ This Act contained detailed provisions only for the levy on goods and chattels under a writ of *fiery facias* or *levary facias* and for the transfer of such goods and chattels to the creditor after an appraisal was arrived at through a specified procedure. Amenability of land to the enforcement of judgments, however, could be implied from a provision specifying that the discharge of a debtor imprisoned for debt should not bar a creditor from taking out "any new execution against the lands, tenements and hereditaments, goods and chattels of such prisoner."¹⁵¹

The picture changed substantially in 1726 with the enactment of a new Law Concerning Executions and Relief of Poor Prisoners.¹⁵² This Act abolished the practice of compelling creditors to accept goods as payment and adopted the English practice governing writs of *fiery facias*, *elegit*, and *capias*, including certain English acts governing that practice.¹⁵³ *Fieri facias* was to be served by levy and sale at public auction.¹⁵⁴ This law was, at least temporarily, superseded by the aforementioned parliamentary Act of 1732,¹⁵⁵ which made real estate descending to an heir liable for the debts of the ancestor in the manner applying to specialties in England and gave any creditor who was a subject of the King the choice of reaching real estate of his judgment debtor either by *elegit* or in the manner prescribed in the respective colony for execution against chattels. The latter branch of the statute, which permitted execution sales of land whenever such sales were permitted for chattels, was actually applied in Virginia in an early reported case.¹⁵⁶ The mandates of the parliamentary Act were reflected also in certain provisions, enacted in 1734¹⁵⁷ and

Their Estates of 1663, 2 Va. Laws 189 (2d ed. W. Hening 1823), *repealing* the second paragraph of Act 48 of 1662, relating to the Payment of Execution in Kind.

150. Act Directing the Manner of Levying Executions, and for Relief of Poor Prisoners for Debt of 1705, ch. 37, 3 Va. Laws 385 (2d ed. W. Hening 1825); Act to Explain Act of 1705, ch. 51, 3 Va. Laws 464.

151. 3 Va. Laws 385, 389 (2d ed. W. Hening 1823).

152. Ch. 3, Va. Laws 151 (W. Hening ed. 1820).

153. Ch. 3, §§ 2-3, 4 Va. Laws 452 (2d ed. W. Hening 1820).

154. Ch. 3, § 15, 4 Va. Laws 460 (2d ed. W. Hening 1820).

155. 5 Geo. 2, c. 7. Section 4 of the Act is set out in the text accompanying note 6 *supra*.

156. *Harrison v. Halley* (1739), 2 Va. Col. Dec. B 80 (J. Randolph & E. Barradall) (R. Barton ed. 1909).

157. Acts for Better Directing Officers, in the Sale of Goods, or Other Things Taken in Execution of 1734, ch. 12, 4 Va. Laws 423 (2d ed. W. Hening 1820).

1736,¹⁵⁸ which authorized execution sales of goods "or other estate" of the debtor on credit if cash sales could not be made at three fourths of their value. At the same time, however, the application of the parliamentary Act was found inconvenient in some circumstances and resisted. In 1734 a special statute was passed to permit departure from the parliamentary Act in the administration of a particular decedent's estate.¹⁵⁹ Moreover, in 1749 a proposition of the County of Richmond to enact the parliamentary Act as a colonial statute was rejected by resolution of the legislature.¹⁶⁰ Thus, the revision of the law of execution enacted in 1748¹⁶¹ reaffirmed the traditional restriction of the writ of *fiery facias* to goods and chattels. The words "goods or other estates" were employed only in one section,¹⁶² which re-enacted the provisions governing execution sales originally adopted in 1734 and 1736. Apparently, this section did not enlarge the scope of the writ of *fiery facias*. Hence, it can be concluded that execution sales of lands of living debtors were no longer permitted. The continued use of the words "or other estate" in the law of 1787 amending the provisions governing execution sales,¹⁶³ as well as in the provisions on execution sales contained in the consolidation of the execution law of 1792,¹⁶⁴ until their deletion in 1795,¹⁶⁵ was not meant to include land. This view is supported by the fact that an Act for the More Speedy Recovery of Debts to This Commonwealth,¹⁶⁶ adopted in 1788, expressly specified that in particular cases involving liability of sheriffs and public collectors or their sureties the writ of *fiery facias* should extend to land and that the form of the writ should so indicate by insertion of the words "land and tenements."¹⁶⁷ Similarly,

158. Act Altering the Laws in Force for the Sale of Goods Taken in Execution of 1736, ch. 5, 4 Va. Laws 483 (2d ed. W. Hening 1820).

159. Act for Better Enabling the Executors of Charles Burges To Pay His Debts of 1734, ch. 25, 4 Va. Laws 451 (2d ed. W. Hening 1820). The Act empowered the executors of the estate of a deceased landowner to sell the assets of the decedent to the highest bidders and to distribute the proceeds among his creditors without the necessity of the creditors' reducing their debts to judgment and levying on the assets, thus avoiding the race to judgment and execution, and thereby the fragmentation of the estate, resulting from the Act of 1732.

160. Va. House of Burgesses J., 1742-1749, at 303 (McIlwaine ed. 1909).

161. Act Concerning Executions, and for Relief of Insolvent Debtors, ch. 12, 5 Va. Laws 526 (W. Hening ed. 1819).

162. Ch. 12, § 13, 5 Va. Laws 534 (W. Hening ed. 1819).

163. Act Directing the Mode of Executions Under Certain Circumstances of 1787, ch. 7, §§ 2-3, 12 Va. Laws 457, 458 (W. Hening ed. 1823).

164. Consolidation of 1792, ch. 5, § 22, 13 Va. Laws at 367 (W. Hening ed. 1823).

165. Act of Dec. 17, 1795, ch. 183, 1 Va. Collected Acts 478 (2d ed. 1814).

166. Ch. 40, 12 Va. Laws 558 (W. Hening ed. 1823).

167. Ch. 40, § 7, 12 Va. Laws 561 (W. Hening ed. 1823).

an Act of 1782, granting emergency rules for post-war executions,¹⁶⁸ provided special procedures for the tender of land in satisfaction of judgments. Sale of land under ordinary judgment liens did not reappear until the code of 1849, and was then available only if an extent for five years did not suffice for a satisfaction in full.¹⁶⁹

B. North Carolina

North Carolina initiated legislation concerning executions with two acts passed in 1714-1715. One gave creditors the right of execution against the lands of debtors who had departed from the jurisdiction without leaving sufficient personal estate for the payment of their debts;¹⁷⁰ the other regulated the disposition of goods taken upon execution.¹⁷¹ The first was repealed by the revision of 1746, while the second one was retained in force¹⁷² but superseded by later legislation.

The enactment of the parliamentary Act of 1732, subjecting land to the execution procedures governing chattels, changed the picture profoundly, and the provisions of this Act governed North Carolina practice, except for short intervals, until the middle of the nineteenth century. An Act of 1764,¹⁷³ which attempted to supersede the parliamentary legislation, was disallowed by the Crown; an amendment of 1766 to that Act expired by its own terms.¹⁷⁴ In 1768¹⁷⁵ and 1770¹⁷⁶ the colony enacted short-lived legislation, prompted by the depression, that prohibited the sale of chattels or lands for less than two thirds of their appraised value and authorized transfer of such chat-

168. Acts of 1783, 11 Va. Laws 176, 349 (W. Hening ed. 1823).

169. Va. Code of 1849, ch. 186, § 9. The provision was explained and applied in *Hutcheson v. Grubbs*, 80 Va. 251 (1885). See *Taylor's Admr. v. Spindle*, 43 Va. 44 (1845).

170. Ch. 18, [1714] N.C. Acts (not in print). See 1 N.C. Pub. Acts, 1715-1803, at 10 (F. Martin ed. 1804).

171. Ch. 20, [1714] N.C. Acts. See 1 N.C. Pub. Acts 10 (F. Martin ed. 1804).

172. Act of 1746, ch. 18, 1 N.C. Pub. Acts 10 (F. Martin ed. 1804); Act of Oct. 16, 1749, ch. 6, §§ 2-4, [1749] N.C. Acts, 1 N.C. Pub. Acts 87, 93 (F. Martin ed. 1804).

173. Ch. 4, [1764] N.C. Acts, 1 N.C. Pub. Acts 152 (F. Martin ed. 1804). The text of the Act is reprinted in 23 N.C. State Rec. 636 (1904). Its passage was preceded by a disagreement between the two legislative houses, see 6 N.C. Col. Rec. 1224-42, 1252, 1270-99, esp. 1240-42, 1298 (Saunders ed. 1888). The Act included some curative provisions relating to execution sales by sheriffs after termination of their office and the establishment of a five-year limitation period, additions which caused the disallowance of the Act by the Crown, Order of June 26, 1766, § 16, 5 P.C., Col. Ser. 38, 39 (J. Munro & A. Fitzroy ed. 1912).

174. Act of 1766, ch. 7, 1 N.C. Pub. Acts 157 (F. Martin ed. 1804).

175. Act To Direct Sheriffs in Levying Executions of 1768, ch. 4, [1768] N.C. Acts (not in print). See N.C. Rev. Laws of 1773, at 439.

176. Act To Direct Sheriffs in Levying Executions and the Disposal of Lands, Goods and Chattels of 1770, ch. 33, N.C. Rev. Laws of 1773, at 485.

tels and lands to the creditor at two thirds of such value. The earlier Act compelled the creditor to accept land, whereas the later Act only gave him a right to that effect.

In 1777, after independence, North Carolina expressly retained the prior law and provided "[t]hat all process which heretofore issued against goods, chattels, lands and tenements, shall for the future issue in the same manner, and such that issued only against goods and chattels, shall hereafter issue against lands and tenements, as well as goods and chattels."¹⁷⁷ In other words, *elegit* and *feri facias* remained alternative remedies, but *feri facias* was formally extended to cover lands and tenements in addition to goods and chattels. This remained the state of the law throughout the applicability of the Revised Laws of 1837¹⁷⁸ and until the adoption of the Revised Code of 1855.¹⁷⁹ The construction of the Acts of 1732 and 1777, which were frequently before the courts in the closing years of the eighteenth century, was settled in a series of adjudications, especially *Baker v. Webb*,¹⁸⁰ *Bell v. Hill*,¹⁸¹ *Farrar v. Hamilton*,¹⁸² and *Jones v. Edmonds*.¹⁸³ These cases decided that a judgment still created a lien upon land as of the date of its rendition, but this lien was destroyed upon sale under a *feri facias*, which operated only as of its *teste*.

C. South Carolina

South Carolina engaged in comparatively little legislative activity in the field of execution, and concerned itself primarily with the relief of persons imprisoned for debt and the attendant distribution of their assets, including land, to their creditors.¹⁸⁴ The English provisions¹⁸⁵ governing the date of judgment liens vis-à-vis bona fide purchasers for value and of execution liens on chattels were expressly given provincial application.¹⁸⁶ The famous parliamentary Act of

177. Acts for Establishing Courts of Law of 1777, ch. 2, § 29, [1777] N.C. Acts, 1 N.C. Pub. Acts 208, 214 (F. Martin ed. 1804).

178. N.C. Rev. Stat. of 1837, ch. 45, § 3 (J. Iredell & W. Battle ed.).

179. N.C. Rev. Code of 1855, ch. 45, §§ 1-2 (B. Moore & A. Biggs ed.).

180. 2 N.C. 55, 1 Hay. 43 (1794).

181. 2 N.C. 85, 1 Hay. 72 (1794).

182. 1 N.C. (Tayl.) 10 (1799).

183. 7 N.C. (3 Mur.) 43, 46 (1819).

184. Act for the More Effectual Relief of Insolvent Debtors of 1744, 3 S.C. Stat., 1716-1752, at 640 (T. Cooper ed. 1838); Act of May 25, 1745, 3 S.C. Stat. 662; Act of May 4, 1757, 3 S.C. Stat. 731; Act for More Effectual Relief of Insolvent Debtors of 1759, 4 S.C. Stat., 1752-1786, at 86 (T. Cooper ed. 1838).

185. 29 Car. 2, c. 3, §§ 14, 15 (1677), set out in part in text accompanying note 19 *supra*.

186. Act To Put in Force in This Province the Several Statutes of England of 1712,

1732—expressly recognized as binding by a colonial insolvency Act of 1759¹⁸⁷—was for a long period the only source regulating levy and sale of real estate. This remained the law until attainment of statehood and during the early days thereof, with the exception of a brief break in 1785 caused by the execution Act of that year,¹⁸⁸ which temporarily suspended execution sales at less than three fourths of the value of the property levied upon and gave creditors the option to take such property at three fourths of its appraised value in *pro tanto* satisfaction of their claim.

The County Courts Act of 1785¹⁸⁹ expressly included the words "land and tenements" in the form for the writ of *feri facias*,¹⁹⁰ regulated execution sales of lands and tenements at public auction, and prescribed that "no writ of *feri facias*, or other writ of execution, shall bind the property of the estate, real or personal, against which such writ is sued forth, but from the time such writ shall be delivered to the sheriff or other officer to be executed."¹⁹¹ Perplexingly, however, the Circuit Courts Act of 1789¹⁹² contained provisions governing the entry and docketing of judgments for the purpose of regulating their effect, with respect to purchasers or mortgagees, and heirs, executors, or administrators, on property, real or personal, other than such property located in the particular district. The courts concluded that judgments still constituted liens on real estate¹⁹³ and that the date of the judgment liens and not that of the delivery of execution determined the priority among creditors with respect to the proceeds from the execution sale of land.¹⁹⁴

D. Maryland

In 1638 Maryland formulated the first colonial rules governing executions in a proposed Act for Recovering of Debts.¹⁹⁵ It provided for the levy of executions on corn, cattle, or other goods or chattels,

2 S.C. Stat., 1682-1716, at 401 (T. Cooper ed. 1838). Cf. note 115 *supra* and accompanying text.

187. Act of 1759, 4 S.C. Stat., 1752-1786, at 86 (T. Cooper ed. 1838).

188. Act for Regulating Sales Under Executions of 1785, 4 S.C. Stat. 710 (T. Cooper ed. 1838).

189. 7 S.C. Stat. 211 (T. Cooper ed. 1838).

190. § 35, 7 S.C. Stat. 226, 227 (T. Cooper ed. 1838).

191. § 37, 7 S.C. Stat. 229 (T. Cooper ed. 1838).

192. § 14, 7 S.C. Stat. 253, 256 (T. Cooper ed. 1838).

193. *Tucker v. Lowndes*, 1 Bay 212, 213 (S.C. 1791).

194. See *Mitchell v. Anderson*, 1 Hill Law 69, 72 (S.C. Ct. App. 1833); *State v. Laval*, 4 McCord 336 (S.C. Ct. App. 1827); *Woodward v. Hill*, 3 McCord 241 (S.C. Sup. Ct. 1825).

195. 1 Archives of Maryland, Proceedings and Acts of the General Assembly, 1637-1664, at 66 (W. Browne ed. 1883) [hereinafter Md. Arch.].

and ordered sale thereof at public auction or delivery to the creditor at an appraised value.¹⁹⁶ The bill was not finally adopted. A more developed and expanded system was established by the Act Providing Some Rule for Executions,¹⁹⁷ adopted in 1642. This law, after exempting necessary clothing, bedding, and tools, extended execution to all other lands, goods, and chattels, and prescribed sale thereof at public auction. In case no sale could be made, the property was, if the debtor so chose, assigned to the creditor at an appraised value. In addition, the Act provided for the possibility of reaching debts owed to the judgment debtor,¹⁹⁸ thus making Maryland the first American state to introduce garnishment as a method for enforcing money judgments. The Act expired in 1645. Subsequent legislation dealt primarily with attachments, exemptions, prohibitions against excessive legislation and general stays.¹⁹⁹

It appears that execution against land by levy and sale was short-lived. Its availability probably was terminated by the expiration in 1645 of the execution Act of 1642. The Acts Regulating the Extent of Attachments and Executions of 1647²⁰⁰ and 1657²⁰¹ recognized only attachments and executions against goods and chattels. Moreover, Acts of 1662²⁰² and 1663²⁰³ Concerning Proceedings at Law prescribed application of the English practice in judicial proceedings where Maryland law did not provide different rules.²⁰⁴ At any rate, the Maryland records between 1663 and 1732 are replete with executions against lands of living debtors²⁰⁵ by means of an extent in the manner of and pursuant to a writ of *elegit*.

196. 1 Md. Arch. 69 (W. Browne ed. 1883).

197. Ch. 10, 1 Md. Arch. 187 (W. Browne ed. 1883).

198. 1 Md. Arch. 187-88 (W. Browne ed. 1883).

199. Act for the Extent of Attachments and Executions of 1647, 1 Md. Arch. 232 (W. Browne ed. 1883), repealed in 1654, 1 Md. Arch. 351 (W. Browne ed. 1883); Act Concerning Regulating of Attachments and Executions of 1657, 1 Md. Arch. 361 (W. Browne ed. 1883); Act Limiting the Extent of Attachments and Providing What Shall Be Levied on Attachment and Execution of 1669, repealed as redundant in 1674, 2 Md. Arch. 361 (W. Browne ed. 1884); Act for Stay of Executions of 1671, 2 Md. Arch. 2 Gen. Assem., 1666-1676, at 289 (W. Browne ed. 1884).

200. 1 Md. Arch. 232 (W. Browne ed. 1883).

201. 1 Md. Arch. 361 (W. Browne ed. 1883).

202. 1 Md. Arch. 448 (W. Browne ed. 1883).

203. 1 Md. Arch. 504 (W. Browne ed. 1883).

204. No record of a writ of execution against land or of an execution sale of land could be found in the early Maryland court records. In 1654, in the case of *Gill v. Neale*, the Provincial Court of Maryland granted an extent of defendant's land to plaintiff who had incurred large expenses for the benefit of the defendant, his son-in-law, 10 Md. Arch., Prov. Ct., 1649-1657, at 76, 359-60 (W. Browne ed. 1891); 41 Md. Arch., Prov. Ct., 1658-1662, at 237 (B. Steiner ed. 1922).

205. Extents of land of deceased debtors on recognizances were ordered practically

Apparently, the Maryland lawyers were at first uncertain about the proper form of the writ. This is evident from the case of *Snowe v. Gerrard*,²⁰⁶ a complex and protracted controversy between two prominent early settlers, which occupied the courts many times in the period between 1661 and 1666. That dispute became a veritable cause célèbre and its story may be called, "The Case of the Confused Writs."²⁰⁷ Thereafter, however, a considerable number of properly drafted and issued writs of *elegit* were recorded,²⁰⁸ showing that

from the beginning of the settlement. See *Stone v. Weston's Estate*, 1 Md. Arch. 230, 231 (W. Browne ed. 1883) (petition and order of extent, 1647), 4 Md. Arch., 1637-1650, at 376-78 (W. Browne ed. 1887) (recognizance and accounting, 1648), 10 Md. Arch. 345 (W. Browne ed. 1891) (order of extent, 1653), 41 Md. Arch. 238, 239 (B. Steiner ed. 1922) (writ of extent, 1658), 49 Md. Arch., Prov. Ct., 1663-1666, at 59, 251 (J. Pleasants ed. 1922) (alias writ and appraisal, 1663, 1664); *Cornwallis v. Chandler*, 41 Md. Arch. 82, 99, 139, 186, 198, 206, 234, 236, 261 (B. Steiner ed. 1922). This litigation in 1658 involved an extent of the manor of the late F. Yardley, now in the hands of defendant. See also *Lewis' Estate*, 41 Md. Arch. 149, 297, 65 Md. Arch., Prov. Ct., 1670-1675, at 668, 669 (J. Pleasants ed. 1938) (extent of a deceased debtor's estate for 99 years, ordered in 1658, proceeds to be prorated among creditors).

206. Marmaduke Snowe, brother of Abell Snowe who was a clerk in the English Chancery, had acquired by mesne assignments the rights of Abell Snowe under a recognizance of 1,000 pounds sterling, executed in his favor by Dr. Gerrard in England on June 19, 1640, and recorded in Maryland. See 41 Md. Arch. 539-50 (B. Steiner ed. 1922), 41 Md. Arch. 543-45 (text of the recognizance), 41 Md. Arch. 548 (the assignment of Abell to his mother Edith), 41 Md. Arch. 549-50 (the assignment by Edith to Marmaduke). Marmaduke commenced suit on the recognizance by *scire facias* in the Maryland Court of Chancery in 1661, but his suit was dismissed by decree on February 21, 1662. The dismissal was reversed by the Upper House on September 20, 1664. 1 Md. Arch. 513, 527 (W. Browne ed. 1883). See 41 Md. Arch. 550, 567, 572, 595 for proceedings following the dismissal and prior to the reversal. Thereupon Marmaduke sued out a new *scire facias* in the provincial court (49 Md. Arch. at 260 (J. Pleasants ed. 1932)), and on October 4, 1664, obtained an order that execution issue. 49 Md. Arch. 279. Marmaduke then asked for a writ commanding the sheriff to "levy by way of Execution upon the Goods Chattels lands tenements and hereditaments" of the judgment debtor. 49 Md. Arch. 286. Subsequently, the chattels seized under the writ yielded only £299:11s 3.5d, and, as a result, Marmaduke prayed for and obtained an order for an extent of Gerrard's lands to collect the balance. 49 Md. Arch. 401. The new writ—in the form of an *elegit*—ordered the sheriff to extend the moiety of the debtor's lands. 49 Md. Arch. 415-16. An extent of fourteen years was ordered. 49 Md. Arch. 431. Even then, however, Snowe was dissatisfied with the extent, and demanded and obtained on October 17, 1665, a further extent of lands omitted from the prior extent. 49 Md. Arch. 511. At that stage Dr. Gerrard, on January 14, 1665, appealed from the granting of the *elegit* arguing, *inter alia*, that the first writ of execution issued was a writ of *levari facias* and that thereafter no writ of *elegit* could issue. 49 Md. Arch. 555-56, 2 Md. Arch. 11, 12 (W. Browne ed. 1884).

On April 29, 1666, the Upper House found error and ordered restoration of the premises extended to Snowe. 2 Md. Arch. 59. A compromise finally terminated the litigation. 57 Md. Arch., Prov. Ct., 1663-1666, at 88, 108 (J. Pleasants ed. 1940).

207. For a similar instance of a confusion between *levari facias* and *elegit* see *Gerrard v. Dent*, 57 Md. Arch. 153-55, 181 (J. Pleasants ed. 1940).

208. See, e.g., *Petition of William Smith*, 57 Md. Arch. 73 (J. Pleasants ed. 1940); *Jennifer v. Cuthbert*, 57 Md. Arch. 359; 65 Md. Arch. 581 (E. Merritt ed. 1952); *Neale v. Russell*, 66 Md. Arch., Prov. Ct., 1675-1677, at 43, 62 (E. Merritt ed. 1952); *Gerard v. Gerard*, 66 Md. Arch. 338, 489, 67 Md. Arch., Prov. Ct., 1677-1678, at 62, 63, 89; *Patty v. Hull*, 68 Md. Arch., Prov. Ct., 1678-1679, at 69-70 (E. Merritt ed. 1959), 69 Md.

English practice as set forth in Dalton's *The Office and Authority of Sheriffs*²⁰⁹ and Fitzherbert's *New Natura Brevium*²¹⁰ had become familiar.

Maryland adopted further legislation dealing with execution in 1683²¹¹ and 1716.²¹² The first of these two enactments, which was re-enacted and revised by subsequent acts,²¹³ regulated attachment of personal property, including garnishment upon judgment. The second one aimed at prevention of excessive levies and wasteful execution sales. It gave the judgment debtor the privilege of exposing his personal property and requiring the creditor to select items from such property for levy and to accept them at an appraised value in satisfaction, in whole or *pro tanto*, of his debt.²¹⁴ If the creditor failed to cooperate, the sheriff was to select and keep such property for the creditor in discharge of the judgment debt. No other substantial changes were made in the legislation of the province until statehood. The British parliamentary Act of 1732, however, greatly changed Maryland practice and resulted in execution sales of land under *feri facias*.²¹⁵ Extents under *elegit* thus became obsolete,²¹⁶ but judgments

Arch., Prov. Ct., 1679-1680, at 315-17 (E. Merritt ed. 1961); *Tarleton v. Lewis*, 70 Md. Arch., Prov. Ct., 1681-1683, at 45 (E. Merritt ed. 1964). *But see* *Wade v. Batchelor*, 57 Md. Arch. 155 (W. Browne ed. 1884) (order of extent, not in form of *elegit*, in execution of judgment rendered at prior term, 49 Md. Arch. 128). Some of these writs are *elegits* against decedents' lands upon recognizances.

209. M. DALTON, *THE OFFICE AND AUTHORITY OF SHERIFFS* 55 (1623).

210. A. FITZHERBERT, *THE NEW NATURA BREVUM* 588 (rev. ed. 1677).

211. Act Limiting the Extent of Attachments and Providing What Shall Be Levied on Attachments and Executions of 1683, 7 Md. Arch., Council, 1678-1683, at 606 (W. Browne ed. 1889).

212. Act To Restrain the Ill Practices Used by Sheriffs in Taking Goods by Fieri Facias, and Selling Them by Venditioni Exponas of 1716, 30 Md. Arch., Gen. Assem., 1715-1716, at 662 (W. Browne ed. 1910).

213. Act Limiting the Extent of Attachments of 1692, 13 Md. Arch., Gen. Assem., 1684-1692, at 522 (W. Browne ed. 1894); Act Directing the Manner of Suing Out Attachments of 1704, 26 Md. Arch., Gen. Assem., 1704-1706, at 220 (W. Browne ed. 1906); Act Directing the Manner of Suing Out Attachments of 1715, 30 Md. Arch. 236 (W. Browne ed. 1910).

214. Act of 1716, § 2, 30 Md. Arch. at 622-23 (W. Browne ed. 1910).

215. *See* *Coombs v. Jordan*, 3 Bla. Ch. 284, 298 (Md. 1831), for a detailed historical discussion by Chancellor Bland. The Act also prompted an extension of attachment to real estate. *See* *Davidson's Lessee v. Beatty*, 3 H. & McH. 594 (Md. Ct. App. 1797).

216. Yet, as late as 1753, 1763, and 1779, fees of clerks for the issuance of *elegits* and of sheriffs for serving them were still fixed by statute. Act for the Limitation of Officer's Fees of 1753, 50 Md. Arch., Gen. Assem., 1652-1654, at 303, 343, 350, 353 (J. Pleasants ed. 1933); Act for Limitation of Officer's Fees of 1763, 58 Md. Arch., Gen. Assem., 1762-1763, at 433, 472, 476 (J. Pleasants ed. 1941); Act for the Regulation of Officer's Fees of 1779, ch. 25, 1 Md. Laws (W. Kilty ed. 1799). *See* Continuation Act of 1790, ch. 59, 2 Md. Laws (W. Kilty ed. 1799).

were still held to create liens upon the real estate of the judgment debtor and to produce special priorities.²¹⁷

E. Georgia

In Georgia the parliamentary Act of 1732 applied from the beginning of the colony. As a result, the writ of *elegit* was not resorted to, and land was levied under *feri facias* and sold at public auction. This state of affairs was recognized by the attachment law of 1761,²¹⁸ which applied to lands, tenements, goods, chattels, monies, debts, and books of accounts belonging to absent debtors and left in the hands of third parties. It provided that, upon recovery of a default judgment in the attachment action, the attached lands should be sold at public auction in the absence of sufficient personal estate of the attachment debtor.²¹⁹ An Act of 1789²²⁰ created judgment liens on the debtor's assets dating from their signing. In Georgia, however, judgment liens attached not only to land but to personal property as well.²²¹

In summary, then, the following observations with respect to the collection of money judgments in the southern colonies may be made: After 1732 Virginia remained the only colony in the South which retained *elegit* as the exclusive writ of execution against land, no redemption rights from the execution sale of land existed, and chattels were, under certain conditions, subject to assignment to the creditor at an appraised value, rather than to sale on execution.

V. NEW STATES AND THE OLD TERRITORIES

A. Vermont

Vermont, towards the end of her struggle for independent statehood, enacted an Act of 1787 Directing and Regulating the Levying and Serving of Executions,²²² which, with a few modifications and additions, was a verbatim copy of Connecticut's contemporary law.²²³

217. See *Coombs v. Jordan*, 3 Bla. Ch. 284 (Md. 1831); *Jones v. Jones*, 1 Bla. Ch. 443 (Md. Ch. 1827). But cf. *Hindman v. Ringgold*, unreported decision discussed in *Abbott v. Nicholls*, 1 H. & J. 471, 473 n.a (1804), a decision which was apparently overruled subsequently.

218. Act Subjecting to Attachment the Estate Real and Personal of Absent Debtors of 1761, Ga. Col. Laws 111 (1932 reprint).

219. §§ 5-6, Ga. Col. Laws at 114-15 (1932 reprint).

220. Act for Regulating the Judiciary Departments of 1789, § 3, DIGEST OF GA. LAWS 389, 391 (R. & G. Watkins ed. 1800).

221. See *Forsyth v. Merbury*, 1 Ga. Rep. Ann. 232 (1831).

222. [1787] Vt. Stat. 60.

223. See text accompanying notes 79-88 *supra*.

It provided for the transfer of land in fee to the creditor at an appraised value, and for the sale of chattels at public auction, subject, however, to the creditor's option of taking the chattels at an appraised value. The writ of execution covered goods, chattels, or lands of the judgment debtor.²²⁴ In 1797 the Act was superseded by a revised Act with the same title,²²⁵ which included life estates in the real estate liable to be taken in execution²²⁶ and provided for redemption by the judgment debtor or his heirs or executor within six months from the extent, permitting the debtor to stay in possession for that period.²²⁷ Priority among creditors depended upon the date of delivery.²²⁸ Execution sales of land were authorized only for the benefit of the state.²²⁹ The same rules were made applicable to decedents' estates.²³⁰

B. Kentucky

Kentucky, upon separation from Virginia, continued the prior laws in force. The first legislature, however, made important changes in the law of execution. In 1792, it subjected lands to execution sales on *fiery facias*.²³¹ The pertinent Act was in substance a combination and modification of two prior Virginia acts—an Act of 1788²³² providing for the enforcement of judgments against public officials for the benefit of the state by means of execution sales under *fiery facias*, and an Act of 1787²³³ which provided for the appraisal of chattels levied upon and special procedures if the execution sale was expected to yield less than three fourths of the chattels' value. The Kentucky Act of 1792 was originally couched in retroactive language, but in 1793 it was given only prospective effect.²³⁴ The Act of 1792 was supplemented by another statute which regulated executions in general.²³⁵

224. Act Prescribing Forms of Writs in Civil Causes of 1787, [1787] Vt. Stat. 164-65.

225. Ch. 8, Vt. Rev. Laws of 1797, at 144 (1798).

226. Ch. 8, § 3, Vt. Rev. Laws of 1797, at 146 (1798).

227. Ch. 8, §§ 5-6, Vt. Rev. Laws of 1797, at 147-48 (1798).

228. Ch. 8, § 10, Vt. Rev. Laws of 1797, at 152 (1798).

229. Ch. 8, §§ 13-14, Vt. Rev. Laws of 1797, at 154 (1798).

230. Act for the Probate of Wills and the Settlement of Testate and Intestate Estates of 1797, ch. 17, § 57, Vt. Rev. Laws of 1797, at 209, 236 (1798).

231. Act Subjecting Lands to the Payment of Debts of 1792, ch. 40, 1 Ky. Laws 128 (W. Littell ed. 1809).

232. Act for the More Speedy Recovery of Debts Due This Commonwealth of 1788, ch. 40, 12 Va. Laws 558 (W. Hening ed. 1823).

233. Act Directing the Mode of Proceeding Under Certain Executions of 1787, ch. 7, 12 Va. Laws 457 (W. Hening ed. 1823).

234. Act of Dec. 11, 1793, ch. 125, § 3, 1 Ky. Laws 206, 210 (W. Littell ed. 1809).

235. Act Concerning Executions, and Relief for Insolvent Debtors of 1792, ch. 41, 1 Ky. Laws 136 (W. Littell ed. 1809).

This legislation dropped the writ of *elegit*, but that writ was restored in the following year.²³⁶ In 1796 Kentucky suspended execution sales of lands for the payment of taxes until further action²³⁷ and revised and consolidated the whole field.²³⁸ The new act was patterned after the corresponding Virginia law²³⁹ and provided for *feri facias* and *elegit*. It specified expressly that a writ of *feri facias* "or other writ of execution" should bind goods, chattels, lands, tenements, or hereditaments only upon delivery to the sheriff.²⁴⁰ In addition, it authorized execution sales only of goods and chattels.²⁴¹ In 1797, however, the Act of 1792 subjecting lands to *feri facias* was revived and amended, permitting execution sales of land either for three fourths or more of the appraised value or, if such sale was estimated to be impossible, on three months credit.²⁴² The former limitation was repealed in 1799.²⁴³ As a result of the express provisions it was held by the courts²⁴⁴ that in Kentucky judgments created no liens on land, especially as it was specified that even a writ of *elegit*, although formally in existence until 1852,²⁴⁵ should not bind lands until delivery to the sheriff.

C. Tennessee

Tennessee was established on an area that was ceded in 1790 to the United States by North Carolina and temporarily organized as Territory South of the River Ohio.²⁴⁶ The cession provided for the continued force of the laws of North Carolina until future amendment or repeal. The territorial assembly in 1794 passed an Act regulating the organization of courts and proceedings therein,²⁴⁷ which

236. Act of Dec. 11, 1793, ch. 125, § 1, 1 Ky. Laws 206 (W. Littell ed. 1809).

237. Act Suspending the Sales of Land of 1796, ch. 270, 1 Ky. Laws 516 (W. Littell ed. 1809).

238. Act of Dec. 19, 1796, ch. 274, 1 Ky. Laws 528 (W. Littell ed. 1809).

239. Consolidation of 1792, ch. 5, § 22, 13 Va. Laws 357 (W. Hening ed. 1823). See text accompanying note 164 *supra*.

240. Ch. 274, § 8, 1 Ky. Laws 540 (W. Littell ed. 1809).

241. Ch. 274, § 15, 1 Ky. Laws 542 (W. Littell ed. 1809).

242. Act of Feb. 28, 1797, ch. 307, § 1, 1 Ky. Laws 670 (W. Littell ed. 1809).

243. Act of Dec. 21, 1799, ch. 217, 2 Ky. Laws 334 (W. Littell ed. 1809).

244. See, e.g., *Bank of the United States v. Tyler*, 29 U.S. (4 Pet.) 366 (1830).

245. Ky. Rev. Stat., ch. 36, art. 1, § 1, at 315 (C. Wickliffe, S. Turner & S. Nicholas ed. 1852).

246. Act To Accept Cession of the Claims of North Carolina to a Certain District of Western Territory of 1789, ch. 6, 1 Stat. 106; Act for the Government of Territory of the United States South of the River Ohio of 1790, ch. 14, 1 Stat. 123.

247. Act of Aug. 25, 1794, ch. 1, A Revisal of all the Public Acts of the State of North Carolina and of the State of Tennessee Now in Force in the State of Tennessee 177, 184 (J. Haywood ed. 1809) [hereinafter *Tenn. Rev.*].

constituted a slightly modified re-enactment of the North Carolina law of 1777.²⁴⁸ It subjected lands, tenements, and hereditaments to levy and sale on *feri facias* if no sufficient personal property could be found.²⁴⁹ In 1799 an amendment was adopted that required execution sales of land to be made within twelve months from the rendition of the judgment.²⁵⁰ A further amendment of 1801 provided for the appointment of appraisers and established certain options if the property, real or personal, could not be sold for at least two thirds of the appraised value.²⁵¹ In that case, the creditor was entitled to take it at two thirds of the valuation. If he did not choose to do so, the debtor had the right to a twelve-month stay, provided he furnished a bond in the amount of the debt. Otherwise, an execution sale for any price was permitted.

Because of the history of the law of execution and the language of the amendment of 1799, early Tennessee cases held that a money judgment created a lien on land subject to the qualifications imported by the Act of 1799.²⁵² The commencement of this lien vis-à-vis purchasers and the priorities among execution creditors *inter se* with respect to both realty and chattels created many perplexing issues, inasmuch as the pertinent provisions of the English Statute of Frauds²⁵³ had been held not to apply in the state.²⁵⁴ As to creditors *inter se*, it was finally decided that judgment liens on land related back to the first day of the term during which the judgment was signed²⁵⁵ and that execution liens on chattels related back to the date of the *teste*, which was likewise the first day of the term, if execution was granted during the term in which the judgment was rendered.²⁵⁶ In 1831 it was provided that a judgment lien on land dated from the

248. See text accompanying note 177 *supra*.

249. Act of 1794, ch. 1, § 23, Tenn. Rev. 184 (J. Haywood ed. 1809).

250. Act To Amend the Law for Selling Lands Under Execution of 1799, ch. 14, § 2, Tenn. Rev. 246, 247 (J. Haywood ed. 1809).

251. Act To Amend Law of Levying Executions of 1801, ch. 13, Tenn. Rev. 288-89 (J. Haywood ed. 1809).

252. See, e.g., *Porter's Lessee v. Cooke*, 7 Tenn. 29 (1823).

253. 29 Car. 2, c. 3, §§ 14-15 (1677), 5 Stat. Realm 412 (1819). Section 14 is set out in the text accompanying note 19 *supra*. Section 15 provided that the writ of *feri facias* and other writs of execution would bind property from the time of delivery to the sheriff.

254. *Johnson v. Ball*, 9 Tenn. 291 (1830); *Battle v. Bering*, 15 Tenn. 529 (1835).

255. *Porter v. Earthman*, 12 Tenn. 358 (1833). See *Clements v. Berry*, 52 U.S. (11 How.) 398, 410 (1850).

256. *Union Bank v. McClung*, 28 Tenn. 91 (1948); *Daley v. Perry*, 17 Tenn. 442 (1836). See also *Barnes v. Hayes*, 31 Tenn. 304 (1851); *Berry v. Clements*, 28 Tenn. 312, 320, 325 (1848), *revd. on other grounds*, *Clements v. Berry*, 52 U.S. (11 How.) 398, 408, 410 (1850). (The Court agreed that under Tennessee law such liens related back to the date of *teste*.)

day of the judgment's rendition,²⁵⁷ and, as a result of this rule, it was held that an execution lien by levy on land no longer related back to its *teste*.²⁵⁸ Rights to redeem from execution sales of land were given to the debtor and unsecured or unpaid bona fide creditors in 1820.²⁵⁹

D. Ohio

Execution against land in the Territory Northwest of the Ohio River was regulated in 1795 by a law adopted from Pennsylvania, pursuant to the mandate of the congressional ordinance for the government of the territory that the governor and the judges should adopt and publish the best-suited laws of the original states.²⁶⁰ The Act²⁶¹ was an almost literal copy of the Pennsylvania law of 1706²⁶² and provided for execution sales of land under the writ of *levari facias* if, upon appraisal, it was estimated that yearly rents and profits from them would not be sufficient to pay off the judgment debt or balance thereof within seven years.²⁶³ If the land in such case could not be sold, it was set off to the plaintiff at an appraised value.²⁶⁴ Delivery of these lands was likewise to be made under that writ rather than under a separate *liberari facias*, as in Pennsylvania.²⁶⁵ Lands yielding sufficient annual rents and profits were levied upon under an *elegit*.²⁶⁶ In 1802, after the separation of the Indiana Territory, the legislature of the remaining territory enacted a comprehensive and, in many respects, original statute regulating executions.²⁶⁷ It consolidated the writs of execution into one, commanding the sheriff to levy on goods and chattels and, in default thereof, on real estate.²⁶⁸ Judgments created liens on real estate dating from the first day of the term in which they were rendered, while executions

257. Ch. 90, [1831] Tenn. Laws, 1 Tenn. Stat. 419 (R. Caruthers & A. Nicholson ed. 1836).

258. *Anderson v. Taylor*, 74 Tenn. 382 (1880).

259. Ch. 11, [1820] Tenn. Laws, 1 Tenn. Laws 98 (J. Haywood & R. Cobbs ed. 1831).

260. An Act To Provide for the Government of the Territory Northwest of the River Ohio of 1845, 1 Stat. 50, 51.

261. Act Subjecting Real Estate to Execution for Debt of 1795, 1 N.W. Terr. Laws, 1788-1800, at 131 (T. Pease ed. 1925).

262. See text accompanying notes 128-29 *supra*.

263. Act of 1795, §§ 1-4, 1 N.W. Terr. Laws, 1788-1800, at 131-33 (T. Pease ed. 1925).

264. § 4, 1 N.W. Terr., 1788-1800, at 133 (T. Pease ed. 1925).

265. See text accompanying note 132 *supra*.

266. § 2, 1 N.W. Terr., 1788-1800, at 131-32 (T. Pease ed. 1925).

267. Act Regulating Executions of 1802, ch. 145, Laws of the Territory Northwest of the River Ohio, 1791-1802, at 316 (1813) [hereinafter N.W. Terr. Laws, 1791-1802].

268. Ch. 145, §§ 6-7, N.W. Terr. Laws, 1791-1802, at 316 (1813).

against chattels created liens upon their levy.²⁶⁹ The statute contained additional and somewhat confusing rules with respect to priorities among creditors *inter se*; generally, the rank of different creditors depended on the date of the delivery of their writs to the sheriff, but creditors were placed on equal footing if either of their writs were delivered to the sheriff on the same day or, in the case of real estate, the writs were sued out within the term in which the respective judgments were obtained or within ten days after its close.²⁷⁰ Real estate was to be sold only if, on the basis of an appraisal, it was not capable of yielding sufficient annual rents and profits to satisfy the judgment within five years.²⁷¹ Such a sale cleared the title of all unenforced judgment liens.²⁷²

After acquisition of statehood, Ohio revised and amended its law²⁷³ in an effort to find a workable method that would avoid execution sales for less than a reasonable price.²⁷⁴ The extent for a term of years was abolished in 1808.²⁷⁵ The relation back of judgment liens, however, was retained until 1927.²⁷⁶

269. Ch. 145, § 2, N.W. Terr. Laws, 1791-1802, at 316 (1813).

270. Ch. 145, §§ 3-5, N.W. Terr. Laws, 1791-1802, at 316 (1813). Seemingly, a creditor who recovered a judgment that became a lien on land lost his priority with respect to a creditor who recovered a lien in the next term if he obtained and delivered a writ of execution in the later term but subsequent to the delivery of the writ of execution by the junior lienor. *See Northern Bank v. Roosa*, 13 Ohio 334 (1844) (involving a different form of the statute).

271. Ch. 145, § 10, N.W. Terr. Laws, 1791-1802, at 317 (1813).

272. Ch. 145, § 14, N.W. Terr. Laws, 1791-1802, at 318 (1813).

273. Act Regulating Judgments and Executions of 1805, 3 Ohio Laws 69 (1805); Act of Feb. 22, 1808, ch. 42, 6 Ohio Laws 147 (1808); Act Regulating Judgments and Executions of 1810, ch. 24, 8 Ohio Laws 71 (1810); Act Regulating Judgments and Executions of 1816, ch. 39, 14 Ohio Laws 171 (1816); Act Regulating Judgments and Executions of 1820, ch. 27, 18 Ohio Laws 179 (1820); Act Regulating Judgments and Executions of 1822, ch. 30, 20 Ohio Laws 68 (1822); Act Regulating Judgments and Executions of 1824, 22 Ohio Laws 108 (1824); Act Regulating Judgments and Executions of 1831, 29 Ohio Laws 101 (1831).

274. The Act of 1805, 3 Ohio Laws 69 (1805), prohibited execution sales of land below a specified fraction of its appraised value, which varied according to the productive or unproductive character of the land. Similar provisions were retained in subsequent acts.

275. Ch. 42, § 7, 6 Ohio Laws 147 (1808).

276. Act of May 2, 1927, 112 Ohio Laws 199 (1927). There were many intervening changes in the law of judgment liens. The Act of 1820, ch. 27, § 2, 18 Ohio Laws 179 (1820), and subsequent acts restricted judgment liens to lands in the county where the judgment was entered. The Act of 1822, ch. 30, § 2, 20 Ohio Laws 68 (1822), and subsequent acts limited the life of the judgment lien against other bona fide judgment creditors to one year if no levy was made within that period, but the extinction operated only if the junior creditor proceeded to a levy within his year. The Act of 1831, § 4, 29 Ohio Laws 101 (1831) finally expressly saved judgment liens from the operation of the priorities depending on the dates of the issuance or levy of the writs of execution. *See Northern Bank v. Roosa*, 13 Ohio 334 (1844).

E. *Indiana*

The Indiana Territory, after its separation from the Northwest Territory, retained the old territorial Act of 1795 until the revision of 1807.²⁷⁷ Even before that date, however, the provisions relating to an extent of lands capable of satisfying the judgment debt from rents and profits within five years were repealed.²⁷⁸ Actually, the first amendment to the Act of 1795 was adopted in 1805.²⁷⁹ It authorized the debtor to tender the lands to be taken, with the effect that such lands could not be sold at less than two thirds of their appraised value to an outsider.²⁸⁰ If no sale was possible, the creditor was deemed to have bought them at such value. This system was repealed in 1806 and execution sales at any price permitted, subject to a stay of months, if the judgment debtor executed a bond securing the debt.²⁸¹ The revision of 1807 authorized execution sales of land at any price, but provided in addition that land remaining unsold should be assigned to the creditor in fee at an appraised value, pursuant to a writ of *levari facias*.²⁸² Curiously enough, on the same day the legislature adopted an inconsistent provision which prescribed a sale of unsold lands under a *venditioni exponas*.²⁸³ An amendment of the following year entitled the judgment debtor to select the property to be levied upon.²⁸⁴ In 1810 the territory adopted the traditional form of the Act for the Prevention of Frauds and Perjuries, which regulated the lien effect of judgments and writs of execution in the form of the English model.²⁸⁵ As a result, it was held that at least since 1795 a judgment created a lien on lands which continued during the whole life of the judgment, even after dormancy.²⁸⁶

277. Act Subjecting Real Estate to Debt of 1807, ch. 12, Ind. Terr. Laws, 1801-1809, at 262 (F. Philbrick ed. 1930).

278. Act Concerning Executions of 1806, ch. 10, Ind. Terr. Laws, 1801-1809, at 187 (F. Philbrick ed. 1930).

279. Act for the Sale and Conveyance of Land Under Execution of 1805, ch. 24, Ind. Terr. Laws, 1801-1809, at 126 (F. Philbrick ed. 1930).

280. Ch. 24, §§ 2-3, Ind. Terr. Laws, 1801-1809, at 126-27 (F. Philbrick ed. 1930).

281. Act Concerning Executions of 1806, ch. 10, § 1, Ind. Terr. Laws, 1801-1809, at 187 (F. Philbrick ed. 1930).

282. Act Subjecting Real Estate to Debt of 1807, ch. 12, § 2, Ind. Terr. Laws, 1801-1809, at 262-63 (F. Philbrick ed. 1930).

283. Act Regulating the Duties of Sheriffs of 1807, ch. 70, § 3, Ind. Terr. Laws, 1801-1809, at 542 (F. Philbrick ed. 1930).

284. Act of Oct. 16, 1808, ch. 15, § 1, Ind. Terr. Laws, 1801-1809, at 665 (F. Philbrick ed. 1930).

285. Ch. 23, Ind. Terr. Laws, 1809-1816, at 129 (L. Ewbank & D. Riker ed. 1934).

286. *Ridge v. Prather*, 1 Bl. 401 (Ind. 1825).

F. *Michigan*

The Michigan Territory likewise inherited the Northwest Territory's Act of 1795, which subjected real estate to execution and was patterned after the corresponding Pennsylvania law. It remained in force until 1810 when execution sales of real estate were abolished and a mixed system providing for an extent for a term not exceeding seven years or an extent in fee subject to a one-year redemption period was introduced.²⁸⁷ This system, as indicated in the enactment, constituted a combination of the laws of Pennsylvania and Vermont. In 1821 the law of 1810 was substantially re-enacted²⁸⁸ but a series of provisions governing priorities, taken from the Ohio law of 1820,²⁸⁹ were added. Since the Ohio additions contemplated execution sales of real estate, the resulting Act constituted a very confused and perplexing piece of legislation. In 1827 the confusion was cleared up when a new law concerning judgments and executions was passed.²⁹⁰ It removed all vestiges of the Pennsylvania and Vermont system and was, with qualifications, an adoption of the Ohio legislation. The principal difference was a clear-cut statement that in Michigan lands and tenements, as well as goods, are bound only from the time of the levy.²⁹¹ While the Ohio rules prescribing equality in rank of executions issued during the term in which the judgments were recovered or within ten days thereafter and of executions delivered on the same day were retained, the statute clearly indicated that—in contrast to the law in Ohio—in Michigan a judgment created no lien.²⁹² This principle was retained in all subsequent pertinent enactments.

G. *Mississippi*

In the Mississippi Territory—established in 1798²⁹³—execution sales of lands were only authorized in exceptional circumstances, such as attachments against nonresidents²⁹⁴ or judgments on bonds to keep

287. Act Subjecting Real Estate to the Payment of Debts of 1810, §§ 2-4, 1 Mich. Terr. Laws 154 (1871). The Act was originally adopted in 1809, 2 Mich. Terr. Laws 42 (1874), and signed with two stylistic changes in 1810.

288. Act Subjecting Real Estate to the Payment of Debts, and Concerning Executions of 1821, 1 Mich. Terr. Laws 860 (1871).

289. 18 Ohio Laws 179 (1820).

290. Act Concerning Judgments and Executions of 1827, 2 Mich. Terr. Laws 487 (1874).

291. Act Concerning Judgments and Executions of 1827, § 2, 2 Mich. Terr. Laws at 487 (1874).

292. § 2, 2 Mich. Terr. Laws 487 (1874).

293. An Act Authorizing the Establishment of a Government in the Mississippi Territory of 1798, 1 Stat. 549.

294. Act Allowing Foreign Attachments of 1799, [1799] Miss. Terr. Laws 188; Act

prison bounds.²⁹⁵ The general execution law of 1807²⁹⁶ was adopted from the corresponding Virginia Act of 1792²⁹⁷ and the Kentucky Act of 1796.²⁹⁸ It expressly prohibited execution against real estate except by writ of *elegit*.²⁹⁹ This Act, with certain amendments, remained in force during the whole territorial period. In 1822, after the acquisition of statehood, Mississippi adopted a new Act which, much in the fashion of South Carolina's law,³⁰⁰ suppressed the writ of *elegit* as a writ of execution and subjected land to execution sales under *feri facias*.³⁰¹ Originally, such sales were only permitted at a price equal to at least three fourths of the appraised value, but this limitation was deleted in 1823.³⁰² The 1822 Act also provided that executions should bind the goods, lands, and tenements only from the delivery to the sheriff.³⁰³ Judgment liens were not recognized. In 1841, however, judgment liens were reintroduced and attached to personal as well as real property.³⁰⁴

H. Missouri

In the Territory of Louisiana, the predecessor of the Missouri Territory, an Act of 1807³⁰⁵ directed that writs of execution be levied on lands and tenements as well as on goods and chattels, and

for the Organization of Courts of 1801, § 26, [1801] Miss. Terr. Laws 21, 49; Act Directing the Method of Proceedings Against Absconding and Other Absent Defendants of 1807, ch. 7, § 7, Miss. Terr. Stats. 142, 146 (H. Toulmin ed. 1807).

295. Act Concerning Execution of 1805, [1805] Miss. Terr. Laws, Extra Sess. 3, *repealed* Act Concerning Executions and for the Relief of Insolvent Debtors of 1807, ch. 12, Miss. Terr. Stats. 175, 199 (H. Toumlin ed. 1807). In order to alleviate the plight of a debtor who was imprisoned for debt, the prison yard in which he was free to move could be extended so as to cover large areas, sometimes the whole county. A debtor was entitled to such privilege by furnishing a bond "to keep prison bounds." For a famous case illustrating this practice, see *Codman v. Lowell*, 3 Me. 52 (1824).

296. Act Concerning Executions and for the Relief of Insolvent Debtors of 1807, ch. 12, Miss. Terr. Stats. 175 (H. Toumlin ed. 1807).

297. 13 Va. Laws 357 (W. Hening ed. 1823).

298. See text accompanying notes 237-41 *supra*.

299. Act Concerning Executions and for the Relief of Insolvent Debtors of 1807, ch. 12, § 36, Miss. Terr. Stat. 199 (H. Toumlin ed. 1807).

300. County Courts Act of 1785, §§ 35, 37, 7 S.C. 227, 229 (T. Cooper ed. 1838). See text accompanying notes 189-91 *supra*.

301. Act of June 22, 1822, [1822] Miss. Laws 128.

302. Act of Jan. 21, 1823, § 4, Miss. Rev. Code 213 (1824).

303. Act of June 22, 1822, § 8, [1822] Miss. Laws 132.

304. Act To Regulate the Liens of Judgment and Decrees of 1841, ch. 9, [1841] Miss. Laws 93, following in that respect a Georgia act of Dec. 19, 1822, [1822] Ga. Laws 55.

305. Act Establishing Courts of Justice and Regulating Judicial Proceedings of 1807, ch. 38, §§ 41-46, 1 Laws of the District of Louisiana, Territory of Louisiana, Territory of Missouri, and State of Missouri to 1824, at 105, 119-21 (1842) [hereinafter Mo. Terr. & State Laws to 1824].

prescribed the modalities of execution sales of lands and tenements. Judgments were made liens on lands and tenements from the first return day of the term in which they were entered,³⁰⁶ while executions bound chattels from their delivery to the sheriff.³⁰⁷ A statute of Missouri passed after statehood, which permitted a creditor to take property at two thirds of its value,³⁰⁸ survived only for one legislative session.³⁰⁹

VI. CONCLUSIONS

The story told in the preceding pages furnishes interesting and important insights from a variety of perspectives. From the point of view of law reform, it shows repeated efforts to alleviate the dissipative effects of individual enforcement procedures by a variety of devices, such as floors on the price at which execution sales may be had (upset prices), assignment of assets to creditors at appraised values, redemption rights exercisable either before or after sale or assignment to creditors, and outright moratoria. In the end, none of these devices achieved permanent satisfactory results, thus raising the question whether the whole system of creditor-dominated enforcement procedures should not be replaced by a flexible system, administered by public collection authorities, as exists to a certain extent in Switzerland.³¹⁰

With respect to the interaction between the economic and social infrastructure and enforcement procedures, the story shows that execution against land depended in the main on the land distribution and land use in the respective colonies. Execution by means of the writ of *elegit*, permitting only an extent of the land for a specified term rather than an assignment to the creditor in fee or an outright sale to the highest bidder, was feasible only in those colonies in which there was a prevalence of larger estates devoted to the raising of particular crops—as was the case primarily in the southern colonies. In New England and in most of the middle colonies, the character of landholding was different, and *elegit* was either never used or abolished long before the parliamentary Act of 1732. The different needs were clearly recognized even in the mother country. Thus, when pass-

306. Ch. 38, § 44, 1 Mo. Terr. & State Laws to 1824, at 120 (1842).

307. Ch. 38, § 41, 1 Mo. Terr. & State Laws to 1824, at 119 (1842).

308. Act Regulating the Sales of Property Under Execution of 1821, ch. 349, § 2, 1 Mo. Terr. & State Laws to 1824, 817, 818 (1842).

309. Act of Nov. 27, 1822, ch. 387, 1 Mo. Terr. & State Laws to 1824, at 941 (1842).

310. Law on Collection of Debts and Bankruptcy of April 11, 1889, § 3 R.S. 3 (1950), provides for the establishment of Execution Offices. The structure and functions of these offices are discussed in 1 FRITSCH, *SCHULDBETREIBUNG UND KONKURS* 26-52 (2d ed. 1967).

ing in 1706 on the conformity of Pennsylvania's Act of 1700, which subjected real estate to execution sales, with the provision of the charter of that colony, Edward Northey, the English attorney general, observed: "This law differs from the law of England but may be practicable there."³¹¹

To the historian interested in intrainperial relations, the effects of the Act of 1732 show that it was long anticipated in the New England and middle colonies and that sporadic episodes of nonconformity were not taken seriously. On the other hand, it had a profound and innovative effect on the southern colonies which, with one exception, complied with it. Virginia, after a brief period of compliance, seems to have disregarded it.³¹²

As to the general problem of legislative techniques in the colonies and the early United States territories, the story shows again the power of legislative precedent. The statutes of the great pioneer colonies of Massachusetts, Pennsylvania, and Virginia exercised an overwhelming influence on the neighboring jurisdictions, which resulted in a wholesale borrowing of provisions. Introductory clauses, such as "To the end that no creditors . . ." (Pennsylvania) or "Whereas the estates of persons . . ." (Massachusetts), furnish veritable clues to the tracing of statutory families.

Perhaps the most intriguing doctrinal problems were produced by the efforts to interlace the treatment of land as chattel for execution purposes with the general common law differentiation of these two categories of property. The controversies over the proper system of priorities and the existence and effects of judgment liens clearly demonstrate the resulting difficulties. Only the historical genesis of the respective statutes explains why Kentucky and Michigan, in addition to most of the New England states, are today the sole jurisdictions where money judgments create no liens on real estate.

311. Reprinted 2 PENN. STAT. 479, 494 (J. Mitchell & H. Flanders ed. 1896).

312. The Act of 1732 was among the objectionable English statutes listed by Jefferson in his instructions for the Virginia delegates to the Continental Congress of 1774 and blamed for lacking the attributes of equal and impartial legislation. 1 THE PAPERS OF THOMAS JEFFERSON 121, 125 (J. Boyd ed. 1950). This does not mean that Jefferson opposed American legislation subjecting real estate to execution sales on *feri facias*. He was the chairman of the Committee of Revision, charged in 1776 with the revision of the Virginia laws, which sponsored a bill concerning executions. Jefferson must have approved it, although it was probably drafted by one of the two other committee members. See 2 *id.* at 305, 320, 641. The bill subjected lands to levy and sale on *feri facias* and regulated in great detail the whole process of execution against chattels and real estate. It constituted a careful modernization of the entire body of Virginia law on the subject. It was never adopted by the legislature but some of its ideas were incorporated in the Act for the More Speedy Recovery of Debts Due This Commonwealth of 1788, ch. 40, 12 Va. Laws 558 (W. Hening ed. 1823). See text accompanying note 166 *supra*.