HISTORICAL ORIGINS OF INTERPLEADER

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A person who seeks relief through the medium of interpleader in the majority of American courts must brave the musty and chilly winds of ancient legal lore. Winds which rustle through the leaves of the later — and more corrupt — Year Books, and which are filled with niceties and technicalities not unlike the technical quibbles often invoked in opposition to an Original writ of the fourteenth century. In 1308 a writ of entry, brought in the Court of Common Pleas, was abated on the ground that it named the defendant “by divers surnames in divers praecipes in one writ”. In 1882 the Massachusetts Supreme Judicial Court, in Third National Bank v. Skillings et al., held that mere lack of privity between the adverse claimants defeated the petitioner's right to relief by interpleader. The courts have long clung tenaciously to the historical errors which have been read into the requirements one must

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1. By far the finest discussions in print dealing with American and English cases of interpleader are the articles by Professor Chafee: Modernizing Interpleader (1921) 30 YALE L. J. 814; Interstate Interpleader (1924) 33 id. at 685; Interpleader in The United States Courts (1932) 41 id. at 1134, 42 id. at 41; The Federal Interpleader Act of 1936 (1936) 45 id. at 963, 1161; and Federal Interpleader Since the Act of 1930 (1940) 49 id. at 377. See also Scope of the Remedy of Interpleader (1901) 15 HARV. L. Rev. 61; The Requirement of Privity in Interpleader (1904) 17 id. at 489; The Scope of Interpleader (1909) 22 id. at 294; and Interpleader in Tax Cases (1911) 25 id. at 174.

2. Cave v. Bardolf, Y. B. 2 Edw. II 34, pl. 117, 19 SELDEN SOCIETY (1904). Thousands of such examples could be cited. But see Anonymous, Y. B. Mich. 3 Edw. II 128, pl. 27 (1309), id., where a writ was upheld against mere grammatical objections.

3. 132 Mass. 410 (1882) (bill in equity). This was also one of the grounds for denying relief in Welch v. City of Boston, 208 Mass. 326, 94 N. E. 271 (1911), but the decision in that case seems to rest principally upon another ground: that public policy favors the prompt collection of taxes. This we submit is also a ground of subject to the criticism urged by Professor Chafee: the criticism that that policy should be the prompt collection of just taxes. For a review supporting the decision in this case see Interpleader in Tax Cases (1911) 25 HARV. L. REV. 174; id. 197. The New York courts have taken a contra view and permit a taxpayer, who is about to be forced to pay taxes assessed on the same property by two towns, to maintain a bill of interpleader against the towns or their tax collectors. Thompson v. Ebbets & Welch, Hopk. Ch. 272 (N. Y. 1824); Dorn v. Fox, 61 N. Y. 264 (1874). And see Jackson v. City of New York, 62 N. Y. App. Div. 46, 70 N. Y. Supp. 877 (1901) (injunction to remove a cloud on title caused by illegal tax).
meet in order to get relief by way of interpleader.\(^4\) To clear away the limitations attendant upon this "admirable remedy",\(^5\) limitations which have been erroneously grafted upon precedents dating back to the Middle Age, we must see whether those limitations in fact ever existed. In short, as Professor Chafee has put it: "Some discussion of the historical origin of the remedy is essential",\(^6\) to its understanding. That discussion must be based upon a fresh investigation of the primary sources of the English law.\(^7\)

The doctrines of "privity" and "independent liability" until only recently have been the great handicaps to relief by way of interpleader in a great many cases where otherwise effective and just relief might have been afforded by that procedure. These two limitations, that privity must exist between all parties, and that the defendant must have incurred no independent liability, from the early part of the seventeenth century to the present, have been justified as having existed at common law. Our investigation of the sources of English law indicates that these doctrines have been grounded in historical error. No such limitations were imposed upon the form of "interpleader" which was allowed at common law prior to the supremacy of Chancery in this field. Relief at common law in the nature of "interpleader" seems to have been allowed first in writs of wardship. Here, so it seems, we have the origin of "interpleader" at common law, and here we shall begin our investigation.

I. THE BIRTH OF COMMON LAW INTERPLEADER

On the death of a man the question of who should have the wardship of his minor children, and of their lands, was one which perplexed the courts and prompted much litigation. The writ of wardship was well established as early as Bracton's time, and the priority of claims of different lords to the right of wardship was governed by strict rules of

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4. The rigid requirements for a strict bill of interpleader in equity, in jurisdictions still maintaining a separation of law and equity, have for the most part remained intact. And even under modern state statutes authorizing defensive interpleader at law some courts hold that the settled doctrines applicable to bills of interpleader at equity are likewise applicable under the statutory action. Gonia v. O'Brien, 223 Mass. 177, 111 N. E. 787 (1916). For a comprehensive review of the American and English decisions see the articles cited note 1 supra.


6. Id. at 822.

7. Id. at 822 n. 27. "The source of all other discussions of this topic is 2 Reeves, History of English Law (Finlason's ed. 1869) 635-40. The Year Books and other primary sources ought to be investigated afresh, since many points might be discovered which escaped Reeves' attention." It seems worth while remarking here that the words garnishment and interpleader (or enterpleader) are words unknown to the general index to Holdsworth, History of the English Law (1922-27), and so far as we can discover they do not appear in any of the separate indices of that set.
law. Perhaps it was on the analogy of voucher to warranty in appeals of larceny, and in litigation concerning land, that it was early decided that the defendant in a writ of wardship could vouch to warranty. In appeals of larceny if the vouchee appeared and admitted that the goods passed from him to the appellee then the appellee retired from the action. The same procedure was carried over into wardship cases. But, if one who made no claim to the wardship of infant children was beset by multiple claims to their wardship, what relief was to be had? Land descended along rigid lines; the devolution of personalty under the tutelage of law and of the church was unlikely to cause much conflict. But here was a situation not squarely covered by either. One who claimed no estate in infant children had no cause for voucher. It was in such situations that we find the embryo of common law interpleader. Drawing upon the analogy of voucher to warranty the courts very early worked out a method of relief by compelling the adverse claimants to “interplead”.

The first reported case of this nature seems to be that of Newmarket v. Boville, decided by the Court of Common Pleas in 1313. In this

12. See note 9 supra.
13. It is likely that analogy was also drawn from the cases where two parties claimed adversely an estray in the lord’s hands. From a report in Bracton’s Note Book (No. 1115) we read of such a case in 1234. Presumably the parties “interpleaded” by producing suit (secta). When an estray was turned over to a claimant the claimant always gave security to restore it in case someone else made claim thereto within a year and a day. Select Pleas in Manorial Courts 31, 2 Selden Society (1889). In Y. B. Eyre of London 14 Edw. II (1321) there is an interesting report of trespass for the false imprisonment of the plaintiff’s servants and his two horses. The defendant was the sheriff of London and he justified the detention in prison by showing that the guardian of the London Bridge found the servants “nutantre apres curfu sone amenant ij. imuments... par qei il avoit suspicioun de mal.” The inquest found that the defendant was justified in the detention but found that the horses belonged to the plaintiff. They were therefore delivered to the plaintiff on mainprise upon condition that he would restore them if anyone else “les vodra clamur durraunt leyre.” Presumably if such a claimant had appeared they would have “interpleaded” as to the right to the horses. Rogers, Year Book, Eyre of London 14 Edward II (1321) 34, pl. 5 in 18 Memoirs Amer. Acad. of Arts and Sciences (1941).
case, Thomas of Newmarket brought a writ of wardship against Walter of Boville and claimed the right to the wardship of an infant who is described as John, son and heir of T. The defendant's counsel appeared and produced the infant in question, saying that the defendant "neither hath aught nor claimeth aught in that wardship save nurture only," but that since one Robert of E had brought a writ of wardship against him concerning the same infant he knew not to which of the two claimants to deliver the child. "And he said that he was ready to deliver [the infant] to whomsoever the Court should adjudge [the wardship]." To this the plaintiff put in a replication to the effect that after the purchase of the writ the defendant married the infant to his [the defendant's] daughter "and consequently he ought not to be discharged of damages by reason of any disclaimer which he hath made." The defendant's answer seems almost witty: "The infant was not married by Walter, but by his mother-in-law; ready etc." But the court took the matter in a different light and immediately gave judgment, and that judgment is well worth considering in full:

"INGE, J. You have said that the infant was not married on the day of the purchase of the writ, and he is now in the nurture of Walter and you have delivered him to the Court, as one in the profit of whose marriage you claim aught, that the Court may adjudge him to him that hath the right to his wardship. Seeing that you are seised of the body of the infant and that you have said that he is not married, when, in fact, he is married, you will be charged with damages, for the claimant saith that he is married to your daughter, and the Court cannot, therefore, give his marriage to anyone. You cannot, consequently, be now received to say that he was married by another than yourself; and therefore, since you admit that he was married while he was in your possession, and you have brought him into Court out of your own possession, and have delivered him to the Court as one that is not married, this Court, consequently, adjudgeth that he that hath the better right [to the wardship] shall recover against Walter damages to the value of the marriage; and do you, who claim the guardianship, plead between yourselves".

This statement is from a justice of the Court of Common Pleas! Could anything be more the complete exaltation of equity and justice over the

15. Wardship was early held to be only a chattel interest. Y. B. Easter 21 Edw. I p. 7 (R. S.); Y. B. Easter 32 Edw. I p. 187 (R. S.); Y. B. Trin. 32 Edw. I p. 245 (R. S.). For later cases to the same effect see Y. B. Hil. 12 Edw. III p. 405 (R. S.); Y. B. Easter 12 Edw. III p. 511 (R. S.); Y. B. Trin. 14 Edw. III 277, pl. 37 (R. S.); Y. B. Hil. 15 Edw. III 313, pl. 26 (R. S.).
16. Y. B. Mich. 7 Edw. II p. 165 (record); 36 SELDEN SOCIETY (1918).
17. Ibid. Cf. Y. B. Mich. 14 Edw. III 225, pl. 93 (R. S.) (where infant ward was married off by defendant after verdict in favor of plaintiff).
18. Id. at 163.
strict and rigid common law? We would not burn daylight but we would transpose this case into its component parts, and into the terminology of a modern statutory bill of interpleader. C-1 sues A at law for the guardianship of a minor child. One of the rights of the guardianship is the right to marry the child to someone of your selection. A comes into court and produces the child and says that C-2 has brought a like suit against him and that he has no claim in the child (save nurture), and is ready to deliver him over to whomsoever the court may direct. To this C-1 counters with the allegation that A has married the child to his [A's] daughter and so has done a wrong with respect to the res. It is unlikely that on such a set of facts any court today would grant A relief under a modern interpleader statute; and we can say with almost no hesitation that if A were to come into equity with a bill of interpleader against C-1 and C-2 the court would refuse to entertain his bill. He not only has an interest in the res—a very real interest for that res is married to his own daughter—but he has, moreover, incurred personal liability by reason of his action toward the res. But a majority of the courts influenced by the ghost of Crawshay v. Thornton would deny the applicant relief because of the mere lack of privity between the parties, ignoring the more basic issue. Not so in 1313. “Modernizing Interpleader”20 “Renovating Interpleader” would be much nearer the facts. The Court in Newmarket v. Boville, and we repeat, a common law court, granted a conditional judgment to a defendant stakeholder who was subject to double vexation in respect to one liability: (1) that adverse claimants should fight out their claim as between themselves; and, (2) that to the successful party in that suit the applicant for interpleader (the defendant in the original suit) would be liable for damages by reason of his wrong.

The second case in which we see the embryo of common law interpleader is the case of Mortimer v. Anonymous, decided by the Court of Common Pleas in 1313.21 In that case the plaintiff brought a writ of wardship against one E and alleged that E wrongfully deprived him of the wardship of one J, son and heir of R of C. The defendant appeared and said that one Adam had brought a writ of wardship against him and claimed the person of this same J, and that he himself claimed naught save nurture, and was ready to surrender to whomsoever the court should adjudge. The defendant was told by the court to produce the infant on the quindene of St. Hilary: “on which day [the defendant]
had himself essoined against R. of [Mortimer] by one essoiner and against Adam by another. When we remember that Adam is not a party to this action it seems strange that the defendant should have an essoin (i.e., an excuse for not appearing in court) as against him. Was he in the meantime made a party to the proceedings by the Court? Unfortunately the report is all too brief and the record of the case has not been found upon the rolls. We are, however, told by a note appended to the report that “R. of [Mortimer] and Adam appeared by attorneys in Court and pleaded and joined issue on the priority [of feoffment] in the absence of [the defendant] who had the custody of the [infant’s] body; and this because [the defendant] had by his answer, etc., disclaimed any right [in the wardship].” From this it is clear that the defendant was allowed his prayer that the two claimants “entered”. How else could Mortimer and Adam join issue on the matter of “priority of feoffment”? Two of the three versions of this report tell us that the defendant claimed nurture. The third version is silent on this point: that silence perhaps being represented by the customary “etc.”. Under modern practice, whether it be in the defensive statutory interpleader or the strict bill of interpleader in equity, if the applicant for relief claims any interest in the res he is denied relief. We can cut a claim of nurture down to its bare ingredients and still it is a claim which would prove sufficient to prevent the applicant from being a “mere stakeholder” as interpreted by English and American courts. Thus, it would seem, the second of the modern requirements for interpleader was not necessary under the practice prevalent in “interpleader situations” in the early fourteenth century.

In the case of Thomas, Earl of Norfolk v. Elianore Blevett the plaintiff demanded the wardship of the defendant's two minor children and also various lands of which the defendant's husband, and father of the children, had died seized. Before the defendant made any answer at all one Eymar de Valence, Earl of Pembroke, made a like demand against the defendant. After these two demands had been made—the only writ mentioned is that brought by the Earl of Norfolk—the defendant's counsel answered that “Elianore tells you that she claims naught in the wardship save as mother and by reason of nurture, and she is ready to render [i.e., deliver up] to whomsoever the court awards.”

22. Id. at 75. The three versions of the case are read together here. The editor of this Year Book has added a footnote to the word “disclaimer”: “Exactly ‘had disabled himself’” by which he seems to miss the point entirely. The defendant by his answer had not disabled himself; he had put himself out of reach of double liability and double vexation.

23. Y. B. Mich. 12 Edw. II p. 361 (Ct of Comm. Pleas 1318). See also Y. B. Hil. 12 Edw. II p. 376 for another action of wardship in which the present plaintiff (Earl of Norfolk) is involved. The plaintiff Earl seems clearly to have been Thomas de Brotherton, Earl of Norfolk, Earl Marshal of England. BURKE'S Peerage (1927) 1795 passim.
As to the wardship of the lands she says that the lands demanded are her franktenement as purchaser with her husband”. Immediately upon this answer the counsel for the two claimants, one the plaintiff to the writ and the other apparently an intervener, begin to argue the question of the priority of their claim to the wardship of the children and of the land. The defendant’s claim to the land seems to have been completely ignored. Issue was finally reached between the two claimants on the question of priority; but because it appeared that the plaintiff, the Earl of Norfolk, appeared only by guardian, and the Earl of Pembroke by attorney, it was ordered by the Court that the two Earls appear in propria persona on the quindene of St. Hilary. And here the reporter injects a not altogether clear remark: “And I believe that this was ‘degrace de Court’ that this issue was received between the guardian and the attorney, for it seems that their lords when they come, if they wish, may replead. I shall inquire of that”. The report of the case continues: “And then the Dame found mainprise to have the children, God willing, etc., one who was present and who said naught, and the other who was sick at home”, before the court when ordered so to do. The report comes to an indefinite conclusion, but the inference is clearly that the two Earls were allowed to try out their priority right. What of the defendant’s claim to the land? Clearly she was not a mere stakeholder standing indifferently between two adverse claimants. She had a vital interest in the res, but concerning that the report is silent.

The case of *Julyan Flitbor v. Alice Soler*²⁵ presents a quite similar problem as to the original defendant’s interest in the res. Here the plaintiff brought a writ of wardship against the defendant and demanded the wardship of the body of the infant son of the defendant’s husband. One Ingham Tirel brought a similar writ against this same defendant respecting the same wardship. Alice, the defendant in both cases, in answer to Julyan’s suit said that she “claimed naught save by reason of nurture and was ready to deliver up to whomsoever the court might adjudge” the right. A day was set to have the two plaintiff-claimants in court in person, and Alice was ordered to produce the infant on the same day. On the appointed day the parties claimants appeared in person and took issue upon the question of the priority of their claim to the wardship of the child. Alice, the original defendant, then spoke up and told how Ingham Tirel on such and such a day had ravished the child out of her possession, wherefore she prayed to be relieved of the responsibility of producing the child as previously so ordered to do. To this the counsel for Ingham answered that they had not had a day in court to

²⁴. Following the report of this case is another short “abstract” of a similar case. It is so abbreviated and so inconclusive that it does not seem worth while to do more than merely call its existence to notice.

²⁵. *Y. B. Hil. 3 Edw. III 3,* pl. 9 *(Ct. of Comm. Pleas 1329).*
answer to this charge, and that if Alice felt she had "action", to bring a writ and they would answer well enough. Herle, J., pointed out that "she has claimed no estate save by reason of nurture, by which estate she is not able to have a writ of ravishment [of ward], and if she not be aided by this answer" she will be subject to distraint for her failure to produce the child. Ingham's counsel countered with the reply that "she would not be distrained to deliver up the child until after judgment", but this argument was unsuccessful for he was put to answer to the original defendant's complaint of ravishment. Can it be that the court in these two cases even then had adopted Professor Chafee's admirable "three stage interpleader" plan? After the two Earls in the earlier case had tried their right was the "Dame" allowed to defend her right? And in the last case was the original defendant's "cause of action" tried out against the adverse claimants prior to the trial between the claimants themselves? Of this we cannot be certain, but we do feel sure that it was in these early cases concerning wardship that we have the formal origin of interpleader of a later day.

Perhaps it may be well to summarize briefly the requirements for relief by way of "interpleader" in these cases. In all of the cases we have seen, save perhaps that of the Earl of Norfolk v. Eliaore Blewell, two suits were actually pending against the defendant for the same wardship. In such situation the court had merely to order that the adverse plaintiffs "interplead" between themselves. But even the pendency of other suits does not seem to have been a requirement, for in Rasteil's Entries we find a record of a case in which the defendant disclaimed save as to nurture, but alleged that certain other persons also were claiming the same wardship. There the record tells us that scire facias issued to garnish (i.e., to warn) the adverse claimants to come in and interplead with the plaintiff. From this it would seem that there was but one requirement for relief from double vexation in these cases: that the defendant be subject either to two claims or two suits with respect to the same wardship. Privity was not essential, indeed, it was lacking.

26. The first stage is that in which the applicant seeks to interplead adverse claimants; the second stage the trial of the adverse claimant's rights; and the third stage the trial of any interest the applicant may have in the res as against the successful claimant in the second stage.

27. Fol. 388v (1596).

28. In fact the record reads almost exactly like that in detinue of a charter of a later day when a third party was garnished by scire facias. But cf. Y. B. Mich. 14 Edw. IV 2, pl. 7 in which there is a dictum by Littleton in a writ of detinue case that "in a writ of wardship the tenant shall not have garnishment against such persons [strangers] etc., but if two bring several writs of wardship [the tenant] may pray that they interplead."

29. "Martin, J. We put case where two writs of wardship are brought against me severally by several persons returnable on the same day, demanding the same thing. I shall show this to the court, and they shall be caused to interplead without privity being
in every case. More important still, the defendant need not be a mere stakeholder standing indifferently between two adverse claimants. It would be hard to imagine a more liberal form of "interpleader relief" than that found in these early cases concerning wardships.\(^{30}\)

II. The Growth and Decadence of Common Law Interpleader

The growth of the common law is reflected in its expansion: an expansion which not only is the result of pressure arising from increased human contacts, but which takes its form and course largely by analogies drawn from the past. Parties who had found themselves faced with two or more claims respecting the same wardship of an infant and his lands had found relief by having the adverse claimants try out their rights between themselves. Here the defendant who sought relief was usually an innocent holder of a chattel interest who was ready to deliver up to "whomsoever the court might adjudge hath the right". The step was but a short one from adverse claims laid to a wardship to adverse claims laid against a bailee. But that step was to be taken cautiously: its growth was to follow the growth of the law.

By the beginning of the fourteenth century it had become a common practice to secure the performance of covenants or the doing of certain acts by taking deeds either from the covenantor or from his surety. Those deeds were then delivered to an impartial third person upon condition that he was to redeliver them either to the covenantor or the covenantee, dependent upon the happening or non-happening of the conditions specified. Parties who had innocently accepted deposits of deeds in this manner soon began to find themselves in a vexatious situation. So far as we are concerned here, a bailee of a chattel in this manner, and who was willing to redeliver, found himself involved in either one of two situations: \(^{31}\) (1) a writ of detinue for the chattel has been brought shown by me between them." Y. B. Easter 3 Hen. VI 43, pl. 20 at f. 44r. Accord, Y. B. Trin. 9 Hen. VI 17, pl. 9.

30. "Interpleader" in wardship cases continued until that action went out of use. For later cases see Y. B. Hil. 24 Edw. III 38, pl. 14; Y. B. Easter 24 Edw. III 24, pl. 3 (cont'd folio 42, pl. 24); Y. B. Mich. 24 Edw. III 31, pl. 11; Y. B. Hil. 30 Edw. III 5, pl. 21; Y. B. Mich. 31 Edw. III, Fitzherbert's Abridgment (1565), Enterpledier pl. 15; Y. B. Mich. 8 Hen. V 10, pl. 11; see also Rastell's Entries (1596) f. 388v. See what appears to be a citation of the case in Fitzherbert, supra, in Y. B. Mich. 7 Hen. IV 3, pl. 19.

31. The res may have been delivered to the bailee by two people jointly to be re-delivered to either the one or the other of them; or, it may have been delivered by \(A\) to be re-delivered to either \(A\) or \(B\) dependent on the happening or certain conditions. What is said here respecting bailies is likewise applicable to finders after the action of detinue was extended to include them. Detinue seems to have been allowed against a finder as early as 1371. Y. B. Easter 44 Edw. III 14, pl. 30 (detinue by the plaintiff for an ass which he alleged strayed to the seignory of the defendant). The classical discussion of
against him by one party and another party asserts a right to that chattel, or, (2) two people have separate and independent actions of detinue pending against the bailee for the same chattel.\textsuperscript{32} In both situations the bailee wishes the right to the chattel to be determined in one suit. If he were to deliver to either he might later be found liable to the other claimant. To obviate the possibility of double liability, defendants in detinue were given relief "in the nature of interpleader", but for procedural reasons that relief was to be known by different names in the two situations. In the first situation "interpleader" was by way of garnishment\textsuperscript{33} because only one of the claimants to the chattel was before the court; in the second situation all adverse claimants were before the court and could be ordered by the court to "enterpled".\textsuperscript{34} The first of these we shall refer to as "interpleader by way of garnishment",\textsuperscript{35} and the second as "compulsory interpleader". Both developed with the action

the historical origins of detinue is that in \textit{Ames, Lectures on Legal History} (1913) 70 \textit{passim}.

32. A third situation is conceivable: \textit{A}, \textit{B}, and \textit{C} jointly bail a chattel to \textit{X}. \textit{A} brings a writ of detinue for the chattel; \textit{B} brings a separate writ of detinue for the same chattel; and \textit{C} merely asserts that the chattel should be delivered to him. In such a situation it seems that the court should order that \textit{A} and \textit{B} "entercled" and that seire facias should issue to garnish \textit{C}. \textit{Y. B. Hil. 11 Edw. IV 11, pl. 7 is precisely this third situation. In that case \textit{C-1} sued \textit{A} in detinue. \textit{A} prayed "garnishment" of \textit{C-2}. Then \textit{C-3} sued \textit{A} for the same res. When \textit{C-2} came in to "interplead" with \textit{C-1}, the court held \textit{A} has no standing in court now and cannot pray that \textit{C-3} "enterpled". But the fact that there were three separate sets of plaintiffs did not bar relief always: \textit{Y. B. Easter 4 Edw. 11 9, pl. 11. Cf. Michigan v. White, 44 Mich. 25 (1881). FITZHERBERT'S AMENDMENT (1565), Enterpledor pl. 39 gives a puzzling note from \textit{Y. B. Hil. 34 Edw. III which may be also this situation. Detinue was there brought by two severally against the defendant for the same res. The defendant prayed "garnishment". As we shall see, if all of the plaintiffs were in court "garnishment" was not the proper plea. But \textit{cf. Y. B. Mich. 6 Edw. III 38, pl. 11.}}"

33. "Garnishment" in this sense means "to warn." In a footnote to the word "garnishment" in \textit{Y. B. 2 Edw. II 39, pl. 127, 19 Selden Society (1904), Professor Maitland wrote: "That is, a writ 'warning' a person to appear. The word comes from the inchoative tenses of garnir, to warn." Cf. \textit{La Lee v. Pykerel, Y. B. Hil. 10 Edw. II 10, pl. 7 at p. 12 (1317), 52 Selden Society (1934).}}"

34. This distinction must constantly be borne in mind. "Interpleader by way of garnishment" could only be had where one of the claimants to the chattel had not brought suit and the other had. "Interpleader" in the second sense included cases where all the claimants to the chattel had writs pending against the same defendant for the same chattel. The failure to keep this distinction in mind has resulted in a great deal of confusion, and even Brooke included eight cases of "interpleader by way of garnishment" among the twenty-nine cases he put under the title "Enterpledor," \textit{Brooke's Amendement (1573), Enterpledor Nos. 1, 3, 10, 13, 15, 23, 24, 25.}}"

35. We might call this "voluntary interpleader" for if the garnishee (the person warned by seire facias to come in) failed to appear, the chattel which the defendant held went to the plaintiff by default and no penalty seems to have attached to the garnishee other than to foreclose his right to sue later the same defendant for the same chattel. This is discussed below at some length. See pp. 934-43 infra.
of detinue and they seem to have been an important source of relief for harassed defendants until relief by strict interpleader in equity came to be a "new found Haliday". We shall consider these two modes of relief separately.

A. "INTERPLEADER BY WAY OF GARNISHMENT"

A bailee who has accepted a writing from two joint bailors to be redelivered to the one or the other upon the happening or non-happening of certain conditions finds himself confronted by a writ of detinue brought by one of the bailors in which it is alleged that the conditions have taken place entitling the bailor-plaintiff to redelivery.36 The bailee-defendant is ignorant of whether or not the conditions have taken place, and while he does not claim any interest in the writing sued for he does not wish to deliver to the plaintiff and later find that he should have delivered to the other bailor. The defendant therefore alleges that the writing was delivered to him upon certain conditions and that he does not know whether the plaintiff is entitled or whether the other bailor (the one who has not brought suit) is entitled to delivery. He therefore prays the court that the third party to the bailment be warned (estre garny) to come in and "enterpled" with the plaintiff. Thereupon a writ of scire facias will issue against the third party to garnish him (to warn him) to show cause why the plaintiff should not recover the writings sued for. The third party, known as the garnishee, when he comes in to "enterpled" with the plaintiff becomes the real defendant to the detinue action and the original defendant, the bailee, is relieved of further liability except that he will be called upon to deliver the writings sued for to the successful party.37 It was in this fashion that the defendant to a detinue writ was enabled to prevent possible double liability and almost certain double vexation with respect to one duty. In short, he was permitted to defensively "interplead by way of garnishment".

To see the development of "interpleader by way of garnishment" in detinue of writings we must turn to the earliest reported cases. The case of Damory v. Polhampton (1316)38 appears to be the first case of detinue of a writing in which the defendant-stakeholder prayed that a third party be garnished. In support of his argument why scire facias should issue to garnish the third party he pleaded that the third party could "allege imprisonment or illness which we cannot plead, wherefor

36. The same thing is later true if the bailment is by A alone to be redelivered to either A or B dependent upon the conditions, and either A or B brings the writ of detinue for delivery. But the action grew up out of joint bailments.
37. Rastell's Entries (1596) f. 214v contains the standard form of the record made in such a case.
he ought to be warned, for if the delivery is not made by award of court, he has such action against us". However, from the record of the case we learn that the defendant later admitted that he should have made delivery of the deed to the plaintiff, and that he finally delivered it "under the name of the aforesaid Walter [the third party sought to be garnished] as ready to be restored". An Anonymous case two years later indicates that where the party warned failed to come in and plead the original plaintiff had judgment. Five years later in 1325 it was held that the plaintiff could not bar the defendant’s "interpleader by way of garnishment" by alleging what may have been a fictitious and collusive action of detinue said to have been brought by the third party in which the present defendant had been non-suited. In these successive stages we can trace the procedure in detinue of writings where "interpleader by way of garnishment" is sought by the original defendant until we come to the case of The Abbess of Barking v. John of Sutton (1342). Here the plaintiff brought a writ of detinue of a writing (by which one Bartholomew of Langriche and John Hankyn of Ongar were bound to her in £100) against the defendant, and she counted that the writing had been delivered to the defendant, as an impartial person, upon condition that if certain covenants entered into between the plaintiff’s predecessor and a third party were not performed then the writings were to be delivered up to her. The defendant acknowledged the delivery upon condition, but said he did not know whether the condition had been performed, "wherefore a scire facias issued" against Bartholomew and John. They came, and after some argument as to the validity of the entry on the roll, pleaded that the covenants were not as the plaintiff had counted. To this the plaintiff’s counsel replied: "He who is party with us in our writ, namely J. of Sutton, has admitted the condition to be as we have counted; and you have come to answer whether you can say anything wherefore the writing according to those conditions ought not to be delivered to us; wherefore the law does not put us to answer to any collateral covenant". To this the counsel for Bartholomew and John replied that "if he against whom you have brought your writ be in league with you, and admit to you that which

40. Y. B. Trin. 12 Edw. II p. 383. Accord. Y. B. Mich. 7 Edw. III 54, pl. 34 (similar where garnishee appeared by attorney not properly authorized); Y. B. Easter 2 Hen. V 5, pl. 23. Cf. Y. B. Mich. 7 Hen. IV 3, pl. 19, where it was held that the warrant for plaintiff’s attorney to sue against the original defendant was sufficient as against the garnishee.
41. Y. B. Mich. 18 Edw. II p. 577. The court pointed out that the suit may have been fictitiously brought in the name of the party sought to be garnished and that he never appeared on the writ. There is a suggestion that if he had appeared the result reached here would be otherwise.
42. Y. B. Trin. 16 Edw. III 119, pl. 32 (R.s.).
was never true, that shall not prejudice me so that I shall not be admitted to say that the covenant was different". After considerable argument on this point, on the analogy of diverse claimants to a wardship where the defendant disclaims right therein, save as to nurture,\textsuperscript{43} the court held: (1) that Bartholomew and John could traverse the count as to the conditions; (2) that the action should proceed as between the abbess and them; and, (3) that the damages should go against the unsuccessful claimant and not the one "against whom the Original writs were brought".\textsuperscript{44} The court seems to rest its holding squarely upon the analogy of the wardship cases in which the disclaiming defendant is allowed to substitute a third party who claims the same wardship of him. The court pointed out that in the wardship cases when the two claimants are in court they can take issue upon the priority of their rights, and that the original defendant is relieved of further liability.\textsuperscript{45}

We can trace the history of "interpleader by way of garnishment" in a continuous line of decisions and records down through the reign of Edward IV (1483). It is a history rich in details, and while many of the details are of matters which might well be classified as abstract learning if considered alone, when viewed as a whole they fit into an orderly and well arranged picture. One might well write a history on the service of the writ of scire facias which issued to warn the adverse claimant\textsuperscript{46}

\textsuperscript{43} \textit{Id.} at 142.

\textsuperscript{44} \textit{Ibid.} I do not understand the use of the plural "writs" here. Only one writ of detinue had been brought against the defendant.

\textsuperscript{45} An interesting case illustrating the newness of the procedure in these cases is reported in \textit{Y. B. Easter 5 Edw. III} 17, pl. 15. There the plaintiff counted upon a joint bailment made by himself and one Robert to the defendant upon certain conditions. The defendant's counsel said that the defendant did not know whether the conditions were performed and he "prayed judgment whether we ought to answer without" Robert. Herle, C. J., said: "Then plead your plea in the manner in which it should be pleaded . . . pray writ to warn Robert to be here on a certain day . . ." And the defendant did so. The defendant's original answer sounds very much like a prayer in aid. Cf. \textit{William of Grave v. Anon.}, \textit{Y. B. Trin. 7 Edw. III} 29, pl. 23 (1333); \textit{William White v. Vicar of Holbeach}, \textit{Y. B. Hil. 19 Edw. III} 461, pl. 22 (1344-45) (R. S.) (garnishee appeared and original defendant relieved); \textit{Prior of St. Oswald v. William de Brokelesby}, \textit{Y. B. Trin. 19 Edw. III} 277, pl. 60 (1345) (R. S.) (garnishee appeared and traversed the conditions alleged by the plaintiff; issue joined thereon); \textit{Y. B. Mich. 20 Edw. III} 199, pl. 10 (R. S.) (garnishee appeared and driven to elect upon which of his two pleas he would take issue).

\textsuperscript{46} If scire facias issues against a husband and his wife and it is returned that the husband is dead must a new scire facias issue as against the wife? \textit{Y. B. Mich. 44 Edw. III} 33, pl. 17; \textit{Y. B. Mich. 44 Edw. III} 34, pl. 22; \textit{Y. B. Trin. 12 Hen. IV} 23, pl. 4. If the garnishee is dead then his heirs must be warned. \textit{Y. B. Mich. 21 Edw. III} 41, pl. 44. Or, his executors. \textit{Y. B. Hil. 5 Hen. V} 11, pl. 27; \textit{Y. B. Amno 14 Hen. VI} 11, pl. 42; \textit{Y. B. Mich. 19 Hen. VI} 9, pl. 24; \textit{Y. B. Mich. 19 Hen. VI} 23, pl. 46; \textit{Y. B. Hil. 21 Hen. VI} 27, pl. 10. Or, the heirs and the ordinary. \textit{Y. B. Hil. 6 Edw. IV} 11, pl. 5. It seems that one may have any number of writs of scire facias in order to get in the interested parties. \textit{Y. B. Easter 48 Edw. III} 30, pl. 19. Misnomer in the scire facias is not a
but from our point of view the important thing is that once the garnishee had been served and appeared the original defendant retired from the action, and the suit proceeded as between the bailors. If the garnishee, after proper service, failed to appear, the plaintiff had judgment for delivery of the chattels sued for. Conversely, if the plaintiff made default on the day on which the garnishee was warned to appear, the garnishee had a like judgment. While the garnishee could not traverse good plea in bar by the garnishee. Y. B. Hil. 3 Hen. VI 37, pl. 37. The writ of scire facias issues in the name of the defendant. Y. B. Easter 3 Hen. VI 40, pl. 9. Where scire facias issues as against two who are not husband and wife and one is dead, there is some conflict in the decisions whether on reissue against the dead person's heirs or executors there must also be a new return as against the other party. Y. B. Mich. 9 Hen. VI 36, pl. 10; Y. B. Mich. 19 Hen. VI 32, pl. 63; Y. B. Hil. 19 Hen. VI 54, pl. 18; Y. B. Easter 19 Hen. VI 66, pl. 11; Y. B. Hil. 21 Hen. VI 27, pl. 10; Y. B. Mich. 14 Edw. IV 1, pl. 3. Scire facias will issue in the county where the garnishee has assets. Y. B. Hil. 6 Edw. IV 11, pl. 5.


48. The garnishee must appear in propria persona. Y. B. Mich. 17 Edw. III 391, pl. 97 (R. S.); cf. Y. B. Hil. 2 Edw. III 18, pl. 24; see Y. B. Mich. 8 Hen. VI 16, pl. 41, where garnishment was prayed “for the common cause” and the sheriff returned on the alias that the garnishee had naught by which he might be arrested. The garnishee nevertheless appeared in person and over plaintiff’s objection “that he had not a day in court” was allowed to “interplead” with the plaintiff.

49. Y. B. Hil. 19 Edw. III 461, pl. 22 (R. S.); Y. B. Mich. 39 Edw. III 22, pl. 12; Y. B. Anno 14 Hen. VI 11, pl. 42; cf. Y. B. Hil. 7 Hen. IV 7, pl. 4 and Y. B. Mich. 7 Hen. VI 11, pl. 28. By “lusage en tiel cas” the defendant does not deposit the res in court, but the successful claimant has distress against him for the res. Y. B. Mich. 9 Hen. VI 30, pl. 10; accord, Y. B. Mich. 9 Hen. VI 38, pl. 13 (but quare, can the defendant later sue an attaint?). The defendant is out of court but it seems that he may later have a writ of error. Y. B. Easter 21 Hen. VI 35, pl. 2; cf. Y. B. Mich. 8 Hen. VI 4, pl. 11 and Y. B. Mich. 11, pl. 28; Y. B. Anno 14 Hen. VI 11, pl. 42. The defendant is out of court to such an extent that he may not even plead that a third party has since sued for the same chattel and therefore ask that that party be compelled to “interplead”. Y. B. Hil. II Edw. IV 11, pl. 7, discussed in note 32 supra.

50. Damages go against the garnishee. Y. B. Mich. 3 Hen. VI 18, pl. 20; Y. B. Trin. 7 Hen. VI 45, pl. 27 (the garnishee not being put in prison for the damages, execution ran only against his goods and chattels; the reporter adds “quia mirum”); Y. B. Mich. 9 Hen. VI 38, pl. 13. But do the damages go against the garnishee if he does not appear? Cf. Y. B. Easter 21 Hen. VI 35, pl. 2 and Y. B. Mich. 27 Hen. VI 2, pl. 11.

51. Y. B. Easter 21 Hen. VI 35, pl. 2; Y. B. Mich. 27 Hen. VI 4, pl. 27 (on garnishee’s default plaintiff recovers deeds sued for but no damages). Contra: Y. B. Mich. 8 Hen. VI 4, pl. 11 (damages may be taxed against garnishee on his default). When two parties are garnished, if one defaults, plaintiff shall have judgment as against him but the other is allowed to interplead. Y. B. Easter 2 Hen. V 5, pl. 23. Accord, Y. B. Hil. 2 Hen. VI 16, pl. 22. See also Y. B. Easter 3 Hen. VI 45, pl. 23 and Y. B. Mich. 4 Hen. VI 9, pl. 26, where garnishee defaulted but protection was put forth for him.

52. Y. B. Mich. 40 Edw. III 39, pl. 15; Y. B. Easter 21 Hen. VI 35, pl. 2. But neither the plaintiff nor the garnishee were entitled to judgment for default of the original defendant on the day when the garnishee came in. Y. B. Mich. 39 Edw. III 22, pl. 13; Y. B. Hil. 2 Rich. II Fitzherbert’s Abundance (1565), Enterpleder pl. 13. Cf. Y. B. Mich. 40 Edw. III 39, pl. 15.
the conditions originally counted by the plaintiff and admitted by the defendant, he could successfully plead that the plaintiff had released to him the debt due in the writing sued for. The plaintiff could not charge the garnishee on matters not in the original writ of detinue, nor was the garnishee allowed to counterclaim for a writing not sued for in the original writ brought by the plaintiff. We are told that the bailors could not proceed directly against one another concerning the right to the chattels in the hands of their bailee, and that it was against right and reason that both bailors should have judgment for the same chattel where the defendant was not at fault.

These details have been treated much more cavalierly than they should have been. This has been done because there seem to be at least three matters which call for more extensive treatment. These are put in the


54. Y. B. Mich. 39 Edw. III 22, pl. 13 (the plaintiff took nothing by his writ since it would avail him nothing to get the writing sued for). Cf. Y. B. Easter 34 Edw. III Fitzherbert's Abridgment (1565), Garnishment pl. 38; Y. B. Easter 49 Edw. III 13, pl. 6. Contra, Y. B. Easter 20 Hen. VI 28, pl. 23. Pleas: The garnishee could plead excommunication of plaintiff on day the original writ was purchased. Y. B. Easter 3 Hen. VI 39, pl. 6. Misnomer in the scire facias was not a good plea in bar by the garnishee, Y. B. Hil. 3 Hen. VI 37, pl. 37. Garnishee not allowed to plead in abatement that defendant in original writ was not the proper party, Y. B. Easter 3 Hen. VI 40, pl. 9; nor that plaintiff was femme sole when bailment made, Y. B. Trin. 3 Hen. VI 50, pl. 13. Garnishee not allowed to plead in abatement that earlier writ by plaintiff against defendant alleged bailment to have been made elsewhere, Y. B. Easter 7 Hen. VI 34, pl. 35. Plea by garnishee that plaintiff agreed in writing to arbitrate all their disputes not allowed, Y. B. Trin. 7 Hen. VI 40, pl. 10. The garnishee cannot plead that he alone bailed to defendant, Y. B. Mich. 20 Edw. IV 13, pl. 16. Cf. Y. B. Easter 11 Hen. VI 40, pl. 34 and Y. B. Anno 14 Hen. VI 11, pl. 42. After the garnishee enters the plaintiff cannot allege that garnishee did not join in the bailment, Y. B. Mich. 39 Edw. III 22, pl. 12. Concerning pleas see Y. B. Trin. 9 Hen. VI 14, pl. 3; Y. B. Mich. 9 Hen. VI 38, pl. 13; Y. B. Mich. 19 Hen. VI 46, pl. 99; Y. B. Mich. 21 Hen. VI 18, pl. 33; Y. B. Trin. 21 Hen. VI 52, pl. 7; Y. B. Mich. 34 Hen. VI 1, pl. 1; Y. B. Mich. 21 Edw. IV 54, pl. 26. On the question whether the garnishee could plead that he alone delivered to defendant, see Y. B. Easter 11 Hen. VI 40, pl. 34; Y. B. Anno 14 Hen. VI 11, pl. 42; and, Y. B. Mich. 20 Edw. IV 13, pl. 16.

55. Y. B. 36 Hen. VI 26, pl. 25 (garnishment had, and garnishee pleaded that he had tendered to fulfill the conditions—the payment of 30s—and that plaintiff had refused. It was held that plaintiff was to have judgment for return of deeds sued for but no damages and garnishee need not now offer to tender the 30s since the plaintiff's demand is only for the deeds).


58. Y. B. Easter 3 Hen. VI 43, pl. 20.
form of questions. First, was privity between the plaintiff and the garnishee essential? Second, did independent liability of the bailee-defendant bar "interpleader by way of garnishment"? Third, was the judgment in the action brought by the plaintiff against the bailee-defendant res judicata as against another claimant where scire facias issued to garnish him? To these three questions we now turn our attention.

Privity. In every case that has come to our attention down to 1422 privity in fact existed between the plaintiff and the person sought to be garnished. But the existence of that relationship was due solely to the practice which had grown up for parties to a contract jointly to bail deeds into the hands of an impartial person to secure the performance of the contract.59 The action of detinue of a writing had developed as a method of charging a bailee, and with the development of the writ there had grown up relief afforded by "interpleader by way of garnishment" where only one of the bailors had brought suit for redelivery of the deeds. But, at the beginning of Henry VI's reign we notice a changed atmosphere. For the first time we hear the plaintiff urging that the defendant is not entitled to garnishment of an outsider — or a stranger, as he was called. In the first case in which this argument was advanced, while the arguments were being made, the party whom the defendant sought to garnish sued a writ of detinue against the defendant for the same res as that sued for by the first plaintiff.60 Then arose the question whether the two plaintiffs should now "enterpled", or whether scire facias still should issue. Unfortunately the report leaves us without an answer, and the reporter quite appropriately added: "quia bonus casus".61 In the case of Rafe Cromwel v. Edmond Moris,62 decided by the Court of Common Pleas in 1424, there are dicta by Justices Martin and Babington to the effect that it is not necessary that privity exist between the plaintiff and the one sought to be garnished, and that the only privity necessary is that between the proposed garnishee and the res; in other words, that the proposed garnishee have some claim against the defendant for the res. Martin, J., argues that the innocent defendant should not be charged twice for the same res, and he draws an analogy to

59. The cases prior to 1422, so far as I can discover, are all cases in which the defendant seeks to have "interpleader by way of garnishment" of the plaintiff's joint bailor.
60. Y. B. Hil. 3 Hen. VI 35, pl. 31. Cf. Y. B. Mich. 20 Edw. IV 13, pl. 16 where the court delayed judgment in order to give the garnishee opportunity to sue his own writ of detinue so that he might get in a special plea. But see note 61 infra.
61. If scire facias had issued to warn the third party and he had then brought a like writ of detinue against the defendant, it was later held that the defendant was out of court to such an extent that he could not call upon the plaintiffs to "interplead." Y. B. Hil. 11 Edw. IV 11, pl. 7. See note 32 supra.
62. Y. B. Easter 3 Hen. VI 43, pl. 20. This was a case of "compulsory interpleader", discussed infra p. 943.
writs of wardship in which it is not necessary for the defendant to show the existence of privity between the two parties making adverse claims to the same wardship. Babington, J., makes an equally strong argument, putting the case of a finder of “deeds in the road”. These dicta show quite clearly the feeling of at least two of the judges of the Court of Common Pleas. On the other hand, Cokain, J., argued that scire facias should not issue to warn one unless he be in privity with the plaintiff to the bailment, but Martin and Babington, JJ., carried the day.63

We have been able to find only one case in which there is a square decision upon this point. It is, however, a decision by Littleton when he was a justice of the Court of Common Pleas, and is worth careful consideration. To a writ of detinue the defendant pleaded that the goods sued for were delivered to him by the plaintiff upon certain conditions, to wit, that if one A performed certain services the goods were to be delivered to the said A, and if not they were to be redelivered to the plaintiff, and that he did not know whether the services had been performed, and therefore he prayed that A be garnished.64 It was urged on behalf of the plaintiff that A should not be garnished since he was shown to be a stranger to the bailment. The plaintiff’s counsel65 argued that “for this reason [lack of privity between adverse claimants] in a writ of wardship the tenant should not have garnishment against such persons . . . [and] . . . If J S delivers to me certain money to deliver to A, here if J S brings a writ of account against me I shall not have garnishment against A for he is a stranger to the receipt, and so here". To this argument Littleton, J., made a most precise answer in which he stated clearly the law with respect to privity:

“In your case of wardship and account etc. garnishment does not lie in the nature of the action etc.66 And the same law is applicable in debt etc. But in detinue it is otherwise etc. In this case A is to have an advantage by the condition and so A ought to have a writ of detinue against the defendant etc.67 Wherefore it is reason [enough] that he be garnished; wherefore etc. Which Pigot conceded.”

These are the “evidences” to support our conclusion that privity between the plaintiff in detinue and the party sought to be garnished need not be shown.68

Independent Liability of the “defendant-applicant”. In an action of detinue brought by Beatrice, widow of the “Count Darundel” against an

63. Cf. Y. B. Mich. 21 Hen. VI f. 2 (dictum by Markham).
64. Y. B. Mich. 14 Edw. IV 2, pl. 7.
65. The counsel who made this argument are not named. The report merely states “And it was moved by some.”
66. As to wardship see pp. 925–32 supra.
67. Is this a suggestion of a right of action in a third party beneficiary?
68. See also Y. B. Mich. 14 Edw. IV 2, pl. 7.
anonymous A, heard in the Court of Common Pleas in 1423, the plaintiff sought to recover a sealed instrument. The defendant said that he was ready to deliver the obligation, but that since it had been delivered to him by the plaintiff and by one John Pellam upon certain conditions, concerning the performance of which he had no knowledge, he asked that Pellam be garnished. Thereupon he put “forth in court an obligation, which was not sealed”. The plaintiff at once asked judgment on the ground that the defendant by offering “an escrow which is not under seal” had not answered to the writ. To this the defendant offered to

69. Y. B. Trin. 2 Hen. VI. 16, pl. 19. The “Count Darundel” presumably refers to the Earl of Arundel “(a feudal honour as adjudged in parliament 8 July, 1433, 11th Henry VI.), by possession of Arundel Castel only, without any creation.” Burke’s Peerage (1927) 1795 passim. Dean Morgan has very kindly pointed out to me that different people might disagree on the correct interpretation of this case. It seems to me, however, that any interpretation of the case other than that here given can only come from an attempt to read into it twentieth-century ideas. The case must be considered not in light of what we know now but in light of what lawyers and judges knew in 1423. With this word of warning it has been thought wise to set the case out in full here. “DEFINITELY fuit porte par vn Beatrice que fuit la femme la counte Darundel enuers vn T., et demanda le liuere dun obligacioun de M. H. en que Iohan Pellam fuit tenus a luy. STRANGWAYS. Sir, vous auez cy le dit T. que est prist oue le dit obligacioun, mes il dit que obligacioun fuit liuere a luy par le pleintif et par vn I[ohan] P[ellam] sur certein condicions et le quel fuit my enseale et issint donqes par auenture puiz donqes auant est mesne par que est prist a respoundre si etc. Et sur ceo il mist auaunt en le court vn obligacion, le quel fuit my enseale, par que etc. WESTBURY. Sir, vous veies bien coment nouz deinaundoins vn obligacion, et ii lie inete auant est mesne en vostre gard le prynt est ale et tout defaile par que nous demaundyons vn escrow mis euers auenture et issint douez par auenture puiz donqes auant est mesne par que est prist a respoundre si etc. Et sur ceo il mist auaunt en le court vn obligacion, le quel fuit my enseale, par que etc. WESTBURY. A ceo dioms nous que cel fait al temps del liuere fuit bon et loialment enseale oue vn print sufficient, le quel matre nous voi- loms auere, et issint esteant le fait en yostre garde le prynt est ale et tout defaile per que nous demaundyons vulgiument et prions nous damages. STRANGWAYS. Sir, il poit estre que les condicyons soient enfrente de son partie et paremple del partie le dit Iohan [Pellam], issint que le dit Iohan [Pellam] ad cause dauer le fait et nemy le pleintif, le quel ne poimys sauer sauns ceo que le dit Iohan [Pellam] soit garny, si issint soit il serra mischeife a nous destre charge de les damages del pleintif lou il nad cause dauer le fait, et paraurenture puiz donqes l’autre a que le droit del obligacion attient voit porter autre bref de definitie de mesme lobligacion emeurs nous et recouerer autrefoitz damages, et issint nous serroms if. feit charge des damages dun mesme chose, le quel sera mischeife, par que etc. MARTIN. [J.] Si le scire facias serra graunt ceo serra sur vn escrow mis cy auant, le quel est nul fait en ley a cause que il nest my enseale, et issint douez par le graunt de scire facias cel escrow ceo serra accept pur vn bon et loial fait, le quel serra graunt mischeif, car donqes il nauera iammes en apres liuere forsegg de mesme le fait, le quel nest que vn escrow, pur ceo que par le graunt del scire facias la ley entend que il accept que il fuit mesme le fait que il demaund per son bref et pur ceo de nul auter duist il auer leyde, le quel serra graunt mischeife a luy, et pur ceo il dit a STRANGWAYS: Dites ceo que vous voillez ou demurrez en iugement et disputes en apres etc.” (The spelling of the black-letter text has been corrected so far as possible).
aver that the deed offered was the same one that was bailed to him by
the plaintiff and Pellam, and he repeated his prayer that Pellam be
garnished. The plaintiff then offered to aver that at the time of bail-
ment the obligation “fuit bon et loialment enseale one vn print sufficient
. . . et issint esteant le fait en vostre gard le prynt est ale et tout defaile
per le male gouernance”. The defendant in support of his prayer that
Pellam be garnished urged the customary argument against possible
double liability, but Martin, J., pointed out that “if scire facias
should be granted upon an escrow . . . which is no deed in law because it
hath not seal, then by the grant of scire facias this escrow would be
accepted for ‘vn bon et loial fait’ ”, by the plaintiff, and that, he said,
would be a great mischief to the plaintiff. While the report ends in-
clusively it seems that the prayer for “interpleader by way of garnish-
ment” was not allowed; and, if indeed it was not, then it seems to fol-
low that the refusal to give the defendant relief against double liability
was due to his own “male gouernance”—or, as it is often put, “due
to his own folly that he is twice charged for the same thing.”

Res judicata. The question whether the judgment in the action
brought by the plaintiff against the bailee-defendant is res judicata as
against another claimant where scire facias issued to warn him is a
troublesome one. The question on analysis breaks down into two (1)
is the judgment res judicata where the garnishee appears, and (2) is it
res judicata if he is warned but does not appear so that the plaintiff
gets judgment by default? In an Anonymous case decided in 1456 this
question arose:71 C-I brought a writ of detinue against A who pleaded
that the res sued for was delivered to him by C-I and C-2 upon certain
conditions, etc., and he prayed garnishment of C-2. C-2 came in and
said that formerly he [C-2] had brought a writ de justicies directed to
the sheriff of Norfolk concerning this same res against this same de-
fendant, upon which the defendant had prayed that scire facias issue to
warn C-I [the present plaintiff], and C-I thereby had been warned and
had defaulted whereby he [C-2] had judgment. Littleton argued that
the garnishee could not plead such a plea because if such were the facts
then it was up to the defendant [A] to have pleaded them, and that since
the defendant had prayed that C-2 be garnished he had thereby “confesse
vncore le possession” of the res.72 Prisot argued that the plea was good,
for, he said, “it would be contrary to reason” that a judgment given
in an earlier action between the same parties and for the same subject
matter should not be binding and a bar to this action. But here again,
unfortunately, the report is not conclusive and goes off on a question

70. Dictum by Martin, J., in Y. B. Easter 3 Hen. VI 43, pl. 20. See also, Y. B.
Trin. 34 Hen. VI 47, pl. 13.
71. Y. B. Trin. 34 Hen. VI 47, pl. 13.
72. See Y. B. Mich. 18 Edw. II p. 577 where plaintiff unsuccessfully alleged an
earlier default judgment against the proposed garnishee.
concerning venue and jurisdiction in the earlier action. The evidence is sparse but we have a dictum by Choke, J., in 20 Edward IV (1490) to the effect that the judgment is not res judicata as against the garnishee unless he appears. On the other hand Serjeant Collow in the same case said: "where the sheriff has returned that we are garnished, then if we do not appear [and judgment is given against us] the judgment would be as strong [binding] as if we had appeared and judgment had been given", and in support of his argument he drew analogy to prayer in aid in cases of annuity where those prayed in aid are barred if scire facias issued and they are served. It is hard to imagine what benefit it would be to a defendant to be allowed to pray that a third party be warned unless by such prayer he was protected from further suits for the same thing. Certainly Collow used the more logical line of reasoning. It appears that the judgment was res judicata where the garnishee came in on scire facias; the little available evidence does not make clear the effect of a judgment taken by default after service of the writ.

B. "Compulsory Interpleader"

We turn finally to the relief offered a person where all the claimants to the chattel in his hands have suits pending against him for a recovery of that chattel. In the first cases of this sort, joint bailors of a writing have brought separate writs of detinue against their common bailee, who is thus faced with two suits for the recovery of the same chattel and with the possibility of double liability. It seems only fair in such circumstances that if the bailee, or finder, has incurred no independent liability to the various plaintiffs, they should be called upon to interplead with respect to the right in the chattel sought. "I understand," said Choke, J., "that the cause of interpleader is in order that the defendant shall not be twice charged where there is no default in him." But there was another reason why two or more claimants to a chattel

73. Y. B. Mich. 20 Edw. IV 13, pl. 16.
74. But what if the sheriff returned that the one sought to be garnished could not be found, or that he had naught by which he might be garnished, and then the garnishee nevertheless appeared and was permitted to plead? If he lost would he be barred in a later action brought by himself? See Y. B. Mich. 8 Hen. VI 16, pl. 41 where the garnishee who made such an appearance was permitted, over plaintiff's objection, to "interplead".
75. See also, Y. B. Anno 14 Hen. VI 11, pl. 42 and Y. B. Mich. 14 Edw. IV 2, pl. 7. Cf. Reed v. Allen, 286 U. S. 191 (1932). It may be well to add that the cases we have discussed here in connection with the theory of res judicata are all the more perplexing when considered in the light of the early common law doctrine that affirmative relief could not be given ordinarily against an absent defendant. The whole theory of the history of the doctrine of res judicata is one which needs to be carefully gone into, and the discussion here does not purport to do more than touch upon it insofar as it relates to "interpleader".
should be called upon to plead with one another concerning the right to a recovery of that chattel. If each of the separate plaintiffs recovered against the defendant, to which of them should delivery of the chattel be made? "I do not know to which," said Martin, J., "[for] if it were delivered to one then the other would be without remedy." The courts very early recognized the need for relief in these cases, and relief was afforded by the court’s ordering (at the prayer of the defendant) that adverse plaintiffs "interplead." This remedy grew up concurrently with "interpleader by way of garnishment"; arose, indeed, in the same type of cases with the addition of one factor: here all the claimants had writs of detinue pending against the defendant for the recovery of the same chattel.

The earliest case of this kind seems to be an Anonymous case decided by the Court of Common Pleas in 1332. In that case C-1 brought a writ of detinue against A and counted that he had bailed to A a charter to be redelivered to him and to C-2 upon certain conditions, and that he had performed the conditions wherefore redelivery should be made to him. A pleaded that he had received the charter on the conditions alleged, but that he did not know whether the conditions had been performed as alleged by the plaintiff. He said, moreover, that C-2 had a like writ of detinue pending against him concerning this same charter, and that he stood ready to deliver to whomsoever the court should adjudge had the right. The writ of detinue brought by C-2 against A was not returnable on the same day as the return of C-1’s writ "wherefore a common day was given to the parties upon this writ [i.e., upon the writ brought by C-1] and scire facias was granted to warn the third [party] to be present on the same day." In the majority of cases in which we find the court ordering that the plaintiffs "interplead" their writs are returnable on the same day, but that was not an essential requirement for this form of relief. Nor did it seem to be essential that the two writs of detinue were made returnable in the same county.

77. Y. B. Easter 3 Hen. VI 43, pl. 20.
78. See RASTELL’S ENTRIES (1596) f. 213 for the entries on the record in cases of this kind.
79. Y. B. Trin. 3 Edw. IV 6, pl. 3 (the defendant on praying that the plaintiffs interplead must show that they claim the same thing).
80. Y. B. Mich. 6 Edw. III 38, pl. 11.
81. This is the reading of the text but the "and" is probably a mistake for "or".
82. In Y. B. Hil. 12 Hen. IV 18, pl. 17 we have a quaere by the reporter: "If the writs had been returnable on different days, whether process should have been made." In Y. B. Hil. 8 Hen. VI 30, pl. 27 Martin, J., held that adverse plaintiffs should interplead regardless of the fact that their writs were returnable on different days, but that the day upon which they should interplead should not be earlier than the latest date granted to either of the two plaintiffs.
83. Y. B. Easter 5 Edw. IV f. 25 (Long Quinto). The case reported in Y. B. Anno 14 Hen. VI 2, pl. 6 can be distinguished on the ground that there the possibility existed that the defendant had incurred independent liability to both plaintiffs.
It was decided very early that the plaintiff whose writ bore the earlier date should occupy the position of plaintiff in the proceedings between the two plaintiffs, and that the plaintiff whose writ was of later date should occupy the defendant’s place. However, if both writs bore the same date then he who first counted against the defendant should occupy the position of plaintiff and the other that of the defendant; unless the court in its discretion should otherwise order. In the proceedings between the two plaintiffs the successful claimant got delivery of the chattel sued for and also his damages.

Unlike a modern bill of interpleader the defendant in “interpleader” at common law did not deposit the res in court. In fact, the court would not permit the defendant to so deposit and step out of the picture.

It is obvious that if the plaintiffs are to be required to interplead they must not only be seeking the same thing, but that the defendant must not have incurred an independent liability to either of them. If the defendant by his own willful misconduct had made himself liable to two persons, there was no cause for them to interplead—they were not, in short, seeking the same thing. So where a defendant accepted a bailment from one party and then delivered the res he had accepted to another party and took from him a rebailment he might well be liable to both by his own “folly.” Justice does not require that two people who have separate and distinct claims against a third party be made to litigate their claims against themselves, but only that a party not be held liable twice for one duty.

84. Y. B. Hil. 12 Hen. IV 18, pl. 17 (“it is said that if two writs are returnable on one day they shall plead on the one bearing earlier date.”); Y. B. Mich. 3 Hen. VI 20, pl. 2 (where the writs are of different dates it is immaterial which of the plaintiffs counts first against defendant); Y. B. Easter 4 Edw. IV 9, pl. 11 (in an action in which it was held that three adverse plaintiffs should interplead, it was said that “each is an actor against the other, and each ought to be plaintiff against the other.”).
85. Damages go against the plaintiff who occupies the place of the defendant, Y. B. Hil. 9 Edw. III 6, pl. 12. If the plaintiff who will be defendant defaults, judgment will go against him, Y. B. Mich. 17 Edw. III 391, pl. 97 (R.S.). The parties must appear in propria persona, Y. B. Hil. 9 Edw. III 6, pl. 12.
86. Y. B. Mich. 19 Hen. VI 3, pl. 4 continued at f. 4, pl. 9 and f. 19, pl. 40.
87. Y. B. Hil. 9 Edw. III 6, pl. 12 (party who took the position of plaintiff recovered damages against the plaintiff who took the position of defendant, and recovered the res from the original defendant). Accord, Y. B. Mich. 39 Hen. VI 36, pl. 1. But see what appears to be a contrary holding in Y. B. Trin. 18 Edw. III 215, pl. 3 (R.S.) (dictum, plaintiff who took position of defendant could recover only damages and not res. Unless this case can be distinguished on the facts it is clearly out of line with many other decisions).
88. This applies both to “interpleader by way of garnishment” and to “compulsory interpleader.” As to the former see pp. 934–43 supra.
89. Y. B. Mich. 39 Hen. VI 36, pl. 1.
90. Y. B. Trin. 8 Edw. IV 6, pl. 3.
91. Y. B. Easter 3 Hen. VI 43, pl. 20 and Y. B. Anno 14 Hen. VI 2, pl. 6.
92. Y. B. Easter 3 Hen. VI 43, pl. 20.
The question of whether or not privity need be shown to exist between the adverse plaintiffs seems from the very first to have been decided in the negative. The first case in which the question seems to have been argued with any show of force is that of Rafe Cromwel v. Edmond Moris, decided by the Court of Common Pleas in 1424. In that case the defendant pleaded that one Gray had a like writ pending against him for the recovery of the same chattel as that now sought and he prayed that Cromwell and Gray interplead concerning their right to the chattel. Martin, J. — whose views finally prevailed — said, "It seems to me that they should be compelled to interplead for otherwise the defendant would be in great mischief for if he were to answer to one and to the other severally, then if it were found against the defendant and for the plaintiff in each case, each of them would have judgment to recover the writing, and so he would be twice charged for the same thing which would be contrary to reason . . ." In support of this reasoning Babington, J., also pointed out that "it would be inconvenient that two severally ought to have the same thing." Moreover, both contended, if the defendant were a mere finder he should have "interpleader" in spite of the fact that neither bailment nor privity existed. And, in the end they held that the plaintiffs must "interplead". In a case four years later (1428) the defendant pleaded to a writ of detinue that he had found the writings sued for "per fortune" and claimed naught in them and that since another had sued him on a like writ that the two plaintiffs should interplead. The plaintiff objected on the ground that the defendant had "traversed the bailment and not the detinue", but again Martin, J., allowed the defendant his prayer for "interpleader relief". From here it was but a short step to allowing interpleader even where one plaintiff sued in detinue and counted upon a bailment, and the other plaintiff sued in detinue and counted upon trover. And even the fact that there were three separate writs of detinue by three separate sets of plaintiffs against the defendant seeking the same res did not prevent a common law court from awarding that the three sets of plaintiffs interplead.

93. Ibid.
94. Y. B. Easter 7 Hen. VI 22, pl. 3.
95. Ibid. Martin, J.: "In the manner he pleads he traverses the bailment for otherwise his plea would serve him naught . . . and the possession came to him by fortune and he claims naught and may not plead in bar, but each of you who have writs pending claim the deed, wherefore it is reasonable that you interplead and that each show his right."
96. Y. B. Mich. 39 Hen. VI 36, pl. 1. Lack of privity was also held to be no bar in the following cases: Y. B. Mich. 19 Hen. VI 3, pl. 6; Y. B. Mich. 19 Hen. VI 4, pl. 9; Y. B. Mich. 19 Hen. VI 19, pl. 40; Y. B. Easter 4 Edw. IV 9, pl. 11; and Y. B. Easter 5 Edw. IV f. 25 (Long Quinto). The dicta in Y. B. Anno 14 Hen. VI 2, pl. 6 and Y. B. Trin. 33 Hen. VI 25, pl. 8 deny interpleader to the defendant not because of lack of privity but because it was questionable whether the two plaintiffs were seeking the same thing, and possible that the defendant might have incurred independent liability.
97. Y. B. Easter 4 Edw. IV 9, pl. 11.
Thus "interpleader" in detinue cases—which because of procedural reasons might take one of two forms as outlined above—was an extremely just and liberal method by which a defendant might prevent a possible double liability with respect to one duty. The only requirements were that the claimants\(^\text{98}\) seek the same thing; that the defendant be under no independent liability by reason of his own wrongdoing; and, that the defendant stand indifferently between the adverse parties.\(^\text{99}\)

"Modernizing Interpleader"? The Federal Interpleader Act of 1936 reads as if it might have been drawn by Justice Martin in the fifteenth century!

**III. Conclusion**

The history of our law is one of slow but gradual growth. As the needs and occasions arise and multiply, so too do the writs and modes of relief come into being and take definite shape. This it seems has been the history of the modern bill of interpleader. We have been told, however, that "Interpleader is not an invention of the Chancellor, but is borrowed from the old common-law writ of interpleader,\(^\text{100}\) which like other peculiar writs, gradually disappeared after the introduction of the jury".\(^\text{101}\) And that "The Writ of garnishment\(^\text{102}\) was closely related to interpleader . . . Garnishment . . . [being] analogous to defensive interpleader at law under modern statutes, just as the writ of interpleader [sic] is analogous to a bill of interpleader in equity."\(^\text{103}\) It is submitted that this is not so, but rather that the law began first to give "interpleader relief" in cases involving two or more claims to the wardship of a minor and his lands; that with the development of the writ of detinue it was carried over to give relief to a bailee or finder who was subject to two or more claims or suits with respect to one thing. Interpleader at common law, however, was never more than defensive interpleader. The applicant for relief was always a defendant in an action at law, and herein lay its great weakness. The defendant was subject to expenses in coming in and asking that the two plaintiffs (or

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98. Or plaintiffs, as we have seen pp. 934-43 *supra*.
99. No case has been found in which the defendant claimed an interest in the res being sued for. There are dicta by Martin, and Babington, JJ., in Y. B. Easter 3 Hen. VI 43, pl. 20 which indicate, however, that the defendant must not claim an interest.
100. A writ of interpleader was a thing unknown to the common law. No example of such a writ appears in any copy of Registrum Breuim that I have examined.
102. As we have seen, there was no such thing as a writ of garnishment. Scire facias was the writ by which the adverse claimant was garnished (i.e., warned to come in).
103. CHAFFEE, *op. cit. supra* note 101, at 2. To say that "the writ of interpleader [at common law] is analogous to a bill of interpleader in equity" is to ignore completely the whole history of our common law and of the writ system through which it operated. Interpleader at common law was allowed only defensively.
one plaintiff and a claimant) "enterpled". More important still, he had to wait until one or both of the claimants took the initiative.\textsuperscript{104}

Concurrently with the growth and development of the common law there was growth and development of the Chancellor's equitable jurisdiction.\textsuperscript{105} The equitable character of the justices in eyre in the reigns of Edward I, Edward II, and Edward III was to have a profound influence on the development of equity, for it is in those eyres that we find many of the origins of equitable jurisdiction.\textsuperscript{106} The justices in eyre at Northamptonshire in 3-4 Edward III (1329-30) declared that it was

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\item[104.] So far as I can discover "interpleader" at common law was limited to writs of wardship and detinue. Professor Chafee says, however, that "Interpleader was also allowed to a person subjected to double vexation from various obsolete actions. For example, if a bishop was asked by two different persons to appoint two respective clergy to a single church, the advowson being claimed by each of the contestants, interpleader furnished an excellent refuge to the bishop from two actions of \textit{quare impedit}.
\end{enumerate}

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\item[106.] The equitable jurisdiction began with the Council, and not with the Chancellor. It became exclusively the Chancellor's, probably by delegation from the Council, towards the end of the fifteenth century, but the details are unknown. BAILDON, \textit{Select Cases in Chancery} xlv, 10 SELDEN SOCIETY (1896).
\end{enumerate}
\end{footnotesize}
ORIGINS OF INTERPLEADER

contrary to law that the same right should be adjudged to be in two adverse claimants, and forced those claimants to "interplead" in order that the right should be adjudged in the proper party.\(^{107}\) The Chancellor from as early as 1310\(^{108}\) had exercised a procedure "in the nature of interpleader" in cases where adverse claimants laid claim to the same office or lands which had devolved upon the king by reason of the death of his tenant.\(^ {109}\) Influenced not only by that procedure but likewise by the equitable character of the justices itinerant and by the "interpleader relief" afforded certain defendants at common law, he soon began to exercise an extensive interpleader jurisdiction of his own. He could

107. Y. B. Eyre of Northampton 3-4 Edw. III, Harvard University Law Library MS 3, f. 24v: "John of Pateshulle was summoned [to answer] by what warrant he claimed waif in his manor of T. John claimed it as appellant to the same manor, and he said that he and his ancestors have had and used it always. Upon this [one] William of Clynton came and said that the aforesaid manor where John claimed waif is within the hundred of L, and he said that he and his ancestors have had and used always [the right to take] waif in the aforesaid manor. Scoxe, [J.] therefore compelled them to interplead because if they both pleaded separately to the quo warranto then perchance the franchise might be adjudged to one and to the other, which would be contrary to law. Wherefore John of Pateshulle said that he and his ancestors have had and used waif in the manors aforesaid absque hoc that William of Clynton or his ancestors were seized of this franchise. And the other to the contrary. And William said that he and his ancestors have had and used waif always in the same manor absque hoc that this John of Pateshulle or any of his ancestors, as above. Aldeburgh said for the king that neither the one nor the other had been seized by prescription if neither they nor their ancestors [etc.] ready etc. And upon this issue was joined." Some of the manuscripts give "counterpled" and some "enterpled" for the word translated above as "interplead".

108. But see note 105 supra.

109. Knovile v. Plukenet, Y. B. Mich. 4 Edw. II 115, pl. 27 (1310), is the earliest case in which I find reference to adverse claimants to lands which have come into the king's hands by reason of his tenant's death being called upon to interplead "in equity" as to their right. For further proceedings in that case see Placitum Abserval (1811) 310 where the pedigrees of the two sets of claimants may be seen in diagram. And see Dict. Nat. Bro. sub nom. Alan Plukenet and Robert Walerand. Perhaps a still earlier instance of "interpleader in Chancery" may be seen in the case of the Bishop of Sabin v. Bedewynde (1307) Select Cases Before the King's Council, 25, 35 Selden Society (1918). In that case both the Bishop and Walter laid claim to the treasurership of the church of York; the former by right, the latter by grant from the king. The king ordered the council (see note 105 supra) to do what "should be done according to reason." For further cases in Chancery concerning the right to an office in which two or more claimants were said to "interplead" with respect thereto see, Y. B. Mich. 35 Hen. VI 19; Y. B. Trin. 5 Edw. IV 4, pl. 4; Y. B. Trin. 11 Edw. IV 1, pl. 1; Y. B. Mich. 15 Edw. IV 10, pl. 16 continued in Y. B. Easter 16 Edw. IV 4, pl. 8; Y. B. Easter 1 Hen. VII 14, pl. 1; Y. B. Trin. 21 Hen. VII 35, pl. 44; Y. B. Trin. 23 Hen. VII 94, pl. 10 (Keilwey); and Y. B. Easter 7 Hen. VIII 177 (Keilwey). In Y. B. Trin. 23 Hen. VII 94, pl. 10 (Keilwey) we find the interesting statement "lenterpled er gist en le Chancery, mes lou ils sont trovres heirs per divers offices a un person, car le enterpled er nest autuer forsque pur trier le privitie de sanke." May not privity have been an invention of the Chancellor?
"head-off" threatened suits by two or more adverse claimants against the same party for the same res, and under threat of duress he could compel the losing claimant to pay the applicant's expenses. After 1483 the action of detinue seems to have been in disfavor. Indeed, the reports of Henry VII and Henry VIII contain only a scattering of such cases, and so far as we can discover there is a complete dearth of detinue actions in which "interpleader" was sought by the defendant. In 1484 we have what appears to be the earliest bill of interpleader in equity. Equity jurisdiction was expanding to a point where it was soon to come into open conflict with the common law. In the final contest for superiority between law and equity, equity won out and an extensive interpleader jurisdiction, won by reason of the popularity of the relief granted, came to be an exclusive jurisdiction. These, it is submitted, were the historical origins of the modern bill of interpleader.

110. Flyyke v. Banyard, 1 Cal. Ch. cxv (1484). Peverell v. Huse, 1 Cal. Ch. cxvii (1493) appears to be the second bill of interpleader in equity. The earliest known instance of a technically strict bill of interpleader is Alnete v. Bettam & E. Marmyon, Cary 65 (1560). The early records of Chancery are quite inadequately edited and it is difficult to base conclusions upon the Calendar alone.

111. For an interesting account and a collection of the authorities concerning this historic conflict see, 1 CHAFFEE AND SIMPSON, CASES ON EQUITY (1934) 35-36.