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COMMENT

COTTON ALLOTMENTS: ANOTHER "NEW PROPERTY"*

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The agricultural allotment, viewed initially as a temporary emergency measure, has become a basic feature of our nation's farm policy. As a result of recent legislation authorizing transfer of allotments separate from land,[1] the agricultural allotment has also become a new and valuable type of intangible property. Estimates of the value of an acre of cotton allotment range as high as 1,000 dollars.[2] Moreover, if the allotment can be moved from an area where it has little value to an area where it has considerable value, the holder of the allotment may have a substantial asset.[3] Presently, the cotton allotment gives the farmer the right to grow and market a specified acreage of cotton without being penalized. In addition, the allotment is the basis for direct federal price-support[4] and acreage payments.[5] This has led one commentator to state that "an allotment-holder may be viewed in some contexts as a licensee, and in others as a holder of a potential claim against the Treasury."[6]

This Comment is concerned with the implications raised by the conversion of the allotment from a regulatory device into a new variety of transferable wealth. The problems to be considered are as follows: How the allotment will be treated in bankruptcy, how it will be treated for income tax purposes, how a security interest may be obtained in the allotment, and how it may be reached to satisfy a debt. Discussion will be limited to cotton allotments since the most significant changes

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* See Reich, *The New Property*, 73 YALE L.J. 733 (1964).

1 Agricultural Adjustment Act of 1938 [hereinafter cited as Act of 1938], § 344a, added by Food and Agriculture Act of 1965 [hereinafter cited as Act of 1965], § 405, 79 Stat. 1197, 7 U.S.C. 1344b (Supp. 1965). The agricultural allotment gives the owner the right to grow various commodities such as cotton. It is essentially a regulatory device used to limit supply of crops in order to raise selling prices and to allocate both federal benefits and shares of the market.

2 See Westfall, *Agricultural Allotments as Property*, 79 HARV. L. REV. 1180, 1188 (1966). The allotment regulations are discussed in greater detail in this article.

3 The extent of that movement is limited, however, by the restrictions on transfers of the allotment separate from the land and because the allotment is made to the farm and not to the farmer.

4 The cotton-allotment program includes (1) diversion payments if the farmer reduces his cotton acreage below the effective farm allotment and puts the diverted acres into an approved conserving use and (2) a right to a guaranteed price for the crop, either from a federal buyer directly, from price-support payments to supplement the proceeds received from private sales, or from a combination of the two. See Agricultural Adjustment Act of 1949, § 103(d), added by Act of 1965, § 402(a), 79 Stat. 1194, 7 U.S.C. § 1444(d) (Supp. 1965).

5 See note 4 *supra*.

6 Westfall, *supra* note 2, at 1183.

in regard to transferability concern them.[7] Before considering the legal treatment of the cotton allotment under federal and state law, a brief look at the agricultural regulations is necessary.

I. Transfers of Cotton Allotments

The Agricultural Adjustment Act of 1938, as currently amended,[8] authorizes the Secretary of Agriculture to determine and proclaim a national acreage allotment for each calendar year's cotton crop and to apportion this allotment among the states. Each state's acreage allotment is then apportioned among its counties and then through local committees to individual farms.[9] The recent Food and Agricultural Act of 1965[10] allows the cotton allotment to be transferred by a variety of methods, including the selling and leasing of cotton allotments separate from the underlying land.[11]

A. Transfers Based on Acquisition of a Farm

(1) Acquisition by Purchase

A purchaser of a complete farm receives the farm's total cotton allotment.[12] If only a part of a farm is purchased, the disposition of the allotment is controlled by law[13] rather than by the parties' intent. The parties' intent, however, may be given effect in two situations: first, in a division required in settling an estate,[14] and secondly, if the purchaser acquires the land for nonagricultural purposes.[15] The purchaser of a

7 The rationale behind the solutions urged would also be applicable to allotments of other crops such as tobacco and rice. The rules regarding transferability of rice allotments are even more liberal than those for cotton. See Act of 1938, § 353(f)(3), as amended, 78 Stat. 6, 7 U.S.C. § 1353(f)(3) (1964). Since 1962 it has been possible to lease from year to year the right to grow and sell most varieties of tobacco. Act of 1938, § 316, added by 75 Stat. 469 (1961), as amended, Act of 1965, § 703, 79 Stat. 1210, 7 U.S.C. § 1314b (Supp. 1965).

8 Act of 1938, added by Act of 1965, 7 U.S.C. § 1281 (Supp. 1965).

9 Act of 1938, § 344(a)-(b), 52 Stat. 57, as amended, 7 U.S.C. § 1344(a)-(b) (1964). The Agricultural Stabilization and Conservation Service is run by county committees made up of farmers from the local community. The purpose of the county committee is to direct the administration of such farm programs as the Agricultural Act of 1938 and the Soil Bank Act. See 7 C.F.R. § 7.3 (1966).

10 Act of 1938, § 344a, added by Act of 1965, § 405, 79 Stat. 1197, 7 U.S.C. § 1344b (Supp. 1965).

11 See text accompanying notes 22-26 *infra*.

12 Act of 1938, § 379, added by Act of 1965, § 707, 79 Stat. 1211, 7 U.S.C. § 1379 (Supp. 1965); Westfall, *supra* note 2, at 1191.

13 *Ibid.* Congress rejected the Secretary of Agriculture's proposal that the allotments be divided "in the manner designated by the owner." Senator Cooper stated that this proposal was rejected in order to avoid the accumulation of allotments "in the hands of those who can afford to bid the highest price." Westfall, *supra* note 2, at 1191 n.72.

14 7 C.F.R. § 719.8(e) (1966); Westfall, *supra* note 2, at 1191. If the county committee determines that division of allotments by a will can reasonably be made, then provisions in a testator's will concerning the division of allotments will be given effect. If there are no controlling testamentary provisions, "all interested heirs may agree on apportionment of allotments." *Ibid.*

15 In this situation the allotments may remain with the parent farm provided certain

farm or a portion of a farm may inquire at the local Agricultural Stabilization and Conservation Service to determine the allotment that will pass with the farm being purchased.[16]

(2) Acquisition by Eminent Domain

When an agency with the power of eminent domain acquires a farm it does not receive any of the allotments if the acquisition is made "other than for the continued production of allotted crops."[17] The former owner, however, will retain the allotments if less than fifteen percent of the total cropland is acquired.[18] Moreover, should the acquired percentage exceed fifteen percent the former owner may transfer the allotment from his old farm to other farms owned by him for a period of three years;[19] these other farms need not be in the same state as the old one. This eminent domain provision allows allotments that ordinarily are not transferable to be moved to a region where their value may be substantially greater.[20]

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conditions are met and the parties make a binding agreement to that effect. See 7 C.F.R. § 719.6(b)(1) (1965); Westfall, *supra* note 2, at 1191-2.

16 See Westfall, *supra* note 2, at 1192. Professor Westfall statcs,

> The prevailing view of attorneys and others familiar with the problem appears to be that no undue risks for buyer or seller are involved in relying upon informal advance determinations of the portion of allotments that will pass with a transfer of part of a farm, although formal action by the county committee is required for reconstitution of the farm. . . . A California Department of Agriculture official reports, however: It is not unusual that the buyer and seller set forth certain conditions in escrow instructions as protection against one or the other or both in regard to allocation of cotton allotment and related cotton history pertaining to land being bought or sold. *Ibid.*

17 Act of 1938, § 378(a), added by 72 Stat. 995 (1958), as amended, 7 U.S.C. § 1378(a) (1964); Westfall, *supra* note 2, at 1192.

18 Act of 1938, § 378(c), added by 72 Stat. 996 (1958), 7 U.S.C. § 1378(c) (1964); Westfall, *supra* note 2, at 1192. Cropland is defined in 7 C.F.R. § 719.2 (1966) as being land that (1) is currently being tilled for the production of a crop for harvest, (2) has been tilled and is currently devoted to legumes or grasses which were established by a producer, or (3) is suitable for crop production and although not currently tilled has been tilled in a prior year.

19 Act of 1938, § 378(a), added by 72 Stat. 995 (1958), as amended, 7 U.S.C. § 1378(a) (1964); Westfall, *supra* note 2, at 1193. When a farmer has his land taken by eminent domain, the allotments are placed in an allotment pool and are available to other farms owned by the displaced farmer. These pooled allotments are available to the displaced farmer for a period of three years after the date of his displacement. Act of 1938, § 378(a), added by 72 Stat. 995 (1958), as amended, 7 U.S.C. § 1378(a) (1964). Some of the tests that must be met in order to have allotments transferred from a farm acquired by eminent domain to a new relocated farm are as follows: (1) The displaced farmer must personally operate the new farm for the first year after the allotment is transferred; (2) the ownership of the new farm must be bona fide; and, (3) an administrative determination of the amount of the allotment for transfer to it must be made. For other requirements that must be met, see 7 C.F.R. § 719.11(f) (1966).

20 See Westfall, *supra* note 2, at 1193 n.81. Professor Westfall states that this was the provision that Billie Sol Estes used to transfer cotton allotments to his Texas land. He would sell his land to displaced farmers from Texas and Georgia who could transfer their cotton allotments to other farms owned by them. These farmers would make no down payment and would lease the land back to Estes; the first year's rent was in fact payment for the allotment. *Ibid.* "The resulting difference in financial return to Estes from the cotton crop was estimated by the minority members of the Permanent Sub-

B. Transfers Not Based on Acquisition of a Farm

Where two farms are operated as a single unit the allotments for one farm may be planted on the other.[21] Presently, the law also permits the owner of one farm to transfer its allotments to the owner of another farm by the following methods: (1) transfer of cotton allotments to other farms owned or controlled by the same owner;[22] (2) exchange of cotton and rice allotments;[23] (3) release and reapportionment of allotments;[24] or (4) sale or lease of allotments.[25]

(1) The Transfer of Cotton Allotments Between Farms Under Common Ownership or Control

The 1965 act authorizes cotton allotments to be transferred between farms under common ownership or control.[26] These transfers, however, are subject to a productivity adjustment[27] and may not be transferred interstate.[28] On the other hand, the owner may transfer cotton allotments under this provision on a permanent basis or for any designated period.[29] Further, these transfers are not subject to the requirement of referendum approval for a transfer out of the county or to any acreage limitations that apply to the sale and lease provisions.[30]

(2) Exchange of Cotton and Rice Allotments

The exchange of cotton and rice allotments between farms in the same county or in adjoining counties in the same state is limited to states in which rice allotments are made to farms rather than producers.[31] This section also requires that the exchange be "acre for acre

committee on Investigations at $820,000 for one year, or as much as $1,170,000 if actual production records rather than 'normal yields' were used." Westfall, *supra* note 2, at 1193 n.83.

21 See Act of 1938, § 379, added by Act of 1965, § 707, 79 Stat. 1211, 7 U.S.C. § 1379 (Supp. 1965).

22 Act of 1938, § 344a(a)(2), added by Act of 1965, § 405, 79 Stat. 1197, 7 U.S.C. § 1344(a)(2) (Supp. 1965).

23 Act of 1938, § 344a, added by Act of 1965, § 405, 79 Stat. 1197, 7 U.S.C. § 1344b (Supp. 1965).

24 Act of 1938, § 344(m)(2), added by 68 Stat. 5 (1954), as amended, 7 U.S.C. § 1344(m)(2) (1964).

25 Act of 1938, § 344a, added by Act of 1965, § 405, 79 Stat. 1197, 7 U.S.C. § 1344b (Supp. 1965).

26 Act of 1938, § 344a(a)(2), added by Act of 1965, § 405, 79 Stat. 1197, 7 U.S.C. § 1344b(a)(2) (Supp. 1965).

27 Each transfer must be adjusted for differences in farm productivity if the projected yield for the farm to which transfer is made for the year the transfer is to take effect exceeds the projected yield for the farm from which transfer is made by more than ten percent. 7 C.F.R. § 722.237(c) (1966).

28 Act of 1938, § 344a(b)(i), added by Act of 1965, § 405, 79 Stat. 1197, 7 U.S.C. § 1344(b)(i) (Supp. 1965).

29 7 C.F.R. § 733.235 (1965).

30 *Ibid.* See Westfall, *supra* note 2, at 1203, and note 43 *infra*.

31 7 C.F.R. § 722.231(a) (1966). The "farm states" consist of Arkansas, Illinois, Mississippi, Missouri, North Carolina, Oklahoma, and a portion of Louisiana. 7 C.F.R. § 730.1511(m) (1966).

or on such other basis as the Secretary [of Agriculture] determines is fair and reasonable," taking into consideration such relevant factors as the comparative productivity of the soil.[32] This transfer provision is subject to the limitation that if the farm is covered by a mortgage or other lien, the lien-holder's written consent to the exchange is required.[33]

(3) Release and Reapportionment

Under the release and reapportionment provision a farmer may release his yearly cotton allotment to the local county committee without losing the right to grow cotton in the future.[34] The county committee in turn may reapportion the released allotments to other farms in the same county.[35] Although the release and reapportionment provision has been used extensively in the past, one commentator, Professor David Westfall, maintains that the recent provisions allowing the cotton allotment to be sold or leased will restrict substantially the volume of released and reapportioned allotments.[36]

(4) Sale or Lease of Cotton Allotments

Significantly, for the first time the Food and Agriculture Act of 1965 authorizes cotton allotments to be sold or leased separate from the underlying land.[37] This is an important step toward treating the allotment as a separate form of intangible property.[38] Westfall has aptly described the implications of this section:

> Like many aspects of federal agricultural legislation that have become permanent, the provision by its terms is temporary, permitting sales or leases only during the years 1966 through 1969. However, since it is also provided that transactions taking place during that period "shall be for such period of years as the parties thereto may agree," there is no federally imposed limit on the duration of allotment leases. And past experience suggests that sale and leasing authorization will more likely than not be broadened and extended in the future.[39]

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32 Act of 1938, § 344a(h), added by Act of 1965, § 405, 79 Stat. 1197, 7 U.S.C. § 1344b(h) (Supp. 1965). See Westfall, *supra* note 2, at 1203-04.

33 7 C.F.R. § 722.231(d)(1)-(2) (1966).

34 Act of 1938, § 344(m)(2), added by 68 Stat. 5 (1954), as amended, 7 U.S.C. § 1344(m)(2) (1964).

35 If an allotment is not needed in the particular county, it may be surrendered to the state committee for reapportionment in other counties.

36 Westfall, *supra* note 2, at 1199, 1202.

37 Act of 1938, § 344a, added by Act of 1965, § 405, 79 Stat. 1197, 7 U.S.C. § 1344b (Supp. 1965).

38 See Westfall, *supra* note 2, at 1200.

39 Westfall, *supra* note 2, at 1201.

Presently, there are many limitations on the sale and lease provision. Mortgagees and other lien creditors are protected by the requirement that they must agree in writing to any allotment transfer.[40] Subleasing of allotments is prohibited.[41] Additionally, there is an acreage limitation[42] on the amount of allotment that may be transferred to any farm. The farmer transferring all or part of his allotment by sale or lease must agree not to plant any excess cotton over the remaining allotment for a period of five years following the sale or during the period of the lease.[43] Lastly, and perhaps the most significant limitation, cotton allotments may not be transferred interstate,[44] and intrastate transfers require authorization in the transferor's county.[45] Authorization to transfer cotton allotments intrastate requires the approval of two-thirds of the cotton producers in the country; this approval is given by means of a referendum and is effective for a three year period.[46]

II. Treatment of the Cotton Allotment Under Federal Law

Many significant legal problems pertaining to allotments should arise now that they are transferable separate from land. At the federal level the two most significant problems are: (1) whether the allotment will be treated as property under the Bankruptcy Act and (2) whether it will be treated as a capital asset under the income tax laws.

A. Bankruptcy

As a practical matter most cotton allotments will be owned by farmers. Under section four of the Bankruptcy Act farmers may become voluntary bankrupts, but may not be forced into involuntary bankruptcy even though they commit an act of bankruptcy, such as making a general assignment for the benefit of creditors.[47] Consequently, whether the holder of cotton allotments is a farmer within the definition of the Bankruptcy Act will be quite important to the creditor.

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40 Act of 1938, § 344a(b)(iii), added by Act of 1965, § 405, 79 Stat. 1197, 7 U.S.C. § 1344b(b)(iii) (Supp. 1965); 7 C.F.R. § 722.238(c) (1966).

41 7 C.F.R. § 722.238(h) (1966).

42 The total acreage allotment that may be transferred by sale or lease to a farm cannot exceed a certain acreage. For the mathematical formula used to determine the limit on amount of acreage transferred see 7 C.F.R. § 722.237(d) (1966).

43 Act of 1938, § 344a(b)(vi)-(d), added by Act of 1965, § 405, 79 Stat. 1197, 7 U.S.C. § 1344(b)(vi)-(d) (Supp. 1965); Westfall, *supra* note 2, at 1201.

44 Act of 1938, § 344a(b)(i), added by Act of 1965, § 405, 79 Stat. 1197, 7 U.S.C. § 1344a(b)(i) (Supp. 1965).

45 Act of 1938, § 344a(b)(ii), added by Act of 1965, § 405, 79 Stat. 1197, 7 U.S.C. § 1344a(b)(ii) (Supp. 1965).

46 A list of counties which have voted approval is contained in 7 C.F.R. § 722.277 (1966).

47 Bankruptcy Act § 4, ch. 541, 30 Stat. 546 (1898), as amended, 49 Stat. 246 (1935), 11 U.S.C. § 22 (1964).

(1) "Farmers" Under the Bankruptcy Act

A "farmer" for the purpose of bankruptcy is defined as "an individual *personally engaged* in farming or tillage of the soil . . . if the principal part of his income is derived from one or more of the farming operations."[48] While it has been stated that a person may operate a farm or farms on behalf of another and still be "personally engaged" in farming,[49] it seems well settled that if one owns a farm and leases it to a tenant, he is not a "farmer" within the meaning of the term when he does not take part in the cultivation or operation of the farm.[50]

Situations arise when a person is engaged, at least part of the time, in an occupation that can be classified as "farming or tillage of the soil" while also engaged in other endeavors. The resulting problem is whether he is a "farmer" and therefore exempt from involuntary proceedings. Generally, the test is to determine from which occupation he derives his principal income or livelihood,[51] the burden being on the petitioning creditors to prove that the individual petitioned against is not a farmer.[52] This practical test of income gives effect to the purpose of the act, which is to protect and exempt from involuntary bankruptcy only those whose principal source of income comes from personal participation in farming.[53] If income is the test, it is then necessary to ascertain the relative amount of income derived from farming operations. The majority of courts seem to adopt gross income rather than net income as the appropriate figure for this purpose.[54] This is the preferable view because it gives effect to the purpose of the exemption without setting a standard that in some cases would work extreme injustice.[55]

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[48] Bankruptcy Act § 1(17), ch. 541, 30 Stat. 544 (1898), as amended, 52 Stat. 840 (1938), 11 U.S.C. § 1(17) (1964). (Emphasis added.)

[49] Evans v. Florida Nat'l Bank, 38 F.2d 627 (5th Cir.), *cert. denied*, 281 U.S. 762 (1930). See generally 1 COLLIER, BANKRUPTCY ¶ 4.15 (14th ed. 1966).

[50] See, *e.g.*, Beamesderfer v. First Nat'l Bank & Trust Co., 91 F.2d 491 (3d Cir.), *cert. denied*, 302 U.S. 686 (1937); Chandler v. Metomkin State Bank & Trust Co., 86 F.2d 370 (4th Cir. 1936). Moreover, a corporation is not within the exemption even though engaged in farming.

[51] Normally "the principal part of his income" will be interpreted to mean more than fifty percent. In close cases, however, where the balance of income is relatively even, the courts will most likely resort to other tests, such as the comparative sums invested in each occupation, the amount of indebtedness contracted in various occupations, and the amount of time and interest devoted to a particular endeavor. See *In re* Schoenburg, 279 F.2d 806 (5th Cir. 1960); 1 COLLIER, BANKRUPTCY ¶ 4.15 (14th ed. 1966).

[52] See *In re* Schoenburg, *supra* note 51; *In re* Beachwood, 42 F. Supp. 401 (D.N.J. 1942); *In re* Mackey, 110 Fed. 355 (D. Del. 1901).

[53] *In re* Mackey, *supra* note 52; 1 COLLIER, BANKRUPTCY ¶ 4.15 (14th ed. 1966).

[54] See, *e.g.*, *In re* Wright, 17 F. Supp. 908 (W.D. La. 1936); *In re* Parmer, 16 F. Supp. 1006 (M.D. Pa. 1936); *In re* Knight, 9 F. Supp. 502 (D. Conn. 1934). *But see* Sherwood v. Kitcher, 86 F.2d 750 (2d Cir.), *cert. denied*, 301 U.S. 703 (1936).

[55] Suppose, for example, a person who operates a large livestock farm, employs many people, spends much time at this occupation, and receives a gross income therefrom of $25,000. Expenses, however, being high and the market low, the net income is nil; in fact, perhaps losses result. He also spends, however, a small part of his time as a

(2) Section 70a(5)—Property of the Bankrupt Vesting in the Trustee

Section 70a of the Bankruptcy Act provides that the trustee in bankruptcy shall be vested by operation of law, as of the date of the filing of the petition, with the title to all property enumerated in the section.[56] Clause five provides that for a given interest or right to fall within the scope of this omnibus clause it must meet a twofold test at the time the petition is filed: It must be (1) property (2) subject to being transferred *by any means* by the bankrupt or levied upon and sold by his creditors, prior to the filing of the petition.[57]

As pointed out in part I above, the cotton allotment is transferable; but if it is not property, its transferability will not suffice to bring it within section 70a(5).[58] However, neither the policy of the Bankruptcy Act nor cases interpreting section 70a(5) require the conclusion that the allotment is not property. The main purpose of section 70a(5) is to secure for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition. To this end the term "property" has been construed most generously, and an interest is not outside its scope because it is novel or contingent or because enjoyment must be postponed.[59] Since the cotton allotment is a valuable asset and is capable of ownership and alienation, it should be considered property. Admittedly, there is a fine line between property and interests that are not property.[60] However, practical, not metaphysical, considerations should determine where this line is to be drawn.

In the landmark case of *Chicago Bd. of Trade v. Johnson*[61] the bankrupt contended that his membership in the Chicago Board of

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veterinarian, from which his net income is $1,000. Under the net-income test this person would not be a farmer under § 4b, thus there would be an inequitable result contrary to the intent of the exemption. See *in re* Knight, 9 F. Supp. 502 (D. Conn. 1934).

[56] Bankruptcy Act § 70a, ch. 541, 30 Stat. 565 (1898), as amended, 52 Stat. 879 (1938), 11 U.S.C. § 110a (1964).

[57] Bankruptcy Act § 70a(5), ch. 541, 30 Stat. 565 (1898), as amended, 52 Stat. 879 (1938), 11 U.S.C. § 110a(5) (1964). (Emphasis added.)

[58] For an example of an interest which, though transferable, is not property see *In re* Baker, 13 F.2d 707 (6th Cir.), *cert. denied*, 273 U.S. 733 (1926) (apparent heir's expectancy).

[59] *E.g.*, Horton v. Moore, 110 F.2d 189 (6th Cir. 1940) (contingent postponed interest in a trust); Kleinschmidt v. Schroeter, 94 F.2d 707 (9th Cir. 1938) (limited interest in future profits of a joint venture); see 3 REMINGTON, BANKRUPTCY §§ 1177-1269 (Henderson ed. 1957).

[60] For examples of the difficulty that courts have had in determining what interests are property see *In re* Edwards, 45 Idaho 676, 266 Pac. 665 (1928) (right to practice law is not a property right but a privilege); Warren v. Sears, 303 Mass. 578, 22 N.E.2d 406 (1939) (power of appointment by will is not a property right); *In re* Thayer's Estate, 172 Misc. 426, 15 N.Y.S.2d 208 (Surr. Ct. 1939) (power of appointment is a property right); Davis v. Beeler, 185 Tenn. 638, 207 S.W.2d 343 (1947) (physician's right to practice medicine is a property right).

[61] 264 U.S. 1 (1924).

Trade was not property within section 70a(5) and therefore could not vest in the trustee in bankruptcy. The Supreme Court of Illinois had earlier held that the membership was not property or subject to judicial sale on the ground that it could not be acquired except upon a vote of ten directors and could not have been transferred to another unless the transfer was approved by the same vote. Despite this reasoning the United States Supreme Court held that the membership in the board was property that passed to the trustee even though it could not be subject to execution under state law. The Court reasoned that what was property under the Bankruptcy Act was a federal question, and when Congress indicated a policy requiring a broader construction of the statute than state courts would give, federal courts would not be bound by the state law.[62]

Similarly, under section 70a(5) it has been held that the bankruptcy trustee takes title to a state license to operate as a motor carrier, although a state statute provides that the license does not "confer any property rights on the holder thereof" and that it can be transferred "by voluntary or involuntary action" only with the approval of the state licensing authority.[63] The Supreme Court has also recently held that the trustee could claim the debtor's income tax refunds based on loss carrybacks, since they are property within the meaning of section 70a(5).[64] Accordingly, in view of the broad construction given section 70a(5) and the transferability and value of the cotton allotment, the allotment should be considered property of the bankrupt passing to the trustee under section 70a(5).

B. Income Tax Treatment

As a result of the provisions of the Food and Agriculture Act of 1965 that permit the selling and leasing of cotton allotments apart from the land,[65] the Internal Revenue Service has concluded that cotton allotments are intangible property rights and will qualify as capital assets having an indeterminate useful life.[66] Therefore gains or losses from the separate sale of cotton allotments will be treated as gains or losses from the sale of capital assets. The basis of the allotment will normally be its cost.[67] On the other hand, amounts received by the

62 *Id.* at 10.

63 Barutha v. Prentice, 189 F.2d 29, 31 (7th Cir.), *cert. denied*, 342 U.S. 841 (1951); *cf. In re* Quaker Room, 90 F. Supp. 758 (S.D. Cal. 1950).

64 Segal v. Rochelle, 382 U.S. 375 (1966).

65 Act of 1938, § 344a, added by Act of 1965, § 405, 79 Stat. 1197, 7 U.S.C. § 1344b (Supp. 1965).

66 Rev. Rul. 66-58, 1966-1 CUM. BULL. 186.

67 *Id.* at 187. Where a taxpayer has acquired an allotment along with the land to which it relates as a unit, the cost or other basis of the entire unit should be allocated between the land and the allotment in accordance with the relative fair market values of the properties on the date of acquisition. *Ibid.*

One problem, sure to arise, is how to determine the basis of allotments acquired

lessor from the lease of cotton allotments will be treated as ordinary income.

The amount expended by a cotton producer to purchase an allotment is not deductible for federal income tax purposes since the allotments can be expected to continue as income-producing assets for a period longer than one year.[68] Consequently, the amount must be capitalized. Furthermore, since these cotton allotments have an indeterminate useful life they are not subject to depreciation or amortization.[69]

III. Treatment of the Cotton Allotment Under State Law

A. The Cotton Allotment as Collateral

In light of the growing use of intangible property as collateral security,[70] a creditor may want to obtain a security interest in the allotment. Under the Uniform Commercial Code a security interest may be taken in intangibles.[71] If a creditor desires to utilize the cotton allotment as security, two problems arise: First, what does the creditor get in the way of collateral; secondly, how does he obtain a security interest in the allotment?

As noted earlier, the cotton allotment gives the farmer the right to grow and market a specified acreage of cotton without being penalized. In addition, the allotment is the basis for direct federal price-support and acreage-diversion payments. The Food and Agriculture Act of 1965 permits a farmer to assign all payments that he may receive under the allotment as security for cash or advances to finance crop production.[72] Thus a creditor can get a lien on the allotment, as well as obtain

before the date on which they became expressly transferable. It is most probable that the Internal Revenue Service will determine the relative fair market value of the land at the time the allotment was acquired. The difference between the value of the land without the allotment and the value with the allotment would be the basis of the allotment. The above method also may be used to determine the basis of an allotment where it was acquired along with the land to which it relates as a unit. It must be acknowledged that this method of determining the basis of the presaleable allotment does necessitate some guesswork.

As a last resort, if the taxpayer can persuade the Internal Revenue Service that an apportionment between the land and the allotment is impossible, he may be entitled to recover his original investment before gain or loss will be recognized. See Inaja Land Co., 9 T.C. 727 (1947) (amount received for easement not directly taxable but used to reduce basis of the land); William T. Piper, 5 T.C. 1104 (1945).

68 Rev. Rul. 66-58, 1966-1 Cum. Bull. 186.

69 *Ibid.*

70 The motion picture industry has effectively used intangibles as collateral. See Republic Pictures Corp. v. Security-First Nat'l Bank, 197 F.2d 767 (9th Cir. 1952), which involved a chattel mortgage covering, among other items of personal property, all copyrights on the story, treatment, script, continuity, and manuscript composition of a motion picture. For many other examples of intangible property used as collateral see Coogan, *Intangibles as Collateral Under the Uniform Commercial Code*, 77 Harv. L. Rev. 997 (1964).

71 Tex. Uniform Commercial Code § 9-102 [hereinafter referred to by section number only]. See generally Coogan, *supra* note 70.

72 Agricultural Act of 1949, § 103, added by Act of 1965, § 402, 79 Stat. 1196, 7 U.S.C.

an assignment of the federal price-support and acreage-diversion payments. If the debtor defaults, the creditor could then sell the allotment subject to the rules and regulations of the Department of Agriculture.[73] Once the creditor decides to use the cotton allotment as collateral he is then faced with the problem of how to obtain a security interest in the allotment.

B. Obtaining a Security Interest in the Cotton Allotment

Under the Code there are many significant differences between agricultural financing and "ordinary" financing.[74] The acquisition of a security interest in cotton allotments therefore may pose unique problems for the creditor. For example, how specifically should the security agreement and financing statement define the collateral, and, where is the correct place to file the financing statement?

(1) Security Agreement and Financing Statement

The cotton allotment is classified as a "general intangible" under the Code,[75] and filing is the only available method of perfection.[76]

1444(d)(13) (Supp. 1965). The assignment must be signed by the farmer and witnessed by a member of the county or other local committee or by the treasurer or secretary of such committee. The assignment must also include the statement that the assignment is not made to pay or secure any preexisting indebtedness. Further, the section does not authorize any suit or impose liability on the Secretary of Agriculture or any disbursing agent if payment to the farmer is made without regard to the existence of any assignment.

[73] Analogous to the situation involving cotton allotments are the cases involving public licenses and franchises. In *In re* Rainbo Express, 179 F.2d 1 (7th Cir.), *cert. denied*, 339 U.S. 981 (1950), a certificate of convenience and necessity issued by the ICC which was transferable property was held capable of becoming the subject matter of a valid chattel mortgage. *Accord*, Breeding Motor Freight Lines, Inc. v. Reconstruction Fin. Corp., 172 F.2d 416 (10th Cir.), *cert. denied*, 338 U.S. 814 (1949); Costello v. Acco Transp. Co., 33 Tenn. App. 411, 232 S.W.2d 297 (1950); Brown v. Smith, 32 Tenn. App. 622, 225 S.W.2d 91 (1949). It has been held that the mortgagee under such a mortgage obtains upon the operating rights granted by the ICC a lien that is effective against a trustee in bankruptcy, notwithstanding the failure to obtain an approval of the mortgage under a rule of the Commission that no attempted transfer shall be effective until approved by the Commission. *In re* Rainbo Express, *supra*; Costello v. Acco Transp. Co., *supra*.

In First Nat'l Bank v. Holliday, 47 F.2d 67 (5th Cir. 1931), a mortgage of a certificate of convenience and necessity issued by a state railroad commission was held authorized even though a statute provided that the certificate could not be mortgaged. The court said that the power of sale of a franchise necessarily included the power to mortgage it. Further, the court noted that a certificate of convenience and necessity, having been validly mortgaged, could be sold to satisfy the mortgage. *Id.* at 69.

[74] *Compare* § 9-401(1)(2) *with* § 9-401(1)(c).

[75] § 9-106. "General Intangibles" is defined to consist of any personal property, including things in action, other than goods, accounts, contract rights, chattel paper, documents, and instruments. As to general intangibles, if the chief place of business of the debtor is in a Code jurisdiction, article 9 governs the validity and perfection of a security interest and the possibility and the effect of a proper filing with respect to it; if the chief place of business is in a non-Code jurisdiction, the law (including the conflict-of-law rules) of that jurisdiction governs. § 9-103(2).

[76] Section 9-305 lists the categories of property in which a security interest may be perfected by possession—accounts, contract rights, and general intangibles do not appear in the list. The short periods of automatic perfection under §§ 9-304(4)-(5) likewise do not apply to the pure intangibles. Filing remains as the only alternative method of perfection in view of the omission of general intangibles from § 9-305.

In addition, when the collateral includes crops, growing or to be grown, a description sufficient to identify the real estate concerned must be included in the financing statement.[77] An interpretation problem may arise over whether cotton allotments are a type of collateral in crops to be grown. Literally the allotment is a type of intangible collateral—the right to grow crops—and not collateral in crops to be grown. Therefore a description of the land should not be legally necessary. To be safe, however, a secured party should include a description of the real estate in both the security agreement and financing statement for *all* land-connected collateral, such as the allotment.

One of the main differences between agricultural financing and ordinary financing concerns the proper place to file. The Code provides for local filing where agricultural financing is involved[78] and for central filing for commercial financing.[79] When the collateral is general intangibles arising from or relating to the sale of farm products by a farmer, the proper place to file is in the county of the debtor's residence.[80] Furthermore, double filing is required in some instances. Where the collateral is crops the secured party must file with the county clerk in the county where the crops are grown and in the county of the debtor's residence.[81] Again, literally, collateral in the cotton allotment is not the same as collateral in crops; however, to be safe and avoid problems when the cotton allotment is used as collateral, the secured party should utilize the double-filing provision.[82]

C. *Local Creditors' Remedies*

Unlike the secured creditor, the general creditor must first reduce his claim to judgment. Once this is done he is faced with the problem of obtaining satisfaction of the judgment. To do this various legal and equitable remedies are available. However, when the only substantial assets of the debtor are intangible property, these remedies may prove useless. The problems connected with the use of these remedies to reach the allotment will now be considered.

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77 §§ 9-110, 9-203(1)(b), 9-402(1).

78 § 9-401(1)(a). Local filing is in the county clerk's office.

79 § 9-401(1)(c). Central filing is in the office of the Secretary of State.

80 § 9-401(1)(a).

81 *Ibid.*

82 Since acreage allotments and marketing quotas are available for public inspection at the local office of the Agricultural Stabilization and Conservation Service, the secured party may also want to file a notice of his security interest with the county office to prevent a bona fide purchaser from cutting off his security interest where it has yet to be perfected. See § 9-301(1)(d). Presently, the regulations of the Department of Agriculture do not require the local ASCS office to keep records of security interests in allotments, and it is doubtful that a local office would allow a security interest in an allotment to be filed without an express regulation providing for filing. Telephone conversation With Vinson Johnson, county manager, ASCS office, Travis County, Texas.

(1) Cotton Allotments on Homestead Property—Exempt?

One problem that may confront the Texas creditor is whether the allotment to grow cotton on homestead property is exempt from execution. Although there is no express statutory exemption, it is well settled that crops growing on homestead property, as well as matured but unsevered crops, are exempt from execution.[83] A debtor possessing a cotton allotment may argue by analogy that if growing crops on the homestead are exempt then so also are allotments—the right to grow crops—where the cotton is to be grown on homestead property. However, the reasoning in the former case would not apply to the latter. The rule exempting crops growing on homestead property from execution is based on the argument that it would be a violation of the homestead right to allow the officer to assert dominion and control over the debtor's property in order to make an effective levy.[84] Where the creditor seeks only to subject cotton allotments to his claims, the debtor's rights to dominion and control over his homestead property would not be violated. Moreover, the rule exempting crops growing on homestead property has been limited; once crops have been picked or harvested they are no longer exempt even though grown on homestead property.[85] Proceeds from the sale of crops raised on homestead property are subject to garnishment even though the writ of garnishment was served while the crops were growing.[86] Accordingly, cotton allotments to grow cotton on homestead property should not be exempt.

(2) Legal Remedies

(a) Attachment, execution, and levy

Article 288 of the Texas statutes provides that the writ of attachment may be levied only upon property that is subject to levy under the writ of execution.[87] Consequently, determining whether cotton allotments are subject to levy under execution will also determine whether they are subject to levy under attachment. In general, any kind of personal property that the debtor can voluntarily transfer or assign may be taken in execution.[88] However, no statutory method of levy is provided for intangible property. Thus many intangible assets

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83 Coates v. Caldwell, 71 Tex. 19, 8 S.W. 922, 923 (1888).

84 *Id.* at 22, 8 S.W. at 924.

85 *E.g.*, Silberg v. Trilling, 82 Tex. 523, 18 S.W. 591 (1891); Willis v. Moore, 59 Tex. 628, 637 (1883).

86 West v. United States Fid. & Guar. Co., 298 S.W. 652 (Tex. Civ. App.—Amarillo 1927, no writ).

87 TEX. REV. CIV. STAT. ANN. art. 288 (1959).

88 Gregg v. First Nat'l Bank, 26 S.W.2d 179, 181 (Tex. Comm'n App. 1930, jdgmt adopted); Jensen v. Wilkinson, 133 S.W.2d 982 (Tex. Civ. App.—Galveston 1939, writ dism'd jdgmt cor.); see 1 FREEMAN, EXECUTIONS § 110 (3d ed. 1900). A prima facie case that property is subject to execution is made by showing the property is transferable and not exempt from forced sale. Smothers v. Field, Thayer & Co., 65 Tex. 435 (1886).

such as choses in action,[89] negotiable notes and accounts,[90] and the interest of an assignee under a farm-out agreement have been held not subject to execution.[91]

Intangible assets that are not expressly exempt by law should be subject to execution. The statutory method of levy on personalty involves taking actual control over the property and reducing it to possession.[92] It is obvious that one cannot take possession of an intangible. However, it has been stated by the Texas courts that what constitutes possession within the statute depends on the character and nature of the property.[93] Consequently, in determining the sufficiency of an alleged levy on intangible assets like the cotton allotment, the courts should consider the peculiar nature of the asset. The same acts necessary for a levy upon personal property that can be easily taken into possession are not required for a levy upon ponderous or immovable personal property.[94] Similarly, the same acts should not be required for a levy on intangible property, which is not capable of manual delivery.[95] A levy on intangibles should be sufficient if it gives notice to the debtor that the property is attached under the writ. No longer should valuable intangible assets elude creditors' legal remedies simply because they cannot be taken into possession.

Many states, where the statutory method of levy on personalty is inappropriate for intangibles because they cannot be reached by direct seizure, have nevertheless held such intangibles subject to execution if there is any appropriate proceeding to reach them.[96] Whether the Texas courts possess the power of courts of equity to aid the infirmity of the law and reach intangible property is explored in the discussion of creditors' bills below.

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89 Price v. Brady, 21 Tex. 614 (1858).

90 Taylor v. Gillean, 23 Tex. 508 (1859); Price v. Brady, 21 Tex. 614 (1858).

91 Shaw v. Frank, 334 S.W.2d 476 (Tex. Civ. App.—El Paso 1959, no writ).

92 TEX. R. CIV. P. 639.

93 See, *e.g.*, Gunter v. Cobb, 82 Tex. 598, 606, 17 S.W. 848 (1892); Portis v. Parker, 8 Tex. 23 (1852); Bryan v. Bridge, 6 Tex. 137 (1851). In Portis v. Parker, *supra*, Chief Justice Hemphill raised, but did not decide, the question of what acts were essential for a levy on a herd of wild cattle. It was obvious that the livestock could not be herded and penned without great inconvenience and expense to the creditor. To remedy the problem the legislature passed a statute, the forerunner of what is now TEX. R. CIV. P. 640, that provided a method of levy by notice.

94 FREEMAN, EXECUTIONS § 262a (3d ed. 1900). It is often stated that to constitute a valid levy on ponderous personal property the officer must do acts that would amount to a trespass, but for the protection of the execution. *E.g.*, Freiberg v. Johnston, 71 Tex. 558, 9 S.W. 455 (1888); Portis v. Parker, 8 Tex. 23 (1852); Bryan v. Bridge, 6 Tex. 137 (1851). In Beaurline v. Sinclair, 191 S.W.2d 774 (Tex. Civ. App.—San Antonio 1945, writ ref'd n.r.e.), a levy upon the debtor's ungathered cotton was held insufficient where the sheriff only told the debtor's wife a levy was made on the cotton and then drove around the property. In similar situations it appears that in order to effect a valid levy the sheriff should post signs to give notice of the levy, as well as commit what would be a trespass but for the writ of execution. *Id.* at 778.

95 See 2 FREEMAN, EXECUTION § 263 (3d ed. 1900).

96 See Shuck v. Quackenbush, 75 Colo. 592, 227 Pac. 1041 (1924); 2 FREEMAN, EXECUTIONS § 262a (3d ed. 1900).

(b) Garnishment

Garnishment is a proceeding whereby the property or effects of a debtor in the hands of a third person may be subjected to the payment of the claims of his creditors.[97] This remedy is in derogation of the common law and is of purely statutory origin.[98] Therefore, it is often stated that the statutes must be strictly construed and that the scope of the remedy of garnishment necessarily depends on the terms of the statutes that authorize the writ.[99] Garnishment ordinarily applies only to those rights, credits, and effects that are of a legal nature[100] and only to those things subject to sale under execution,[101] for if property in the hands of the debtor could not be sold under execution, then it should not be charged against the garnishee.[102]

Garnishment, in general, will reach the debts owed to the judgment debtor, as well as effects of the judgment debtor in the hands of third persons.[103] It has been used to subject the following diverse interests to the creditor's judgment: the surplus of property held by a trustee in trust for other creditors;[104] judgment debts;[105] amounts due on a fire insurance policy after loss, though before proof thereof;[106] the excess of property of the judgment debtor in the hands of the sheriff under execution in favor of another creditor;[107] and a debtor's seat on the cotton exchange.[108] Even this broad remedy, however, has failed to reach all the assets left immune by the execution statute. Of those still exempt, the most important are negotiable notes and choses in action[109] and the various intangible assets, such as patents and copy-

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97 TEX. R. CIV. P. 659-69; Blanks v. Radford, 188 S.W.2d 879, 885 (Tex. Civ. App.—Eastland 1945, writ ref'd w.o.m.).

98 See Beggs v. Fite, 130 Tex. 46, 106 S.W.2d 1039 (1937).

99 See Gause v. Cone, 73 Tex. 239, 11 S.W. 163 (1889).

100 Galveston, H. & S.A. Ry. v. McDonald, 53 Tex. 510 (1880) (land held in trust for the benefit of creditors).

101 Barker v. Swenson, 66 Tex. 407, 1 S.W. 117 (1886) (land headright subject to execution); Price v. Brady, 21 Tex. 614 (1858) (notes and accounts not subject to execution).

102 *Ibid.*

103 TEX. REV. CIV. STAT. ANN. art. 4076 (1960).

104 Carter Bros. & Co. v. Bush, 79 Tex. 29, 15 S.W. 167 (1890).

105 Burke v. Hance, 76 Tex. 76, 13 S.W. 163 (1890).

106 Stratton v. Westchester Fire Ins. Co., 182 S.W. 4 (Tex. Civ. App.—Galveston 1915, writ ref'd).

107 Turner v. Gibson, 105 Tex. 488, 151 S.W. 793 (1912).

108 Fort Worth Grain & Cotton Exch. v. Smith Bros. Grain Co., 40 S.W.2d 229 (Tex. Civ. App.—El Paso 1931, writ ref'd). At the time this case was decided a statute provided that shares of stock owned by the debtor in incorporated or joint stock companies were subject to garnishment. The court reasoned, therefore, that membership in the cotton exchange was the same as stock and subject to garnishment. The opinion of the court, however, gives other reasons for subjecting the membership in the cotton exchange to garnishment and much of the reasoning may be appropriate to cotton allotments. *Id.* at 231-32. The proper method for levy on shares of stock is now by actual seizure of stock certificates by the officer, unless the certificate is surrendered to the corporation which issued it. See TEX. UNIFORM COMMERCIAL CODE § 8-317.

109 Ellison v. Tuttle, 26 Tex. 283 (1862); Taylor v. Gillean, 23 Tex. 508 (1859); Price

rights, not creating debts owed to the debtor, nor constituting *effects* of the debtor in the hands of third persons. Thus it is doubtful that cotton allotments, which are intangible assets, could be reached by garnishment, even if an official or agent of the United States Government could properly be made a garnishee, which is unlikely.[110]

(3) Equitable Remedies

(a) The creditor's bill

Creditors' bills are bills in equity filed by creditors to reach and subject to the payment of their debts so-called equitable property or assets that cannot be reached at law by a levy and sale under execution.[111] As a general rule a creditor's bill is not available where there is an adequate legal remedy,[112] and many states require a judgment at law and execution returned unsatisfied before the bill may be maintained.[113] At common law, when there was no adequate legal remedy the courts of equity permitted creditors' bills for three purposes: (1) to discover assets, (2) to reach equitable and other interests not subject to levy and sale at law, and (3) to set aside fraudulent conveyances.[114] In Texas the rights of a creditor to discover assets[115] and set aside fraudulent conveyances[116] are specifically provided for by statute and by the rules of civil procedure. The following discussion, therefore, will focus on whether the second of these purposes, the so-called creditor's bill to reach and apply, is available to the Texas creditor to acquire intangible property such as the cotton allotment.

It has never been squarely held that the nonstatutory creditor's bill to reach and apply does not exist in Texas. However, a series of Texas cases decided before 1900 seems to have limited the scope of the traditional creditor's bill to cases involving fraud and trusts.[117] The

v. Brady, 21 Tex. 614 (1858). Generally, in other states negotiable instruments and choses in action can be reached by creditor's bill. See, *e.g.*, Darby v. Van Meter, 155 Ky. 462, 159 S.W. 940 (1913).

110 Generally, garnishee process cannot reach the federal government. See McCarthy v. United States Shipping Bd. Merchant Fleet Corp., 53 F.2d 923 (D.C. Cir.), *cert. denied*, 285 U.S. 547 (1931); Hines v. Minor, 266 Ga. App. 278, 105 S.E. 851 (1921); Oglesby v. Dutt, 173 S.W. 275, 278 (Tex. Civ. App.—Austin 1915, writ ref'd) (dictum). In Texas neither the state nor county is subject to garnishment. A city is subject to garnishment unless its charter specifically provides otherwise. Laredo v. Nalle, 65 Tex. 359 (1886).

111 4 POMEROY, EQUITY JURISPRUDENCE § 1415 (5th ed. 1941); SMITH, EQUITABLE REMEDIES 10 (1899). For an exhaustive discussion of the Texas situation concerning creditors' bills see Clayton, *Creditors' Bills in Texas*, 5 TEXAS L. REV. 263 (1927).

112 4 POMEROY, EQUITY JURISPRUDENCE § 1415 (5th ed. 1941).

113 See, *e.g.*, Shuck v. Quackenbush, 75 Colo. 592, 227 Pac. 1041 (1924); B. F. Avery & Sons Plow Co. v. Mayfield, 111 S.W.2d 1134 (Tex. Civ. App.—Fort Worth 1937, writ dism'd). Some states, however, require only that an execution be issued. 1 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 28 (rev. ed. 1940).

114 4 POMEROY, EQUITY JURISPRUDENCE § 1415 (5th ed. 1941); SMITH, EQUITABLE REMEDIES 10 (1899).

115 TEX. R. CIV. P. 737.

116 TEX. REV. CIV. STAT. ANN. art. 3996 (1966).

117 Cargill v. Kountze, 86 Tex. 386, 22 S.W. 1015 (1893); White Sewing Mach. Co.

statements in these early cases expressing doubt regarding whether the creditor's bill existed in Texas were all dicta.[118] Nevertheless, in 1915 in *Gulf Nat'l Bank v. Bass*[119] a court of civil appeals refused equitable relief to a creditor who had sought the aid of the court to garnish the executrix of an estate against which his debtor had a valid claim. Discussing *Cargill v. Kountze*,[120] one of the pre-1900 cases denying equitable relief, the court stated:

> That decision did not directly deny the right of a judgment creditor to subject choses in action which cannot be reached by statutory remedies to the payment of his debt by means of a creditors' bill, nor have we found any case in which that case has been directly decided, but the statements made therein, and in other cases cited above, have been generally accepted by the bar as settling the question by denying the aid of equity, except in cases of fraud or a trust.[121]

Dictum thus became, for all practical purposes, the accepted law of this jurisdiction without an actual decision from the supreme court on the point.

On principle there seems to be little reason for denying the remedy of a creditor's bill to reach and apply. All of the pre-1900 cases that express doubt about the creditor's bill were decided when a traditional sympathy for the debtor existed in an essentially rural economy. Today, in an expanding urban economy much wealth is held in the form of intangible assets. To allow the debtor to retain assets like the cotton allotment would give him a windfall at the expense of his creditors. Indeed, in view of our liberal exemption laws—a reflection of the nineteenth-century attitude of protecting debtors in every way possible—the creditor should have available a procedure to reach any asset that is not expressly exempt.

In recent years the courts have shown a much more favorable attitude toward giving equitable aid to the creditor when his legal remedies prove inadequate. For example, in *Chandler v. Welborn*[122] the Texas Supreme Court, stating that "equity will not suffer a right to be without a remedy,"[123] held that a creditor's bill was available to creditors of a decedent, thus permitting them to maintain a suit for

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v. Atkeson, 75 Tex. 330, 12 S.W. 812 (1889); Taylor v. Gillean, 23 Tex. 508 (1859); Price v. Brady, 21 Tex. 614 (1858); see Clayton, *supra* note 111, at 277.

118 Cargill v. Kountze, *supra* note 117, at 395-96, 22 S.W. at 1019; White Sewing Mach. Co. v. Atkeson, *supra* note 117, at 334, 12 S.W. at 813; Taylor v. Gillean, *supra* note 117, at 516; Price v. Brady, *supra* note 117, at 620.

119 177 S.W. 1019 (Tex. Civ. App.—San Antonio 1915, writ ref'd).

120 86 Tex. 386, 22 S.W. 1015 (1893).

121 177 S.W. at 1023.

122 156 Tex. 312, 294 S.W.2d 801 (1956).

123 *Id.* at 319, 294 S.W.2d at 807.

the benefit of the estate when their legal remedies proved inadequate.[124] The entire tenor of the opinion evinces a far different attitude than that of the courts of the earlier period. Thus the question whether the creditor's bill to reach and apply is available in Texas should be answered in the affirmative by a modern appellate court.

In addition to the more favorable attitude toward equitable relief, rule 737[125] (the creditor's bill of discovery) appears sufficiently broad to include, as an incident to its enforcement, the creditor's bill to reach and apply. The rule states that "all trial courts shall entertain suits in the nature of bills of discovery, *and grant relief therein in accordance with the usage of equity.*"[126] As noted above, creditors' bills to reach and apply were in accordance with the usage of equity.[127] Further, rule 737 has been given a very broad interpretation by the courts.[128] In *Hastings Oil Co. v. Texas Co.*[129] it was held that rule 737 entitled plaintiff to have a directional survey made on defendant's land to determine whether defendant's oil well slanted into plaintiff's oil lease. The court stated that in the determination of the extent of relief to be granted under the rule recourse can be had *only* to the general principles of equity jurisdiction.[130] The court indicated that if the order granted by the trial court was "in accordance with the usages of

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124 Usually when an executor or administrator refuses to account for property in his possession belonging to the estate or fails to exercise ordinary diligence to recover assets of the estate, the creditors have an adequate remedy at law by a suit on the representative's bond. In *Chandler*, however, the court found that under the facts in that case there was not an adequate legal remedy. First, it was assumed that the bond required of the administratrix was only nominal. Secondly, the heirs and the administratrix held and claimed the property under a deed from the decedent that was voidable but not void, and the administratrix could not be charged with a violation of any duty with respect to such property until the deed was set aside. The court stated that under these circumstances the creditors should not be required to incur the expense and suffer the delays involved in compelling the personal representative to bring suit. *Id.* at 319-20, 294 S.W.2d at 806.

125 TEX. R. CIV. P. 737.

126 *Ibid.* (Emphasis added.) The rule's forerunner, article 2002, was enacted in 1923 in answer to the pronouncement in Cargill v. Kountze, 86 Tex. 386, 22 S.W. 1015 (1893), that such a remedy could not be held to exist in the absence of a statute.

127 See note 114 *supra* and accompanying text. The creditor's bill to reach and apply was often termed an "omnibus bill" because it would reach every species of assets of the debtor through an equitable decree directing sale. SMITH, EQUITABLE REMEDIES 10 (1899); WAIT, FRAUDULENT CONVEYANCES AND CREDITORS' BILLS § 68 (3d ed. 1884).

128 See, *e.g.*, National Compress Co. v. Hamlin, 114 Tex. 375, 269 S.W. 1024 (1925); Roy Mitchell Contracting Co. v. Mueller Co., 326 S.W.2d 522 (Tex. Civ. App.—Texarkana 1959, writ ref'd n.r.e.); Highway Ins. Underwriters v. Griffith, 290 S.W.2d 950 (Tex. Civ. App.—Austin 1956, writ ref'd n.r.e.). In *Hamlin* the court stated:

> We believe that Chancellor Kent . . . made a declaration in accordance with the usages of equity, in saying: "I have no doubt that this court can and ought to lend its aid whenever that aid becomes requisite, to enforce a judgment at law, by compelling a discovery and *account*, either as against the debtor, or as against any third person who may have possessed himself of the debtor's property and placed it beyond the reach of an execution at law."

Id. at 1029. (Emphasis added.)

129 149 Tex. 416, 234 S.W.2d 389 (1950).

130 *Id.* at 425, 234 S.W.2d at 394.

courts of equity,"[131] then the courts had power to grant relief. In light of this broad interpretation, the creditor's bill to reach and apply should be available under rule 737. Similarly, the broad constitutional and statutory provisions conferring general equity jurisdiction on our district courts are ample authority for the relief.[132] If it is only the *nature* of the property that puts valuable intangibles like cotton allotments, patents, and copyrights beyond the clumsy process of the law, then there is no reason for equity not to aid the creditor.

(b) Receivership

Section 2293(1) of the Texas receivership statutes permits the appointment of a receiver "in an action . . . by a creditor to subject any property or fund to his claim. . . ."[133] It could be argued with some force that a general creditor is entitled to the appointment of a receiver whenever he attempts to satisfy his unsecured claim out of "any property or fund" belonging to his debtor, assuming the other specific requirements of the statute are satisfied. However, in the leading case of *Carter Bros. v. Hightower*[134] the supreme court held that the words "or by a creditor to subject any property or fund to his claim" are to be limited to those creditors who possess specific liens on some particular fund or property belonging to a debtor. All cases since the *Carter Bros.* decision have been in accord that a specific lien be shown.[135]

In *Pelton v. First Nat'l Bank*[136] plaintiff-creditor sought the appointment of a receiver to take charge of and manage debtor's rice allotment, with authority to rent, lease, or sell the allotment subject to the prior approval of the court. The creditor had obtained a judgment against the debtor on certain promissory notes in the sum of 29,293 dollars that were secured by a lien on certain farming machinery used in rice farming. There was evidence that the machinery would bring about 2,000 dollars at a sale. Under the rules and regulations of the United States Department of Agriculture, the debtor's rice allotment could only be sold or transferred when coupled with the farm machinery. Debtor's rice allotment when coupled with the machinery could be sold for 47,000 dollars, an amount far in excess of the judgment. The trial court granted the appointment of a receiver. The court of civil appeals reversed and held that under the authority

131 *Ibid.*

132 TEX. CONST. art. V, § 8; TEX. REV. CIV. STAT. ANN. art. 1913 (1964).

133 TEX. REV. CIV. STAT. ANN. art. 2293(1) (1964). See generally Comment, 40 TEXAS L. REV. 649 (1962).

134 79 Tex. 135, 15 S.W. 223 (1890).

135 *E.g.*, Supervend Corp. v. Jones, 235 S.W.2d 707 (Tex. Civ. App.—Dallas 1950, no writ); Elliot Addressing Mach. Co. v. Campbell, 159 S.W.2d 967 (Tex. Civ. App.—Dallas 1948, no writ). In addition, the property subjected to a receivership can only be that covered by the lien. Scarborough v. Connell, 84 S.W.2d 734 (Tex. Civ. App.—Eastland 1935, no writ).

136 400 S.W.2d 398 (Tex. Civ. App.—Houston 1966, no writ).

of *Carter Bros.* a receiver could not be appointed to take over the rice allotment because the creditor did not have a specific lien on the allotment.[137] The court of civil appeals did not discuss whether the rice allotment was property, although the trial court had specifically held that the rice allotment was property and could be the res of a receivership. It thus appears that if a creditor has obtained a security interest so as to have a specific lien in an allotment, a receivership can be utilized if all other remedies fail.

CONCLUSION

The cotton allotment is a valuable asset that can be transferred by sale or lease separate from any land. It possesses all of the characteristics of other intangible personal property; however, as an intangible it should not be less susceptible to legal process than other property rights. Although many courts in the past have found it difficult to treat intangibles as property, most courts now recognize them as such. Many intangibles, like the allotment, are the result of increased governmental regulation of economic activity and, indeed, intangibles such as patents and licenses to operate certain businesses (for example, a right to operate a liquor store, a taxicab, or a television station) frequently sell at an impressive price.

The antiquated legal remedies now available to creditors who wish to subject a debtor's property to the payments of their claims were established at a time when many of the intangibles recognized today did not exist. It was realized early that certain property was by its nature, and not by any express exemption, put beyond the process of the law. Because of the narrowness of the common-law remedies, equity began to entertain suits in aid of creditors. Today, in most jurisdictions that have the creditor's bill, this bill is sufficient to reach those new intangibles not subject to the legal remedies. In Texas doubt has been expressed on the existence of the creditor's bill. The issue, however, has been by no means foreclosed. In today's economy a creditor may find a modern tribunal much more sympathetic than in the past. Rule 737, together with the broad constitutional and statutory provisions granting general equity jurisdiction to our courts, seems ample authority for relief. The Internal Revenue Service has ruled that the allotment will be treated as a capital asset. Moreover, the allotment probably will pass to a debtor's trustee in bankruptcy under section 70a(5) of the Bankruptcy Act. In view of this federal treatment it is unlikely that state courts will long ignore a valuable asset like the allotment where it is sufficient to satisfy a creditor's claims. Thus when a creditor's legal remedies are inadequate, the courts should grant him equitable relief.

[137] *Id.* at 401.