cluding joint creditors who had made proof under a separate commission from receiving a dividend from the separate estate ratably with the separate creditors, Lord Loughborough admitted, arguendo, two exceptions. The first was the case of the petitioning creditor. It has been shown that a joint creditor might take out a separate commission. Having done so, and thus having borne the brunt of the suit, he was permitted to receive a dividend like a separate creditor. "With regard to the creditor suing out the commission, the separate creditors cannot object to his having the effect of the execution he has taken out." This exception had, of course, no application to the converse case under a joint commission. Again, and less clearly, in arguing concerning the marshaling of assets, Lord Loughborough said:

"It is not stated as a case where there are no joint effects. Here it is only that there are two funds. Their proper fund is the joint estate, and they must get as much as they can from that first."

Except Ex parte Hayden, before referred to, this is the first suggestion of that exception to the rule concerning the distribution of joint and separate estate which has caused so much debate and perplexity for a hundred years, and is in question in the case at bar. Ex parte Elton was followed by Lord Loughborough in Ex parte Abell (1799) 4 Ves. 837, although it seems that in that case there was no joint estate.

The law as it stood at the very beginning of this century is well stated in Cull. Bankr. Laws (London, 1800) p. 451. After observing that the taking out of both joint and separate commissions against the same persons had been discountenanced on grounds of expense, and that such commissions could not subsist together, the author states that the various classes of creditors, with some variations and restrictions, are let in under the same commission. Under a joint commission the assignees take all the property, joint and separate. Under a separate commission the assignees take all the separate property, and take the bankrupt's interest in the joint estate in the same manner as the separate creditor takes it upon an execution against the individual partner. All creditors can prove under either a joint or a separate commission, in order to assent to or dissent from the granting the certificate. As to dividends, separate creditors, formerly by special order, but since 1794 by general order, may prove under the joint commission, and may receive dividends from the separate estate and from the surplus of the joint estate. Under a separate commission, joint creditors cannot receive dividends from the separate estate until the separate debts have been paid in full. An exception to this rule is admitted in the case of a petitioning creditor, which exception is explained, but no mention is made of any exception where there is no joint estate. See, also, 1 Cooke, Bankr. Law (4th Ed.; 1797) 244. The latter author, writing between the decision in Ex parte Elton and that in Ex parte Abell, seems to recognize both exceptions.

In 1801 Lord Eldon succeeded Lord Loughborough as chancellor. In Ex parte Pinkerton, 6 Ves. 814, note, decided within a month of his becoming chancellor, a joint creditor petitioned to prove and re-

ceive dividends under a separate commission against one of two persons, who were partners only upon the bill of exchange representing the debt which the petitioner sought to prove. There was no joint property. Lord Eldon admitted him to prove, reciting in the order that there was no joint property. He said that, "whatever he thought of a settled rule, he should adhere to it, on account of the mischief arising from shaking settled rules, but observed that it seemed very singular that the nature of the debt should turn upon the fact whether there is joint property or not." In this case the intimation somewhat hastily thrown out in Ex parte Elton, though disregarded in Ex parte Abell, was definitely formulated, and the exception to the rule of distribution in the case of absence of joint estate was established. It was recognized even more formally in Ex parte Hill (1802) 2 Bos. & P. (N. R.) 191, note.

In Ex parte Clay (1802) 6 Ves. 813, Lord Eldon followed Lord Loughborough's rule in Ex parte Elton, saying:

"The rule that prevailed in Lord Hardwicke's time, and down to the time of Lord Thurlow, was that joint creditors should not be admitted to prove under a separate commission for the purpose of receiving dividends with the separate creditors. Lord Thurlow altered that, upon much consideration, thinking the joint creditors ought to be admitted with the separate creditors, and left it so when he left this court. Lord Loughborough thought that was not right, and got back again, not quite to the old rule; but he settled it that they should prove only for the purpose of keeping separate accounts, but not to receive a dividend. I do not presume to say which is the best rule, except that the last is open to this difficulty: that the creditor is not a party to the proceedings under the commission. But I think it better to follow the rule that I find established, than to let it be continually changing so that no one can tell how it is. Therefore, unless some more prominent mischief can be pointed out, take the order according to Lord Loughborough's rule."

The reason for the exception to the general rule of distribution which was suggested by Lord Loughborough, and admitted by Lord Eldon, in the absence of joint estate, can be made out with reasonable probability. Lord Thurlow had, by order in bankruptcy, admitted the joint creditor to take a dividend ratably with the separate creditors under a separate commission; the dividend being paid from all the assets in the hands of the assignees, both joint and separate. If, however, the separate creditors under the separate commission would procure, by a bill in equity, the winding up of the partnership, and the application of the joint estate to the payment of the joint debts, then the chancellor, sitting in equity, would enjoin the assignees from paying a dividend to the joint creditors out of the separate estate until the separate creditors had been paid in full; thus depriving the joint creditors of the benefit of the order he has just made in bankruptcy. Lord Loughborough changed this practice, because of the inconvenience of making an order in bankruptcy for the payment of a dividend, and immediately thereafter suspending it upon a bill in equity. This change was made by Lord Loughborough in order to save bringing a bill in equity; but, where there was no joint estate, a bill in equity to take account of the partnership business would not lie, or, if barely maintainable, would be useless. Where, under Lord Thurlow, a bill in equity would have been impossible or useless, Lord Loughborough intimated an intention to refuse that order for keeping

distinct accounts which was his substitute for Lord Thurlow's bill in equity. Therefore, where there was no joint estate, there would be no order for keeping distinct accounts, and so the joint creditor would share ratably with the separate creditor in the dividend. Lord Loughborough's reasoning on this question in Ex parte Elton was defective, indeed, because it did not take sufficient account of the prior right inhering in the separate creditor to go upon the separate estate, but it was not unnatural. By his subsequent decision in Ex parte Abell, it seems that he became ready to disapprove the exception he had suggested.

Lord Eldon, when Sir John Scott, had been counsel for the joint creditor in Ex parte Elton and in Ex parte Abell, and he perceived in the changed practice inaugurated by Lord Loughborough an inconvenience which had escaped Lord Loughborough's attention. Under that practice the joint estate was to be distributed under a separate commission, and this, as Lord Eldon perceived, might not always be easy, inasmuch as the partner of the bankrupt was not a party to the commission. Lord Eldon, however, felt himself bound to follow Lord Loughborough's practice, by reason of the greater inconvenience which would arise from a change of practice with each changing chancellor. Viewing the difference between Lord Thurlow and Lord Loughborough as a difference about the boundary dividing equity from bankruptcy, rather than as a difference about the rights of creditors, he not unnaturally applied, somewhat blindly, what he understood to be the rule of Ex parte Elton, though his common sense warned him that the exception in the absence of joint estate, which Lord Loughborough had admitted arguendo, had little reason to support it.

In Gray v. Chiswell (1802) 9 Ves. 118, which was a bill in equity, and not a proceeding in bankruptcy, Lord Eldon gave the separate creditor priority upon the separate estate, observing that:

"It is extremely difficult to say upon what the rule in bankruptcy is founded. But, if the court aim at equality, it is extraordinary to say they shall have a better remedy in consequence of his death [i. e. in equity] than if he had lived [i. e. in bankruptcy]."

The distinction between the application of the general rule of distribution under a joint commission and under a separate commission was beginning to be obscured. In the frequent change of practice, in the confusion of equity and bankruptcy, in the anomalous rights of a petitioning joint creditor under a separate commission, and in discussion if a prior separate commission should be superseded in favor of a subsequent joint commission,—a discussion which need only be alluded to here,—the history of the general rule of distribution, of the causes which led to the rule's adoption, and of the origin of the exceptions to its application, was lost sight of. Lord Eldon's repeated grumblings, meant to be directed chiefly against the administration of the joint estate under a separate commission, were taken to be complaints against the general rule of distribution; and it came to be supposed, quite erroneously, that under Lord Thurlow the general rule of distribution had been changed. See the note to Bolton v. Puller, 1 Bos. & P. 548, written as early as 1805; Ex parte

Taitt (1809) 16 Ves. 193; Ex parte Machell (1813) 2 Ves. & B. 216; Ex parte Gardner (1812) 1 Ves. & B. 74. The earliest statement that Lord Loughborough's order of 1794 affected the distribution of estates is in Cooper, Bankr. Law (Phila., 1800) 298, 300. In that work the matter is misstated only partially.

The exception in the absence of joint estate, as the rule of Ex parte Pinkerton may be called, now came itself to receive fantastic constructions and to admit subexceptions. In Ex parte Peake (1814) 2 Rose, 54, the joint estate amounted only to £1. 11s. 6d., yet the joint creditors were not allowed to come upon the separate estate. In Ex parte Kennedy, 2 De Gex, M. & G. 228, the joint estate was exhausted in costs, yet it was held that the exception did not apply. In Ex parte Kensington (1808) 14 Ves. 447, there was a solvent partner, but no joint estate, and it was held that the separate estate should first be applied to the payment of the separate debts. Some curious learning arose as to the meaning of the words "solvent partner," and it was held that a partner who had applied to take the benefit of the insolvency acts, and had admitted £18,000 of debts and a total want of assets, was yet a solvent partner within the meaning of the subexception, because he had not been made a bankrupt. Ex parte Morris, Mont. 218. See, also, Ex parte Janson, Buck, 227. In Ex parte Willock (1816) 2 Rose, 392, the exception in the absence of joint estate was applied, as it seems, under a joint commission. Under such a commission the question would not often arise, for a joint commission would seldom be taken out where there was no joint estate. In Cowell v. Sikes (1827) 2 Russ. 191, the exception was first applied in equity.

Until 1822 the question had been unaffected by statute. In that year, by St. 3 Geo. IV. c. 81, § 10, it was provided that if a joint creditor or joint creditors of three or more persons, being partners, should be the petitioning creditor or creditors against two or more persons, being partners, all joint creditors might vote for assignees, and assent to or dissent from the certificate, but neither the petitioning creditor nor any other joint creditor should be permitted to receive a dividend out of the separate estate until the separate creditors had been fully paid. This, it will be noticed, expressly settled the rule where there were at least three partners, and the commission was issued against at least two of them on the petition of one or more of the joint creditors. Why the application of the law was made to be so limited does not clearly appear. See section 8 of the same act. By St. 5 Geo. IV. c. 98, § 104, it was provided that in all commissions against one or more of the partners of a firm, where the debt of the petitioning creditor was a joint debt, the petitioning creditor should receive no dividend out of the separate estate until all the separate creditors had been fully paid. This cut off the petitioning joint creditor from the separate estate in all cases, the joint creditors not on the petition having been cut off by the rule in Ex parte Elton. St. 5 Geo. IV. c. 98, practically was never in force, being repealed by an act passed the day after it took effect. 6 Geo. IV. c. 16. By section 62 of the last-mentioned act it was provided that, in all commissions against one or more partners, any joint creditor might prove his debt under the

separate commission for the purpose only of voting in the choice of assignees, and of assenting to or dissenting from the bankrupt's certificate; "but such creditor shall not receive any dividend out of the separate estate of the bankrupt or bankrupts until all the separate creditors shall have received the full amount of their respective debts, unless such creditor shall be a petitioning creditor in a commission against one member of a firm." This statute, while re-establishing the right of the petitioning joint creditor to receive a dividend out of the separate estate equally with the separate creditors, would seem clearly to abolish the other exception to the general rule, that in the absence of joint estate, and to establish generally that under both joint and separate commissions and in all cases, the joint estate should be applied first to the payment of joint debts, and the separate estate first to the payment of separate debts, subject only to the exception of the petitioning joint creditor under a separate commission. Section 62 obviated, of course, the necessity of a special order in each case to permit joint creditors to prove under a separate commission to deal with the certificate. See 2 Christ. Bankr. Law (2d Ed.) 92. This view of the statute is taken in Cary on Partnership, published in 1827. The author states that the right of the joint creditor to prove against the separate estate is entirely set at rest by St. 6 Geo. IV. See the American reprint of this work, pages 265, 220. Other writers saw the matter less clearly, and lost sight of the history of the rule and of its exceptions, neglecting the difference between joint and separate commissions, and between bankruptcy and equity. Thus, in 1 Deac. Bankr. (1827) 646, it is stated without qualification that the rights of joint and separate creditors under both joint and separate commissions are settled by Lord Loughborough's order of 1794. This order is said to accord in a measure with the old rule, which, though acted upon by Lord Hardwicke, was abandoned by Lord Thurlow, and restored by Lord Loughborough. In very many subsequent cases and text-books this version of the history has been recounted until it has become traditional and unquestioned, though, as has been already shown, it is quite inaccurate. This I shall venture to call the "traditional version."

Under these circumstances it was not unnatural that the intent of the legislature in passing St. 6 Geo. IV. c. 16, should be strangely interpreted. In Ex parte Morris (1831) Mont. 218, it was said that section 62 applied only to partnerships subsisting at the time of the bankruptcy,—a distinction which, as was pointed out in the argument of the case, deprived the section of nearly all effect, and introduced a meaningless subexception to the already fantastic exception. In Ex parte Marston (1839) Mont. & C. 576, 585, 587, 589, Ex parte Morris was much questioned, and the judges seem to have upheld the exception in the absence of joint estate by deciding that section 62 was not intended to change the method of distribution, and that it left the exception in the absence of joint estate in full force as theretofore. This had the advantage of getting rid of the subexception introduced by Ex parte Morris (where the partnership was subsisting at the time of the bankruptcy), but it was an audacious disregard of plain statutory language. The practice of the courts of bankruptcy

was now somewhat as follows, there being in this respect no distinction between the proceedings under a joint and under a separate commission: The joint estate was first applied to the payment of the joint debts, the separate estate to the payment of the separate debts, the joint creditors having a right to come upon the surplus of the separate estate, and the separate creditors having a right to come upon the surplus of the joint estate. The material exceptions to this rule were: (1) In the case of the petitioning joint creditor under a separate commission, as provided by St. 6 Geo. IV. c. 16, § 62, and (2) where there was no joint estate, and no solvent partner; this exception being upheld in spite of St. 6 Geo. IV. c. 16.

The confusion created by the last-mentioned exception thus ingrafted upon the general rule is well illustrated by the opinions rendered by the lords justices in Lodge v. Prichard (1863) 1 De Gex, J. & S. 610. A separate commission of bankruptcy issued against a surviving partner. Out of the joint estate there was paid a dividend on the joint debts insufficient to satisfy them. A suit in chancery was then brought to administer the estate of the deceased partner, who was also insolvent. The joint creditors of the firm sought to share equally with the separate creditors of the deceased partner in the distribution of his separate estate. After stating the general rule of distribution, and remarking that it applied in equity as well as in bankruptcy, Lord Justice Turner somewhat doubtingly sought its reason in the peculiarities of the law of partnership and in the rights of the partners in the joint estate, saying that it was not for him to say, now that the rule had been so long established, whether it was correct or not. Counsel had argued that the case before him fell within the exception in the absence of joint estate, because there was no joint estate yet remaining to be administered. He observed:

"In this case there was joint estate, and this rule (i. e. the exception) can be applicable only if it can be made out that the joint creditors are entitled in bankruptcy, when the joint estate has been exhausted, to come upon the separate estate for so much of their debts as may not have been satisfied out of the joint estate. I do not think, however, that the rule in bankruptcy has ever been carried, or can be carried, to this length. If it was, I do not see how any dividend could be made upon the separate estate until the joint estate was wound up, as it would depend upon the produce of that estate whether the joint creditors would come in upon the separate estate; and besides, if this effect was given to the rule, the consequence would be, as above pointed out, that the joint creditors would have a double fund to resort to, when the separate creditors could resort to one fund only, which would hardly be conformable to the ordinary rule of making a just and equal distribution."

Lord Justice Knight Bruce observed briefly:

"My opinion on the point arising in the present case has fluctuated, but I have arrived at the same conclusion as the lord justice."

From this it appears that in 1863—nearly a century and a half after the rule of Ex parte Crowder had been adopted—the modifications and exceptions ingrafted thereupon had so altered its aspect that two very able English equity judges doubted if a joint creditor, after exhausting the joint estate, had not the right for the unpaid balance of his debt to come upon the separate estate pari passu with the separate creditors. If he had this right, clearly the general rule of dis-

tribution would be limited to a mere marshaling of the joint and separate estates.

Finally, in Re Budgett [1894] 2 Ch. 557, Mr. Justice Chitty said that he had listened to a very learned argument tracing the history of section 40 of the bankrupt act of 1883 from the time of Lord King, and especially from the well-known order of Lord Loughborough (an argument which doubtless repeated the erroneous traditional version of that history). He then said that, in substance, the section had the same intent as the order (a statement quite erroneous, for the order applied only to joint commissions, concerned procedure only, and did not effect the distribution of estates). He then observed that there were four well-known exceptions to the order (referring to Lindl. Partn. [6th Ed.] 749), or rather "four cases which did not fall within the order." After stating that St. 6 Geo. IV. was passed in 1830 (a curious slip), he concluded that the order had always been interpreted with reference to the exceptions, and that, when the act of 1883 was passed, "it seems reasonable and proper to infer, and to adopt the inference as correct, that the legislature, though now for the first time it put the substance of the order (of 1794) on the statute book, intended the law to stand, on the construction of the section, in the same way that it stood previously to the passing of the act." It is probable that the law of England, both in bankruptcy and in equity, is now pretty well settled in accordance with the opinion of Mr. Justice Chitty and the statements of Lindley on Partnership, but undeniably it is rested upon a theory of historical development altogether erroneous See, also, In re Carpenter, 7 Morrell, Bankr. Cas. 270; Read v. Bailey, 3 App. Cas. 94, 102; Lacey v. Hill, 8 Ch. App. 441, 444.

The very numerous cases in the state courts which have dealt with the distribution of the joint estate of a partnership and of the separate estate of the component partners have not arisen in bankruptcy, but almost altogether in equity. The general rule of distribution followed by English courts of bankruptcy is said to have been adopted in South Carolina in 1797. Tunno v. Trezevant (1804) 2 Desaus. 264, 270. In Woddrop v. Ward (1811) 3 Desaus. 203, the general rule, and not the exception of Ex parte Pinkerton, was applied, though there was no joint estate. See, also, Sniffer v. Sass (1828) 14 Rich. Law, 20, note. In later cases, however, the priority given by the general rule to the claim of the separate creditor upon the separate estate has been weakened into a mere marshaling of debts and assets. Wardlaw v. Gray's Heirs (1837) Dud. Eq. 85; Fleming v. Belk (1856) 9 Rich. Eq. 149; Gadsden v. Carson, Id. 252, 267; Wilson v. McConnell, Id. 510. The case of Kuhne v. Law (1866) 14 Rich. Law, 18, leaves the whole matter in doubt, and the opinion therein rehearses what has been called above the "traditional version" of history.

In Pennsylvania the question was first discussed in Bell v. Newman (1819) 5 Serg. & R. 78. Chief Justice Tilghman rehearsed the traditional version, and denied that the general rule produced equality. Guided by the statutes of Pennsylvania more than by the general principles of law, he held that, where there was joint and separate estate, the separate creditors should receive from the separate estate a payment equal to that received by the joint creditors from the

joint estate, and that the rest of the separate estate should be divided pro rata between both classes of creditors. Mr. Justice Gibson, afterwards chief justice, dissented vigorously, and declared himself in favor of the general rule. This, he said, was "founded in the most substantial justice," inasmuch as "the joint creditors have already an immense advantage over the separate creditors in being exclusively entitled to the partnership fund." "This exclusive liability of the partnership estate to the joint creditors is founded on no equity peculiar to themselves, but results from the nature of the contract of partnership, which requires the joint debts to be paid before the equity can be settled between the partners, each being individually liable till all is paid. Concede the present question to the joint creditors, and you give them, in effect, a monopoly of the insolvent's whole estate. What merit do they possess that the separate creditors may not lay claim to? In the usual course of transactions each class indiscriminately trusts to the whole estate, both joint and separate." "If, then, the policy of trade requires that the joint fund shall be appropriated, in the first instance, to payment of the joint debts, justice, equity, and conscience on the other hand, without interfering with that policy, demand that the separate creditors should, at least, have the miserable advantage of the same priority as regards the separate estate." The dissenting opinion of Mr. Justice Gibson is well worth study as a vigorous and independent discussion of the general principles of law upon which the rule depends. After prolonged hesitation, Bell v. Newman was explicitly overruled, and the general rule of distribution was definitely established in Pennsylvania. Black's Appeal, 44 Pa. St. 503; McCormick's Appeal, 55 Pa. St. 252.

In Maryland, the question first arose in McCulloh v. Dashiell's Adm'r, 1 Har. & G. 96, decided in 1827. Mr. Justice Archer, in delivering the opinion of the court, gave a history of the general rule, which, though not altogether full nor absolutely accurate, is fuller and better than any other to be found in any American report or textbook. He observed that it was difficult to say upon what the general rule and the exception in the absence of joint estate were founded, and he criticised especially the exception. Both, he declared, were settled and established in both bankruptcy and equity. This case has remained undoubted in the courts of Maryland.

In Murray v. Murray (1821) 5 Johns. Ch. 60, 72, Chancellor Kent gave the history of the general rule in England, not exactly in the traditional version, but imperfectly and inaccurately. The decision went upon another point. In Wilder v. Keeler (1832) 3 Paige, 167, Chancellor Walworth expounded and applied the general rule, rehearsing some part of the traditional history. He said nothing expressly about the exception in the absence of joint estate, though he expressed his disapproval of the decision in Cowell v. Sykes, 2 Russ. 191, in which the exception was applied by Lord Eldon. The general rule has been recognized in several later cases in the courts of New York, and in Bank v. Stewart, 4 Bradf. Sur. 254, the exception was expressly disapproved.

It is not necessary to discuss elaborately the history of the rule and of the exception in all those states of the Union whose courts have