

44 for his property having been disposed of, by *the Court; and, being entirely under its control, he, the original debtor, cannot be held bound as an insurer of its sufficiency or safety, and liable for any loss that has happened to the fund which has been so taken into the custody of the Court. For, it is a general rule, that where a loss happens by the failure of a trustee appointed by creditors, they must bear it; but where a loss happens from the default of a receiver or trustee, appointed by the Court, or from any failure in the direction of the Court itself, the estate must bear it. *Hutchinson v. Lord Massarene*, 2 Ball & Bea. 49; *The Rendsberg*, 6 Rob. Adm. Rep. 156. To seize any more of Waters' property, in such a case, would be to make him pay his debt over again.

It is said, however, that there is an unappropriated surplus of the proceeds of Penn's property in Court; and that, Penn and Waters being jointly liable, that surplus may be applied to make good the ultimate deficiency in the proceeds of the sale of Waters' property. But, according to the decree of the 24th of March, 1812, which has been affirmed by the Court of Appeals, and is founded upon the clearest principles of law and equity, these two obligors, Penn and Waters, were held bound to contribute to the satisfaction of this debt in equal proportions, so far as such just contribution could be enforced without prejudice to their creditors. *Herbert's Case*, 3 Co. 13; *Wright v. Simpson*, 6 Ves. 734. And that contribution having been effected, by the sale of their respective estates, without delay or prejudice to these plaintiffs, was, as to Penn and Waters respectively, a complete satisfaction of the debt. Now, if it would be unjust, as we have seen it would be, to take any more of Waters' property to make good this deficiency, it cannot be at all equitable to take Penn's property for that purpose; since Penn and Waters, as to this debt, being jointly liable, are as one and the same debtor; and consequently Penn's property cannot be touched on any principle which would not, in like manner, authorize the taking of Waters' property.

The confirmed report of the trustee shews, that more than enough of Waters' property had been sold; and consequently he is a claimant to the amount of the surplus stated to have arisen from that sale; and is, in that respect, a creditor of the fund taken by the Court, who must be permitted to stand here upon as high ground as those creditors who brought him here as a defendant; and to satisfy whose claims the Court had taken this, his property. Therefore, if there should be any deficiency, in collecting the proceeds of the sale of the property of Waters, which has been resold, such loss must be *borne *pro rata*; that is, by Waters, in

45 proportion to his surplus, and by his creditors in proportion to their several established claims.